

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

IN RE: Moorehead Brothers, Inc.
Application No. 88-0932F

DECISION AND ORDER

This matter is before the Hearing Officer on the appeal of the applicant, Moorehead Brothers, Inc. (hereinafter "Moorehead") from a denial of Wetlands Formal Application number 88-0932F issued by the Division of Groundwater and Freshwater Wetland Protection of the Department of Environmental Management (hereinafter "Division").

The Division was represented by Catherine Robinson Hall, Esq. and Moorehead was represented by Dennis Esposito, Esq.

A prehearing conference was held on July 23, 1990 at One Capitol Hill Providence, Rhode Island in the Ground Floor Training Room B. At that time the parties presented the Hearing Officer with a list of agreed exhibits, stipulations and issues.

The parties subsequently agreed to witness qualifications and filed a further stipulation with the Hearing Officer.

JOINT EXHIBITS

With respect to exhibits the parties entered the following joint exhibits:

- JT.1 Formal application form to alter Freshwater Wetlands received by the Department on October 13, 1988.
- JT.2 Evaluation of application for permission to alter Freshwater Wetland by Susan Cabeceiras dated July 10, 1989.

- JT.3 Site plan submitted by applicants entitled "Wetlands Submission Signal Ridge Subdivision Number 8 Owner and Developer: Queens Grant Development Company, 1 Signal Ridge Way, East Greenwich, Rhode Island. Engineer: SFM Engineering Associates, 2840 Hartford Avenue, Johnston, Rhode Island. Two sheets dated received by the Department March 31, 1988.
- JT.4 Official notice regarding public notice and comment signed by Brian C. Tefft and dated April 28, 1989.
- JT.5 A letter dated August 9, 1989 to Moorehead Brothers, Inc., from Brian C. Tefft denying application No. 88-0932F.
- JT.6 A letter dated August 18, 1989 to Brian Tefft from Scott Moorehead requesting an adjudicatory hearing.
- JT.7 Notice of administrative hearing and pre-hearing conference and certification dated July 12, 1990.
- JT.8 Resume of Brian C. Tefft.
- JT.9 Culvert design for Assessor's Plat 12, Portion Lot 14, Signal Ridge Subdivision Lot 54.

The following exhibits were offered by the Applicant and entered in full by the Hearing Officer.

- Applic 1. Assessment of Wetlands Impacts Lot 54, Signal Ridge Subdivision (18 pages).
- Applic 2. Overall Development Plan for Signal Ridge.
- Applic 3. Letter dated May 12, 1987 from Dean Albro to Moorehead Brothers, Inc.
- Applic 4. Applicant's Wetlands Crossing Plan for Wetlands Application 88-0932F.

STIPULATIONS OF FACT

The parties also agreed on the following stipulations of fact:

1. The applicants filed all necessary documents and paid all necessary fees to be properly before the Hearing Officer in the above referenced matter.

2. The subject site is owned by Queens Grant Development Company, and is located west of Signal Ridge Way, opposite the intersection of Signal Ridge Way, Assessor's Plat 12, Lot 14, East Greenwich, Rhode Island.

3. The formal application 88-0932F was filed with the Department on October 13, 1988.

4. The site plan subject to this hearing which was received by the Department on March 31, 1988.

5. The site plan was sent out to public notice on April 28, 1989, commencing a 45-day notice period, which ended June 12, 1989.

6. The Department received two public comments during the public comment period, which were not to be of a substantive nature pursuant to § 5.05 (b) of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act.

7. The Department denied this application on August 9, 1989.

8. The Applicant filed a timely request for an adjudicatory hearing on August 18, 1989.

9. The state jurisdictional wetland affected by the Applicant's proposal includes a wooded swamp in the 50-foot perimeter wetland.

10. In the Freshwater Wetlands Application number 6364 in the Signal Ridge Way subdivision, no wetlands were present in the area where road construction occurred. Therefore, pursuant to R.I. General Laws 2-1-22 (a), it was determined that the Wetlands Act did not apply to the proposed road construction.

The parties agreed on the qualifications of three witnesses as follows:

Scott F. Moorehead was qualified as an expert in Civil Engineering, including drainage calculations, impact and effects on floodplain, impact and effects on soil stability, impact and effects on water quality and other areas of engineering concern under the Freshwater Wetlands Act and Regulations.

