

OFFICE OF ADJUDICATIONS

IN THE MATTER OF : ***APPLICATION NO. IW-99-122***

GREY ROCK DEVELOPMENT, LLC : ***NOVEMBER 15, 2000***

PROPOSED FINAL DECISION

I

SUMMARY

Grey Rock Development, LLC (the applicant) has applied to the Department of Environmental Protection (DEP) for a permit to conduct regulated activities in 0.018 acres of wetlands in conjunction with construction of a single-family residence, lawn and driveway in the Town of Seymour. This application was filed pursuant to General Statutes §22a-36 through 22a-45, the “Inland Wetlands and Watercourses Act” (IWWA).

The parties to this proceeding are the applicant and the wetlands section of the DEP Inland Water Resources Division (staff). The staff supports issuance of the permit and has entered on the record a draft permit that would authorize the proposed regulated activities.

Upon review of the relevant facts and applicable law in this matter, I find and conclude that the proposed regulated activities, if conducted in accordance with the terms

and conditions of the draft permit as modified herein, are consistent with the applicable legal standards for permit issuance. General Statutes §22a-36 and §22a-41(a); Regs., Conn. State Agencies §22a-39-6.1. Furthermore, I find that development of the property will serve the economic interests of the state. I therefore recommend issuance of the permit to conduct regulated activities based on the terms and conditions set forth in the draft permit with the additional condition incorporated herein. (See Attachments A and B)

II

PROCEDURAL HISTORY

On or about October 21, 1999, the applicant submitted a permit application to the DEP Inland Water Resources Division. The applicant pursued approval for its proposed project from the DEP because the Town of Seymour Inland Wetlands Commission (SIWC) failed to act within the sixty-five day time period required by General Statutes §22a-42(c)(1). On March 15, 2000, the Commissioner of Environmental Protection (Commissioner) issued and published a Notice of Tentative Determination to approve the application and to waive the requirement for a public hearing. Accordingly, staff prepared a draft permit that would authorize the proposed regulated activities subject to certain terms and conditions.

On April 12, 2000, staff received a petition signed by fifty-three persons requesting a public hearing on the application. A hearing was held on July 11, 2000 in the Town of Seymour public library. A site visit was also conducted on July 11, 2000

where all parties were represented. The record on these proceedings was closed on August 4, 2000.

III

DECISION

A

Findings Of Fact

Having considered all the testimony of the witnesses and the exhibits presented at the hearing, I make the following findings of fact by a preponderance of the evidence.

PROPOSED REGULATED ACTIVITIES

1. The applicant proposes to :

- place approximately seventy-five cubic yards of fill in the wetlands to create a level base for a portion of the driveway;
- extend and improve the Town of Seymour storm drainage system located on the site by adding an additional ninety-five feet of reinforced concrete pipe with a flared end at the outlet, removing approximately twelve cubic yards of wetland soil, and installing a 15' x 25' riprap splash pad at the outlet of the pipe;
- construct a four-foot high boulder retaining wall to delineate the wetlands perimeter and to preclude activity to the east of that wall.

(Exs. APP-1, 2; test. D. Smith, 7/11/00.)

(These activities will hereinafter be referred to collectively as “the proposed regulated activities.”)

THE SITE

2. The proposed project site (the site) was initially considered by the SIWC in 1996 as part of a subdivision plan entitled “Robin Road Estates” and was identified as Lot #3 on that plan. At that time, the SIWC classified the application for the “Robin Road Estates” Subdivision (including Lot #3) as “Class B, Non Significant Impact.” The SIWC approved the proposed regulated activities on Lot #3 as they were shown on a January 15, 1996 site development plan. (Ex. APP-3; test. D. Smith 7/11/00.)
3. The site is located at 24 Pheasant Drive in Seymour and consists of 1.8 acres of land, of which 1.2 acres are wetlands that are part of the impoundment area of the former Spring Lake.¹ The site, including the proposed driveway, is bounded on all sides by either abutting landowners, Pheasant Drive, or the remainder of the Spring Lake wetlands. (Ex. APP-1, 2.)
4. Access to the site will be from a driveway that will start at the northern end of Pheasant Drive. The contours of the site and the boundary lines of the abutting landowners limit the driveway design alternatives. (Ex. APP-2; test. D. Smith 7/11/00.)
5. The upland area of the site consists primarily of well-drained soils and areas of ledge outcrop with slopes ranging from fifteen to thirty-five percent. The soils include ten to forty-inch depths of a fine, sandy, loam surface layer and subsoil over hard bedrock. The outcrop consists of crystalline bedrock, commonly gneiss, schist or

