

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
DIVISION OF GROUND WATER AND FRESH WATER WETLANDS

IN RE: MANUEL REZENDES
APPLICATION NO. 85-0400F

DECISION AND ORDER

This matter is before the hearing officer on the application of Manuel Rezendes to alter freshwater wetlands in the City of Newport, Rhode Island. The application of Mr. Rezendes originates from a notice of violation which was issued to Mr. Rezendes on June 3, 1982 from which a consent agreement was entered into on June 3, 1985 which, inter alia, allowed Mr. Rezendes to file a formal application to alter freshwater wetlands. He subsequently filed his application with the Department of Environmental Management (DEM) and said application was denied on August 26, 1986.

Pursuant to the applicant's request, an administrative hearing concerning the above-sited application was held on June 19, 20 and 21, 1989, in the City of Newport, State of Rhode Island. The hearing was conducted pursuant to the Administrative Procedures Act (Rhode Island General Laws Section 42-35-1 et seq.), and the Administrative Rules of Practice and Procedure of the Department of Environmental Management, Division of Freshwater Wetlands and Ground Water Protection. Vernon Harvey, Esquire represented the applicant, Manuel Rezendes. No requests for intervention were received.

TRAVEL

The proposed site of alteration is located west of JT Connell Highway and north of Admiral Kalfus Road, Newport, Rhode Island, identified on Assessor's Plat A, No. 4, Lot 52. The application sought permission to alter freshwater wetlands by adding fill within 50 feet of said wetland, filling in an area subject to storm flowage and flooding and installing a culvert to drain from said area subject to storm and flooding away from the site.

The site first came to the attention of DEM when the applicant was issued (a) warning in 1982 and a Notice of Violation in July 1985. Subsequent to the Notice of Violation, a Consent Agreement was entered into between the parties on June 3, 1985 which set forth certain terms and conditions pertaining to the site in question.

Pursuant to the provisions contained in the consent agreement, the applicant filed his application for alteration, and on August 26, 1986, he was advised by letter that his application for alteration of said wetland was denied. DEM cited the following as reasons for the denial:

(1) The proposed alteration will cause random, unnecessary and/or undesirable destruction of freshwater wetland as described in Section 5.03(a)(b)(c) of the Rules and Regulations governing the enforcement of the Rhode Island Freshwater Wetlands Act;

(2) Significant loss and disturbance of wildlife habitat and loss of valuable recreational environment will occur;

(3) The proposed alteration will completely obliterate the entire open water portion of the existing marsh and thereby

destroy said marshes' favorable wildlife habitat and animal life in addition to eliminating recreational activities linked with this locally scarce wetland type;

(4) The applicants property contains the last remaining wetland of its type in the entire area and, it remains vitally important to wildlife, both endemic, transient and migratory.

The applicant requested a hearing on the denial and accordingly, the matter is before this Hearing Officer.

Pursuant to Section 11.02 of the Rules and Regulations governing the enforcement of wetlands act ("Act"), adopted June of 1981 ("Regulations"), the applicant bore the burden of proof that the subject proposal is not inconsistent with the Freshwater Wetlands Act and the Regulations adopted thereunder.

WITNESSES

The following witnesses were presented by the applicant:

Manuel Rezendes, the applicant and owner of the land which is the subject of this proceeding; Irene Deveaux, applicant's daughter; Theresa Picard, also a daughter of the applicant; John F. Mello, son of the former owner of this subject parcel of land; Louis Furna, purchaser of a portion of land sold to him by the applicant; Robert Nunes, real estate broker employed by Century 21; Robert Erickson, senior wetlands wildlife biologist for the Environmental Scientific Corporation; and Kamal Higorany, registered professional engineer.

The Department presented the testimony of Brian C. Tefft, a biologist employed as a supervisor of applications for the Fresh Water Wetlands section of DEM and Martin Wencek, also a biologist

employed as a principal natural resource specialist in the Fresh Water Wetlands section of DEM.

The following exhibits were admitted as full exhibits:

APPLICANT'S

1. City of Newport Resolution;
- 2-13 Photographs of subject site;
15. Photograph dated April 13, 1981;
17. ADR Photograph dated March, 1973, Topographical survey of Newport;
18. Contour Map; and
19. Contour Map

DEM EXHIBITS

1. Consent Agreement;
2. Plan for public notice, Rezendes application;
3. Curriculum Vitae and resume of Brian Tefft;
4. Statute and rules and regulations regarding wetlands;
6. Denial letter to applicant dated August 24, 1986;
7. Resume of Martin Wencek
8. Biological evaluation application 85-400F;
9. Photographs taken by DEM counsel;
10. Photographs taken by DEM counsel;
11. 1972 aerial photograph;
12. Mylar;
13. Copy of 1981 aerial photograph;
14. 1981 aerial map; and
15. Mylar for 1985 aerial photograph

The first witness presented by the applicant was Manuel Rezendes, owner of the land subject to this hearing. Mr. Rezendes testified, essentially, that since 1971, as the owner of the site, he would park cars on the site in 1971 and 1972 in July during the Newport Jazz Festival (Tr. 6-19-89, p. 11-12). He described how sewer pipes were constructed in the area along with development along Admiral Kalbfus Road which he blamed for the water problem at the site (Id. p. 13-21).