Scott S. Hobson was qualified as an expert in wetlands ecology, wildlife habitat, recreational environment evaluation and assessment as well as environmental impact assessment.

Brian Tefft was qualified as an expert in wetlands ecology, wildlife habitat, recreational environment evaluation and assessment as well as environmental impact assessment.

The parties agreed that the disputed issues are as follows:

1. Whether the proposed and existing alterations will cause undesirable and/or unnecessary destruction of the subject freshwater wetlands complex, pursuant to Section 5.03 (b) (c) (7) of the Rules and Regulations.
2. Whether the proposed and existing alterations will result in loss, encroachment and permanent alteration of the wetland complex.
3. Whether the proposed and existing alterations will reduce the value of a valuable wetland recreational environment pursuant to § 7.06 (b) of the Rules and Regulations, and whether or not, in fact, there exists a valuable wetland.
4. Whether the proposed and existing alterations will reduce and negatively impact the aesthetic and natural character of the undeveloped wetland and buffer zone.

With consent of the parties the Hearing Officer has taken administra-

tive notice of the "New Policy Guidance for Permitting Wetland Crossings in Rhode Island". This document has been made part of the record.

No written requests to intervene were received nor were any persons present at either the prehearing or hearing requesting such status. Accordingly, the only parties to the proceedings are Moorehead and the Division.

The hearing was held on August 6, 1990 at the Alton Jones Campus, West Greenwich, Rhode Island. The hearing commenced at 1:00 p.m., and ran continuously until its adjournment at 7:00 p.m. No members of the public were in attendance at any time during the public hearing.

The parties waived opening statements and proceeded with testimony. The applicant offered two witnesses, Scott Moorehead and Scott Hobson. Each qualified as an expert as previously discussed.

Mr. Moorehead testified generally concerning the Signal Ridge Subdivision and that it encompasses a 145-acre parcel with approximately 100 house lots developed in phases over the past eleven years.

There is one remaining lot in the subdivision and that lot is the subject of the present hearing. The applicant is proposing to construct a single family residence on the upland portion of lot 54, outside the jurisdictional limits of the Division. Groundwater and percolation tests indicate the upland portion is developable. Moorehead also proposes to construct a twelve foot wide driveway from Signal Ridge Road to the house site in the upland area and three twenty-four inch (24") diameter culverts to accommodate stormwater and groundwater flow. Over the

Division's objection, Mr. Moorehead testified concerning additional mitigation measures substituted for the proposed culverts including construction of a twelve foot wide timber bridge to span a portion of the wetland. These changes are embodied in Applicant's Exhibit 4 (Revised Plan").

The effect of the bridge substitution will be to lessen the amount of vegetated wetland filled and would have less effect on the flow characteristics of the wetland. The new mitigation measures are comprised of the bridge and placement of the culvert as well as additional pine and shrub plantings and changing the asphalt surface of the driveway to crushed gravel which is more impervious.

The driveway is in the same location and the grades are at virtually the same elevation as the original plan. The erosion control measures proposed under the original plan are identical to what is proposed under the revised plan. In Mr. Moorehead's opinion as an engineer, the revised plan constitutes the least intrusive alternative possible at the site and that all practical steps have been incorporated to minimize adverse impacts on wetland values. Mr. Moorehead further stated that the revised proposal is the only viable alternative for the parcel which meets all other town zoning criteria. All upland alternatives were explored and exhausted and no alternative upland access exists.

Mr. Hobson testified concerning the anticipated effects of the proposed alterations. It was Mr. Hobson's opinion that the proposed activities will provide and maintain wildlife habitat, wildlife species

and wildlife population. Under the "revised plan" the overstory will remain relatively undisturbed and wildlife viability, although affected, will be preserved by a short span bridge. The bridge will allow for wildlife passage of some species, in particular, amphibians, reptiles and small mammals. Mr. Hobson testified that in his opinion the proposed alterations, as revised, did not constitute a random, unnecessary or undesirable alteration of a freshwater wetland.