¹ Spring Lake was originally used for ice production. The former impoundment area of the lake covers approximately four acres.

granite. In order to provide adequate distance between the house and the wetlands' perimeter, excavation of the site will require some minimal blasting into this outcrop. (Ex. APP-1; test. D. Smith, 7/11/00.)

6. A concrete dam exists on the northwest corner of the property. The dam formerly controlled Spring Lake. The gate structure that regulates the impoundment is inoperable and fixed in a partially open position. This serves to keep the former lake in a drawn down state except during periods of heavy rainfall. Following a heavy rain, storm water will accumulate and virtually flood the wetlands until the storm waters pass through the dam or are absorbed into the wetlands. (Exs. APP-1; HO-2, 3; test. D. Smith, 7/11/00.)
7. In addition to the proposed regulated activities, the applicant proposes to remove the existing, inoperable gate valve and provide a 24" x 24" x 24" epoxy-coated metal trash rack at the outlet to better drain the area. Staff from the DEP Dam Safety Unit have determined that the proposed modifications to the dam will not require a DEP dam construction permit because the alterations will not change the structural integrity of the dam or hinder its ability to function properly. However, investigators from the Dam Safety Unit have recommended that the trash rack openings be horizontal and spaced six inches apart in order to mitigate the potential for debris to build up and prevent drainage. Staff agreed with this recommendation and proposed that a condition be added to the permit that would address this issue. Subsequently, staff submitted a proposed condition, which is attached as Attachment B. (Exs. APP-1, DEP-9; test. D. Smith 7/11/00; test. C. Chase, 7/11/00.)

WETLANDS AND WATERCOURSES

8. The wetlands on this site were initially investigated and boundaries were marked in September, 1994. The identification of the wetlands was based on soil on the site and the guidelines of the National Cooperative Soil Survey Program. At the time of the investigation, the area was crossed by a drainageway or ditch that originated at the outlet of a storm water drainage culvert. There was no indication of water flow other than storm drainage. The site was investigated again in October, 1999 and the original findings pertaining to the characterization and boundaries of the wetlands and the function of the drainage ditch were confirmed. (Ex. APP-1; test. Shook 7/11/00.)
9. The drainage ditch is approximately 100 feet long, three feet wide and three feet deep. The ditch carries storm water to the former Spring Lake. The ditch is eroding because the energy of the flow of storm water into it is such that it causes sediment to be transported and deposited into the wetlands. (Ex. DEP-4b, test. D. Smith 7/11/00; test. J. Caiola, 7/11/00.)
10. The section of wetland that will be impacted by the proposed regulated activities is classified as a “forested wetland complex dominated by Red maple, Grey birch and Spicebush.” Silky dogwood, Golden rod and Panic grass also exist in the wooded or forested area. The wetland to the east of the impact area is vegetated by Phragmites. The primary functions of the wetland include wildlife habitat and storm water detention and renovation. Habitat similar to that being impacted is present on the site directly to the east of the proposed regulated activities. (Exs. DEP-5b, APP-1; test. A. Dangler, 7/11/00; test. R. Shook, 7/11/00.)