Mr. Rezendes conceded that when he received a warning from DEM to discontinue allowing fill to be dumped, that standing water was present on the site along with vegetation (Id. p. 30-31). He also acknowledged signing a consent agreement with DEM on June 3, 1985 (Id. p. 34).

Irene Deveaux testified that she worked with her father parking cars during the festival in 1971 and 1972 (Id. p. 38). During this time in question she asserted the land was completely dry (Id. p. 39). She pointed out that in 1982, she took photos of the site in an effort to verify that the water which appeared on the site had come from a nearby commercial parking lot (Id. p. 40-42).

Theresa Picard testified consistent with the testimony of Ms. Deveaux as to the use and condition of the site in July of 1971 and 1972.

John F. Mello testified that his father sold the land to Mr. Rezendes. He described how the site was plowed to a depth of nine inches in April in order to plant corn (Id. p. 47).

Louis Furna testified that he purchased a lot from the applicant and was familiar with the land. He stated he never had problems with the land being wet (Id. p. 49-50).

Robert Nunes testified that as a real estate broker familiar with the subject site, in his opinion, the contract negotiated between the applicant and a prospective buyer of \$368,425.00 for 57,000 square feet of the site is a fair market value price (Id. p. 53-54).

Robert Erickson was the next witness presented on behalf of the applicant. He testified that he was employed as a senior wetlands wildlife biologist for the Environment Scientific Corporation (Id. p. 55). As part of his involvement with this application, he examined aerial photographs from 1972 which showed the presence of surface water on the subject site of less than an acre (Id. p. 57-59). While he stated the area on the aerial does not meet the definition of a swampland (Id. p. 59), he does acknowledge that it has been classified as a marsh by DEM (Id. p. 63).

He also testified that the surface water depicted in the 1972 photograph exceeds the quarter acre threshold for classification as a pond (Id. p. 64), and concedes that the area is subject to storm flowage and flooding and thus meets the definition of a wetland (Id. p. 69). Lastly, he testified that within the definition of wetlands water at or near the surface to a depth of 36 inches beneath the surface qualifies as a wetland.

The applicant next presented the testimony of Kamal Higorany, a registered professional engineer. He testified that he is

familiar with the area in general, and to the proposal to add fill and storm drainage pipe thereto (Tr. 6-20-89 p. 12). He described the use he made of topographical and contour maps to support his conclusion that the subject site does not have standing water (Id. 16).

He also testified that his inquiry into the type of soil on the subject site indicated a type of soil that is well drained and subject to loss of moisture at a rate faster than other soil types (Id. 17-18).

In Mr. Higorany's opinion, in 1973 there was no standing water at the subject site (Id. p. 25).

DEM presented the testimony of Brian C. Tefft, a biologist assigned to the Fresh Water Wetlands section. He testified that as a supervisor in his section, he is responsible for overseeing the entire application process (Id. p. 73-74). He was qualified to testify as an expert in wetland biology without objection.

Mr. Tefft traced DEM's first contact with the applicant in 1977 when it issued a warning notice to Mr. Rezendes regarding alteration of wetlands at the subject site (Id. p. 78).

He testified that in 1982, DEM issued a Notice of Violation to the applicant from which a Consent Agreement evolved (Id. p 79-80). As a product of the Consent Agreement, a formal application to alter wetlands was filed by the applicant, allowed by DEM and after review by the Freshwater Wetlands section, the application was denied by DEM on August 26, 1986 (Id. 81-82).

Mr. Tefft provided an overview of DEM policies relating to wetlands and the public interest in maintaining the areas for preservation of wildlife and recreation (Id. p. 82-83).

He testified that he became familiar with the site through review of the department data and a site visit (Id. 84-85).

Based upon his review of all the data, Mr. Tefft testified the site qualified as a wetland based upon the existence of hydrophilic plants and ground or standing water (Id. p. 88-90). Mr. Tefft further testified that the Notice of Violation also required the applicant to restore the wetlands to their state as of July 16, 1971 as far as possible (Id. p. 93-95). Mr. Tefft asserted his analysis of the data produced a measurement of not less than 1.3 acres and not more than 1.6 of wetlands (Id. p. 98). He concluded by referring to the recreational value the subject site has for the general public.

The next witness presented by DEM was Martin Wencek, a principal natural resource specialist who is responsible for field inspections, assessments of wetlands ecology, wildlife habitat and preparation of written reports for review by his supervisors within the Freshwater Wetlands Section (Tr. 6-21-89 p. 4-5).

By agreement of the parties, Mr. Wencek was permitted to testify as an expert witness in the areas of wetland wildlife habitat, ecology and aerial photographic interpretation (Id. p. 9).

Mr. Wencek testified he first became acquainted with the area in 1982 with a visit to site in conjunction with an enforcement action (Id. p. 10). While there he observed various

marsh plant species and wild and aquatic life. He also determined the area was subject to storm flowage. His observations also disclosed that portions of the site had been filled.