Mr. Tefft testified under direct examination that the "Wetlands Crossing Policy" has been developed by the Division to assist the applicant community in making preliminary determinations with respect to applications which propose wetland crossings. Preliminary determinations, briefly stated, are requested by applicants to the Division for a determination as to whether a proposed alteration is significant and therefore requires a formal application, or is insignificant and may be accomplished without further regulatory involvement. Testimony clearly indicates that the "Wetland Crossing Policy" was developed for use by the Division in classifying proposed crossings as significant alterations or insignificant alterations for preliminary determination purposes. The policy itself states in its conclusion that when the Department finds the proposed crossing to be significant, the applicant has the right to proceed through the administrative process of the formal application and other proceedings as necessary. The administrative adjudication division has jurisdiction to review, inter alia, denials of wetland applications. Preliminary

determinations, which indicate whether formal application is required, are not denials of an application and accordingly are not per se reviewable by a hearing officer.

I wish to make clear that I am not applying the Wetlands Crossing Policy to this application. Determinations under the wetlands crossing Policy are preliminary in nature and I will not review preliminary decisions. The modifications proposed by Applicant in Applicant's Exhibit 4 are however, insubstantial modifications which I will consider in determining whether the applicant meets his burden of proof as it relates to the original denial of August 9, 1989. Applicant's appeal is limited to an appeal of the denial as contained in Joint Exhibit 5.

Both the applicant and the Division, through their respective experts, testified at length concerning the recreational value of the subject wetland. Testimony differed concerning interpretation of the Rules and Regulations, specifically Rule 7.06 which defines a valuable recreational environment. Generally speaking, applicant's position is that the property does not constitute a valuable recreational environment because it is private property and would not support use by the general public at this time. Conversely, the Division's position is that any relatively natural area, which in its natural state is capable of providing recreation to the general public, now or at some time in the future, meets the definition of Rule 7.06 (b). The Division's interpretation of Rule 7.06 (b) is that actual or present public recreational access is not required, but merely the possibility of such access.

I find the Applicant's argument that there can be no public recreational value to privately held wetlands, solely because of the private nature of the property, to be unconvincing. Applicant's interpretation of 7.06 (b) would effectively limit the protection provided to valuable recreational environments only to wetlands that are publicly held. Ultimately, this would mean that no private property which is the subject of a wetland application could be found to be a valuable recreational environment under Rule 7.06 (b). The Freshwater Wetlands Act and Regulations promulgated thereunder clearly establish that this was not the intent of the Legislature nor the agency in promulgating the Regulations.

But, as Mr. Esposito points out in his questioning of Mr. Tefft, should the Division's interpretation be accepted wholesale, it too would be extreme because as Mr. Tefft acknowledges, nearly all relatively natural undeveloped areas would theoretically be considered valuable recreational environments. As the Director has found previously in In Re: Application of Alice I. Wheeler, App. No. 87-0704F, Decision issued October 31, 1989, "...I do not find that the intent of Rule 7.06 (b) was to limit recreationally valuable wetlands to those already held by the public, neither do I find an intent to assign [public] recreational value to all wetlands under any and all circumstances. Likewise, while I agree as argued by the Division that actual and present recreational access or opportunity is not required for there to exist the 'capability' of supporting public recreational use, there nevertheless is implicit in the

regulatory requirement some reasonable standard of probability or at least possibility". Wheeler Decision at pp. 10-11.

Applying the "reasonableness" standard for Rule 7.06 (b) enunciated in Wheeler, I find that the subject property does not exhibit any reasonable probability of ever being reasonably accessible to the public or of ever being made reasonably accessible to the public. The subject site is approximately four to five acres in size with the upland, non-jurisdictional portion constituting approximately one acre. There exists no physical access to the property other than the portion bordering on Signal Ridge Way. The upland parcel is surrounded on three sides by wetlands and the closest alternative public access to the upland would be in excess of 2,000 feet to the northwest on Division Street. This route is comprised of severe topography without any easements of record. The front portion of the property bordering on Signal Ridge Way is flanked on each side by developed parcels with private residences, part of the overall Signal Ridge Development.