11. The hydraulic impacts of the proposed activity will result in a minor increase in runoff from the site. Runoff leaves the site via sheet flow into the lakebed. The pre-construction discharge is 0.76 cubic feet per second (cfs) for the ten-year storm event. Following construction this will increase by 0.12 cfs to 0.88 cfs. Runoff during the 100-year storm event will increase by 0.28 cfs. The increase will be mitigated because the former Spring Lake serves as a detention basin for the developed area around it. (Ex. DEP-4b; test. J. Caiola, 7/11/00.)
12. Construction of the driveway will require placement of 74 cubic yards of fill in approximately 350 square feet of wetlands. Storm water currently discharges into the planned driveway area via a catch basin and drainage pipe. The pipe will need to be extended to accommodate installation of the driveway. A manhole cover will be installed at the end of the existing pipe and the extension of pipe by ninety-five feet will bring the discharge point closer to the wetlands. (Exs. DEP-5b; APP-1; test. A. Dangler, 7/11/00; test. D. Smith, 7/11/00.)
13. In addition to extending the drainage pipe, a 25' X 15' riprap splash pad will be installed at the new discharge outlet point that will dissipate the energy of the flow of storm water into the wetlands and will provide protection against further erosion of the area. Installation of this splash pad will require excavation of approximately twelve cubic yards of wetland soil. (Exs. DEP-4b, 5b; APP-1; test. D. Smith, 7/11/00; test. J. Caiola, 7/11/00; test. A. Dangler, 7/11/00.)
14. The extension of the drainage pipe and the placement of the riprap splash pad will disturb approximately 450 square feet of wetlands. These activities will alter the

existing wetlands but the area will still have wetland hydrology. In addition, some wildlife species will be displaced due to the construction activity and the continuous presence of humans once the residence is occupied. (Exs. DEP-5b; APP-1; test. A. Dangler, 7/11/00; test. R. Shook, 7/11/00; test. D. Smith, 7/11/00.)

15. In order to avoid any additional impacts to the wetlands during and post-construction, the applicant proposes to comply with the conditions outlining Best Management Practices in the draft permit and in relevant activities depicted in the applicant's application in the following manner.

- Implement standard erosion control measures such as constructing a line of silt fence along the toe of the slope of the site, near the drainage area, and elsewhere as needed;
- Plant grasses in the lawn area which will slow the runoff and stabilize the disturbed slope before it reaches the wetland to prevent erosion;
- Take steps to avoid the deposition of excavated soils and demolition or construction debris in the wetlands; and
- Construct a boulder retaining wall to provide an undisturbed natural buffer between the wetlands and the site.

(Ex. APP-1, 2; test. D. Smith, 7/11/00.)

WILDLIFE

16. The wildlife observed on the site includes rabbits, deer and ducks. The placement of fill required to construct the driveway will result in some loss of wildlife habitat at the

site. Therefore, some wildlife may be displaced as a result of the construction.

However, almost four additional acres of wetland and wildlife habitat will remain undisturbed. (Ex. APP-1; test.D. Ebling, 7/11/00; R. Shook, 7/11/00.)

17. There are no known populations of endangered or threatened species or species of special concern (as those terms are defined in General Statutes §26-304) within the site. (Ex. APP-1, Test., Shook, 7/11/00)

FLOODING

18. The development of this site will result in minor increases in storm water runoff during the ten and 100 year storm events. The natural detention characteristics of the former Spring Lake will mitigate these minimal increases in peak flow so that the effect will not be detectable downstream. The driveway will be constructed with gravel that will allow water to permeate rather than increase the volume of runoff at the site. In addition, the improvements to the existing outlet structure in the dam will also facilitate flow and drainage during periods of heavy rainfall. (Ex. APP-1; test. D. Smith, 7/11/00.)

SEDIMENTATION

19. As noted previously, the applicant will take steps to avoid release of sediments into the wetlands during and following the proposed regulated activities. Furthermore, the modifications to the drainage system will mitigate the current deposition of sediment in the wetlands. (Ex. APP-1; test. D. Smith, 7/11/00.)

ALTERNATIVES

20. The proposed development plan for Lot #3 filed with the original subdivision plan and approved by the SIWC in 1996 indicated an impact on 1,770 square feet of wetlands and would have required activities within twenty-five feet of the wetlands.² A second iteration of the plan (apparently submitted to the SIWC but not acted on) indicated 1,131 square feet of wetlands impact with the activities twenty-five feet from the wetlands. A third plan, the plan submitted to the DEP, will result in an impact on a total of 802 square feet of wetlands and the construction activities will be twenty-five feet from the wetlands at the closest point and forty-five feet from the wetlands at the farthest point. The applicant considers this third plan to have the least impact on the wetlands. (Exs. App-1, 2; test. D. Smith, 7/11/00.)
21. The applicant purchased the site because it was an approved building lot within the 1996 subdivision plan. The applicant is in the business of developing real estate. The applicant believes that there is no activity, other than the proposed project, that will allow for the development of the site and have a lesser impact on the wetlands. (Ex. APP-1; test. D. Smith, 7/11/00.)