He returned to the site again in 1986 to perform a formal evaluation in response to an application filed by Mr. Rezendes (Id. p. 14). From this site visit, Mr. Wencek prepared a written report which assessed the wildlife and wetlands values. Based upon his assessment he recommended against granting a permit to alter the wetlands (Id. 17). In the report, Mr. Wencek was of the opinion that the proposed alteration would "cause random, unnecessary and/or undesirable destruction of a fresh water wetland", (Id. p. 18) and would cause, "[a] significant loss and disturbance of wildlife habitat and loss of valuable recreational environment". (Id.) The third basis for recommending against the alteration, Mr. Wencek noted was the total elimination of the existing marsh and wildlife habitat (Id. p. 19-20).

Based upon the vegetation found at the site, Mr. Wencek testified he classified the site as a marsh measuring no less than 1.3 and not more than 1.6 acres with various wild and aquatic species observed at the site in an open water body surrounded by tall grass (Id. p. 23-30).

He noted the wetlands had decreased in size based upon his review of aerial photos of 1981 and 1985, from the 1972 measurement because of the fill placed on site.

Regarding the use of topographical maps, Mr. Wencek stated that he was familiar with and has used topographical maps to

define wetlands. However, he stated, the topographical maps were not used to measure water (Id. p. 30).

FINDINGS OF FACT

Based upon review of all the testimonial and documentary evidence on the record, I make the following findings of fact:

1. On June 3, 1982, applicant, Manuel Rezendes was the owner of a parcel of land in Newport, Rhode Island, located north of Admiral Kalbfus Road, east of Connell Highway, west of Penn Central right-of-way, described as Assessor's Plat #4, Lot 52.

2. On June 3, 1982, applicant was issued a Notice of Violation and ordered to restore said freshwater wetlands to their state as of July 16, 1971.

3. That on June 3, 1985, a Consent Agreement was entered into between DEM and Manuel Rezendes.

4. Pursuant to said Consent Agreement, the parties agreed DEM had jurisdiction over the subject matter.

5. On July 7, 1985, an application to alter fresh water wetlands was filed with DEM by Manuel Rezendes.

6. On August 26, 1986, DEM notified the applicant that his application to alter fresh water wetlands was denied.

7. Applicant duly requested a hearing on the denial and a hearing on Application 85-0400F was held on June 19, 20 and 21, 1989 in Newport, Rhode Island.

8. Notice of the hearing was published in the Providence Journal on June 8 and 15, 1989; and on June 5 and 12, 1989 in the

Newport Daily News.

9. The application involves placing additional fill and regrading construction of storm drains.

10. That the subject area contains a wetland under the jurisdiction of DEM since at least 1972.

11. That the wetland has been altered without prior authorization of DEM.

12. The subject wetland is defined as a marsh of no less than 1.3 and no more than 1.6 acres.

13. As a consequence of fill already placed in the wetland, wildlife has been adversely impacted through the elimination of wildlife habitat.

14. The size of the wetland has decreased by virtue of the placement of fill at the site.

15. Continued progress on Application 85-400F will remove and destroy valuable wildlife habitat and cause disturbance of existing and remaining wildlife.

CONCLUSION OF LAW

Based upon all the documentary and testimonial evidence of record, I conclude the following as a matter of law:

1. Public hearings were held in Newport, Rhode Island on June 19, 20 and 21, 1989 at the Newport City Council Chamber and Newport Police Department Community Room, a location reasonably convenient to the site of the proposed alterations.

2. Publication of the Notice of Hearing was in substantial compliance with R.I.G.L. §2-1-22(b).

3. The proposed alterations contained in Application 85-400F will cause the undesirable destruction of a valuable freshwater wetland.

4. The applicant has failed to sustain his burden of proof that Application 85-400F will not cause random, unnecessary and/or undesirable destruction of freshwater wetlands.

5. The issuance of the Notice of Violation was proper.

Therefore it is

ORDERED

1. Application 85-400F to alter freshwater wetlands is denied.

2. Restoration of the subject shall be accomplished under supervision of DEM consistent with its policies.

I hereby recommend the foregoing Decision and Order to the Director for issuance as a final order.

April 2, 1991

William C. Clifton
William C. Clifton in his
capacity as Hearing Officer

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

April 4, 1991

Louise Durfee
Louise Durfee in her
capacity as Director,
Department of Environmental
Management

CERTIFICATION

I hereby certify that I caused a true copy of the within Director's Decision and Order to be forwarded via regular mail, postage pre-paid to Vernon Harvey, Esq., 55 Memorial Boulevard, P.O. Box 92, Newport, Rhode Island 02840; via inter-office mail to Sandra J. Calvert, Esq., 9 Hayes Street, Providence, Rhode Island 02908 and via inter-office mail to Dean H. Albro, Acting Chief, Division of Freshwater Wetlands, 291 Promenade Street, Providence, Rhode Island 02908 on this 5th day of April, 1991.

Jacqueline S. Ballard

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