The extent of the proposed alteration is a total impact area of approximately 7,000 square feet or 0.16 acres (Project Assessment Sheet, Joint 2). The facts in this matter closely parallel the Wheeler Decision. I find that this privately held site is too small and too isolated relative to other publicly held land to establish any reasonable probability of ever being accessible to the public. The recreational activities cited are passive in nature but due to its size, access, and location within a residential development, its significance as a passive

aesthetic resource for the public is tenuous.

FINDINGS OF FACT

Based upon all the documentary and testimonial evidence of record I find as fact the following:

1. The subject site is owned by Queens Grant Development Co. and is located west of Signal Ridge Way, opposite the intersection of Signal Ridge Way and Boulder Way, Assessor's Plat 12, Lot 14, East Greenwich, Rhode Island.
2. The applicants filed all necessary documents and paid all necessary fees to be properly before the Hearing Officer in the above referenced matter.
3. The formal application, 88-0932F was filed with the Department on October 13, 1988.
4. The site plan subject to this hearing was received by the Department on March 31, 1988.
5. The site plan was sent out to public notice on April 28, 1989, commencing a forty-five (45) day notice period which ended June 12, 1989.
6. The Department received two (2) public comments during the public comment period which were not deemed to be of a substantive nature pursuant to § 5.05 (b) of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act.
7. The Department denied this application on August 9, 1989.
8. The Applicant filed a timely request for an adjudicatory hearing

on August 18, 1989.

9. The state jurisdictional wetlands effected by the Applicant's proposal includes a wooded swamp and the fifty foot (50') perimeter wetland.

10. A prehearing conference was held on July 23, 1990 at One Capitol Hill, Providence, Rhode Island.

11. A public hearing was held and conducted on Monday August 6, 1990 at the Alton Jones Campus, West Greenwich, Rhode Island regarding the above-entitled application.

12. All agreed exhibits, stipulations of fact and issues were read into the record at the commencement of the hearing.

13. A view of the site was taken by the Hearing Officer, accompanied by both counsel, on August 7, 1990.

14. No requests to intervene were filed and no members of the public appeared to make comment on the application.

15. No briefs or memoranda were requested by the Hearing Officer or submitted by the parties.

16. The applicant bears the burden of proving by a preponderance of the evidence that the proposed alterations are not inconsistent with the Freshwater Wetland Act or the regulations promulgated thereunder.

17. The proposed project will cause permanent alteration of a freshwater wetland and will result in permanent alteration and disturbance of approximately 7,000 square feet (0.16 acres) of state regulated wetland.

18. The proposed alterations consist of filling in, grading, creating soil disturbance, vegetative clearing and associated construction activities within the wetland.

19. The lot in question is approximately four to five acres in size and is comprised of approximately one acre of non-jurisdictional upland.

20. The purpose of the proposed alterations is for construction of a driveway to access property for a proposed upland single family dwelling, on-site sewage disposal system, lawn and landscape areas.

21. There exists no physical access to the property other than from Signal Ridge Way. The upland parcel is surrounded on three sides by state regulated wetlands and the closest alternative access to the upland would be in excess of 2,000 feet to the northwest on Division Street.

22. The front portion of the property is flanked on each side by developed residential lots.

23. The Division of Groundwater and Freshwater Wetlands completed an evaluation of the application and a biological inspection report dated July 10, 1989. (JT 2).

24. Mitigation measures, not included in the original application, were offered by the applicant in a "Revised Plan". Those mitigation measures include a bridge crossing and placement of the culvert, additional plantings and a change in the driveway surface from asphalt to crushed gravel.

25. A twelve foot wide driveway is proposed and is the minimum width practical for safe passage of vehicles.

26. The fill slopes from the embankment were kept as steep as practical to minimize any fill within the wetland.

27. The driveway was oriented to cross the wetland at its narrowest point.

28. The Revised Plan did not change the location of the driveway, the grade elevations or the erosion control measures or the location of the wetland crossing.

29. The Guidance for Permitting Wetland Crossings is a policy document authored by the Division to make preliminary determinations as to whether a proposed crossing is insignificant or significant.

30. A Golet Analysis was performed and testimony elicited a revised score of 55.0 which places the wetland in the medium range. This analysis, based on the foregoing score, did not find the wetland to be one of high diversity and production.