DEP JURISDICTION

22. On April 14, 1999, the applicant submitted a site plan for the development of this lot to the SIWC. Approval of this site plan by the SIWC was required prior to issuance

² See F.F. #2.

of a building permit. The site plan appeared on the agenda of the SIWC for its next regularly scheduled meeting, which was held on April 26, 1999. (Exs. DEP-8; APP-1.)

23. The SIWC did not request an extension of time to consider the application and the applicant did not withdraw the plan at any time. The SIWC took no action on the site plan until its September 27, 1999 meeting, 166 days after the application was submitted. At that meeting, the SIWC decided that the proposed activities were likely to have a significant impact on the inland wetlands and scheduled a public hearing. (Exs. DEP-8; APP.-1.)

24. Applicant submitted the DEP application for permit on or about October 21, 1999. At a public hearing, held by the SIWC on October 25, 1999, applicant's attorney informed the SIWC of the DEP application and explained that the DEP would also conduct a public hearing. (Ex. APP-8.)

B

Conclusions of Law

1

Jurisdiction

It is the policy of the state to require municipal regulation of activities that affect the wetlands “within the territorial limits” of a municipality. General Statutes §22a-42. Municipal agencies are authorized to act in accordance with §22a-42a, therefore, any person wishing to conduct a regulated activity must apply to the municipal agency for a permit to do so. The agency is deemed to have received an application as of the day of its next regularly scheduled meeting. The agency must act on or schedule and conduct a hearing on the application within sixty-five days of its receipt. In the event that a municipal inland wetlands agency fails to act within sixty-five days, “the applicant may file such application with the Commissioner ... who shall review and act on such application...” provided that the applicant has neither withdrawn his application from the municipality nor granted any requests by the municipality to extend the time to act on it. General Statutes §22a-42a(c)(1).

The evidence on the record supports the conclusion that the SIWC failed to act within the time required by statute. The application was filed and received by the SIWC at its regularly scheduled meeting held on April 26, 1999, however, the SIWC did not render a decision or schedule and conduct a hearing on the application within sixty-five days of its receipt. The SIWC did not request an extension of time from the applicant

during the time that the application was before it and the applicant did not withdraw its application at any time.

Based on the foregoing, I find that the SIWC failed to act within the requisite time period and that the applicant was legally entitled to file its application with the Commissioner. The Commissioner properly reviewed and acted on the application in accordance with General Statutes §22a-42a(c)(1).

2

Statutory Considerations

In order to implement the policies set forth in the Connecticut Inland Wetlands and Watercourses Act³, the legislature enacted General Statutes §22a-41(b). This section provides that where a public hearing has been held on an application, no permit shall be issued unless no feasible and prudent alternative is found to exist. *Madrid Corporation v. Inland Wetlands Agency*, 25 Conn. App. 446, 450 (1991). In making that determination, the facts and circumstances set forth in General Statutes §22a-41(a) must be considered.

These factors include:

- (1) The environmental impact of the proposed action;
- (2) The alternatives to the proposed action;
- (3) The relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity;
- (4) Irreversible and irretrievable commitments of resources which would be involved in the proposed activity;

³ General Statutes §22a-36 through 22a-45 inclusive.

- (5) The character and degree of injury to, or interference with, safety, health or the reasonable use of the property which is caused or threatened; and
- (6) The impacts of the proposed action on wetlands outside the area and future activities made inevitable by the proposed activity that may have an impact on the wetlands.

See also Regs., Conn. State Agencies §22a-39-6.1.

(1) Environmental Impact on Wetlands

The record shows that the proposed regulated activities will result in some loss of wetlands and some temporary disturbance to other wetlands. Other than the driveway, the applicant's construction activities will be conducted outside the wetlands' perimeter. The boulder buffer will protect the wetlands from any future upland activity. Thus, the balance of the wetlands will be preserved. Furthermore, the improved drainage system is designed to protect the integrity of the wetlands and to preserve the wildlife habitat. I therefore conclude that the impacts to the wetlands will be minimal and will not diminish the wetlands' natural capacity to support desirable biological life, prevent flooding, control sediment, facilitate drainage and promote public health and safety.

(2) Alternatives

The evidence indicates that the applicant considered a number of alternatives to its current construction plan. Those alternatives would either cause greater adverse impact to the environment or would not permit the applicant to develop the site. Furthermore, there is no feasible and prudent alternative to the proposed regulated activities associated

with the construction. Given the characteristics of the site and the applicant's purposes, the alternative presented by the applicant is "sound from an engineering standpoint and is economically reasonable in light of the social benefits derived from the activity."

Samperi v. Inland Wetlands Agency of the City of West Haven, et al., 226 Conn. 579, 596 (1993) citing *Manchester Environmental Coalition v. Stockton*, 184 Conn. 51, 63 (1981).

I conclude that the applicant has adequately demonstrated that "its proposed development plan, insofar as it intrudes upon the wetlands, is the only alternative that is both feasible and prudent." *Samperi*, supra, 593.

(3) Short-term Uses and Long-term Productivity

The record demonstrates that the short-term impacts of the proposed regulated activities will be both minimal and temporary, provided the applicant adheres to the terms and conditions of the permit. While the proposed regulated activities will result in some permanent loss of wetlands, following cessation of those activities, the long-term productivity of the remaining wetlands in the area will not otherwise be adversely affected. I therefore conclude that the proposed activities will not have a significant long-term impact on the existing wetlands or on the natural development of the wetlands in the future.

(4) Commitment of Resources

The applicant's proposed improvements to the storm water drainage system will alleviate the on-going erosion to the wetlands caused by sediment deposition and will

allow for better drainage and flow of runoff. The repairs to the dam outlet structure and the installation of the recommended trash rack will reduce the flooding problems that occur during heavy rainfalls. I conclude that the commitment of wetlands resources associated with the proposed regulated activities is not significant and will result in improvements to the wetlands' storm water detention and renovation capabilities.

(5) Impact on Safety, Health and Reasonable Property Use

The record amply demonstrates that the applicant intends to avoid additional adverse impacts to the wetlands during and after completion of its construction activities. The minor impacts of the proposed regulated activities do not pose a threat of injury or interference with the public health or the reasonable use of property.

(6) Impact on Wetlands Outside the Area and Inevitable Future Activities

There is no evidence that the proposed regulated activities will have an impact on wetlands outside the proposed project area. Furthermore, the boulder buffer and improved drainage system will prevent any other future activities from having an adverse impact on wetlands. I conclude that the proposed regulated activities, which will take place at the site of a previously approved building lot, will have minimal adverse environmental impacts, thereby striking an appropriate balance of the state's interest in economic growth and its need to protect the environment.

The record amply demonstrates that the requirements of General Statute §22a-41(b)(1) have been met. The application received a public hearing pursuant to §22a-39(k). Based on the record of that hearing and taking into account the facts and circumstances set forth in §22a-41(a) I find that a feasible and prudent alternative to the proposed regulated activities does not exist and a permit should be issued.

C

Recommendations

In light of the foregoing, I recommend that the Commissioner issue the requested permit incorporating the terms and conditions set forth in the draft permit and in Attachment B incorporated herein.

November 15, 2000
Date

Jean F. Dellamarggio
Jean F. Dellamarggio, Hearing Officer

Attachment B

At the close of the public hearing, staff proposed to draft an additional permit condition that would address the concern of the DEP Dam Safety Unit regarding the design of the trash rack. Staff subsequently drafted the following proposed condition that I recommend be incorporated into the applicant's permit.

The permittee shall install a trash rack on the gate structure of the existing outlet to the former Spring Lake at the site by the expiration date of this permit. The trash rack shall consist of a 24" X 24" X 24" epoxy coated metal structure with horizontal openings approximately 6" wide.