31. It is undisputed that the proposed alteration is not random.

32. The upland portion of the parcel is suitable for an ISDS system and residential development.

33. All other upland alternatives were exhausted by the applicant.

34. The proposed drainage culverting is sufficient to meet a 100 year storm and will not reduce the ability of the wetland's flood storage capacity or impact the tributaries to water supplies. The "Revised Plan" has a greater capacity to mitigate the effects of a 100 year event and would have a lesser effect on the flow characteristics of the wetland.

35. Mitigation of impacts to the wetland have been planned for to

the greatest extent possible.

CONCLUSIONS OF LAW

After review of all the documentary and testimonial evidence of record I conclude the following as a matter of law:

1. A public hearing was held at Alton Jones Campus, West Greenwich, Rhode Island, a location reasonably convenient to the site of the proposed alteration and was in compliance with the statutory requirements regarding the locus of the hearing stated on R.I.G.L. 2-1-22.

2. Publication of the Notice of Hearing was in substantial compliance with R.I.G.L. 2-1-22 (b). This statute requires that publication of the Notice of Hearing be in a newspaper of statewide circulation and in a local newspaper.

3. This matter is properly before the Administrative Adjudication Hearing Officer as required by R.I.G.L. 42-17-1, 42-17-7.2.

4. The Division filed a timely denial letter of applicant's request to alter a Freshwater Wetland.

5. Applicant filed an appropriate and timely request for hearing and paid all necessary fees.

6. That the area in question is a wetland pursuant to R.I.G.L. 2-1-20.

7. Pursuant to Rule 11.02 of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act, the burden of proof is upon the applicant to show by preponderance of the evidence, that the

proposal is not inconsistent with the Act and accompanying Regulations.

8. The applicant has sustained his burden of proof by preponderance of the evidence that this wetland is not a valuable recreational environment pursuant to § 7.06 (b) of the Rules and Regulations Governing Rhode Island Freshwater Wetlands Act.

9. The changes incorporated into the "Revised Plan" were not substantive in nature and therefore were properly before the Hearing Officer and did not violate the notice requirement of R.I.G.L. 2-1- .

10. Determinations under the "Wetlands Crossing Policy" per se are preliminary in nature and the administrative adjudication division is without jurisdiction to hear appeals of interlocutory decisions. Accordingly, only the final Division denial is reviewable upon appeal to the AAD, not the initial determination of whether the proposed alteration is significant or insignificant.

11. With appropriate mitigation measures, the applicant has demonstrated by the preponderance of the evidence, that his project will not reduce and negatively impact the aesthetic and natural character of the undeveloped wetland.

12. The applicant did sustain his burden of proof that the proposed alteration would not result in unnecessary destruction of a Freshwater Wetland as defined in R.I.G.L. 2-1-20 and § 5.03 (c) of the Rules and Regulations Governing the Enforcement of the Rhode Island Freshwater Wetlands Act.

13. The applicant did sustain his burden of proof that the proposed

alteration, with appropriate mitigation measures, will not result in an undesirable destruction of a Freshwater Wetland as defined in R.I.G.L. 2-1-20 and § 5.03 (c) of the Rules and Regulations Governing the Enforcement of the Rhode Island Freshwater Wetlands Act.

14. The proposal is not inconsistent with the best public interest and public policy stated in R.I.G.L. 2-1-18 and 2-1-19 and § 1.00 of the Rules and Regulations Governing the Enforcement of the Rhode Island Freshwater Wetlands Act.

Therefore, it is

ORDERED

That application 88-0932F is hereby approved as revised by
Applicant's Exhibit 4.

The foregoing Recommended Decision and Order is hereby forwarded to
the Director pursuant to R.I.G.L. § 42-17.7-6.

February 20, 1991
Date

Kathleen M. Lanphear
Kathleen M. Lanphear
Chief Hearing Officer

The within Decision and Order is hereby adopted as a final Decision
and Order.

February 22, 1991
Date

Louise Durfee
Louise Durfee
Director
Department of Environmental Management

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Moorehead Brothers, Inc.

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded, regular mail, postage prepaid to Dennis H. Esposito, Esq., 200 Shakespeare Hall, 128 Dorrance Street, Providence, Rhode Island 02903; Catherine Robinson Hall, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 on this 21st day of February, 1991.

Jacqueline J. Ballard