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Appendix A-1

Supreme Court of the State of New York  
Appellate Division: Second Judicial Department

\_\_ AD3d \_\_

Argued - December 15, 2017

JEFFREY A. COHEN, J.P.  
ROBERT J. MILLER  
HECTOR D. LASALLE  
VALERIE BRATHWAITE NELSON, JJ.

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2015-09522

DECISION & ORDER

In the Matter of Denis P. Kelleher, et al., appellants,  
v New York State Department of Environmental  
Conservation, respondent.

(Index No. 2631/09)

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Esseks, Hefter, Angel, Di Talia & Pasca, LLP,  
Riverhead, NY (Stephen R. Angel, Anthony C.  
Pasca, and Nancy Silverman of counsel), for  
appellants.

Eric T. Schneiderman, Attorney General, New  
York, NY (Anisha S. Dasgupta and Judith N.  
Vale of counsel), for respondent.

In a proceeding pursuant to CPLR article 78 to  
review a determination of the Commissioner of the  
New York State Department of Environmental  
Conservation dated December 24, 2008, which denied  
the petitioners' application for a tidal wetlands

## Appendix A-2

permit, or, in the alternative, to direct the respondent to commence condemnation proceedings to acquire the petitioners' property, the petitioners appeal, as limited by their brief, from so much of a judgment of the Supreme Court, Suffolk County (Garguilo, J.), dated June 24, 2015, as denied that branch of the petition which was to direct the respondent to commence condemnation proceedings to acquire the petitioners' property.

ORDERED that the judgment is affirmed insofar as appealed from, with costs.

The real property at issue on this appeal is a parcel consisting of 17,334 square feet located on Westminster Road, in the Town of Southampton, and bordering Calf Creek, a tributary of Mecox Bay. On December 24, 2008, the petitioners' application to construct a single-family house with accompanying septic system on the property was denied by the Department of Environmental Conservation of the State of New York (hereinafter the DEC). In 2009, the petitioners commenced this CPLR article 78 proceeding to review the DEC's determination. The proceeding was transferred to this Court, which granted the DEC's motion to remit the matter to the Supreme Court, Suffolk County, "for further proceedings pursuant to ECL 25-0404" (Appellate Division Docket No. 2009-09938). Pursuant to that statute, if the Supreme Court finds, inter alia, that the determination of the DEC "constitutes the equivalent of a taking without compensation," it may, among other things, require the DEC to acquire the property under the power of eminent domain. After a hearing, the Supreme Court found that the DEC's

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determination did not constitute a taking without just compensation and denied the petition in its entirety. The petitioners appeal from so much of the judgment as denied that branch of the petition which was to direct the DEC to commence condemnation proceedings to acquire the property. We affirm insofar as appealed from.

The Supreme Court correctly determined that the DEC's denial of the petitioners' application did not result in a taking of the petitioners' property without just compensation, since the petitioners failed to demonstrate that, at the time they acquired title, they possessed the right to develop and use the property in the manner in which they proposed (*see Matter of Gazza v New York State Dept. of Env'tl. Conservation*, 89 NY2d 603, 617; *Matter of Brotherton v Department of Env'tl. Conservation of State of NY.*, 252 AD2d 498, 499).

The petitioners' remaining contentions are without merit.

COHEN, J.P., MILLER, LASALLE and  
BRATHWAITE NELSON, JJ., concur.

ENTER:

S/ Aprilanne Agostino  
Aprilanne Agostino  
Clerk of the Court

March 14, 2018

Appendix B-1

**SUPREME COURT- STATE OF NEW YORK  
I.A.S. TERM, PART 47 – SUFFOLK COUNTY**

**PRESENT:**

**HON. JERRY GARGUILO  
SUPREME COURT JUSTICE**

**DECISION AFTER ARTICLE 78 HEARING**

---

In the Mater of the Application of DENIS P.  
KELLEHER and CAROL KELLEHER,

Petitioners,

For a Judgment under Article 78 of the Civil  
Practice Law and Rules relating to a Decision dated  
December 24, 2008 of the New York State  
Department of Environmental Conservation

-against-

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION,

Respondent.

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The Petitioners, by way of an Article 78  
proceeding seek a judgment relating to a decision  
dated December 24, 2008 of the New York State  
Department of Environmental Conservation. The  
Court conducted a three (3) day evidentiary hearing  
on December 9th, 12th and 16th, 2014.

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The Petitioner, Carol Kelleher is the owner of a parcel of real property approximately seventeen thousand three hundred thirty four (17,334) square feet in area located at 115 Westminster Road, Water Mill, in the Town of Southampton, County of Suffolk, State of New York. Said property is described by Suffolk County Tax Map Number 0904-102-01-62 (hereinafter referred to as the "property"). The Petitioner, Denis Kelleher is the husband of Carol Kelleher. It is undisputed that Carol Kelleher acquired the property from a Calvin S. Frost, Jr. and Anne J. Frost by deed dated March 12, 1999 and recorded in the Suffolk County Clerk's office at Liber 11954, cp. 488 on March 31, 1999.

The Respondent, The New York State Department of Environmental Conservation (DEC) has jurisdiction pursuant to Article 25 of the Environmental Conservation Law (ECL) to issue tidal wetlands permits. The DEC also has the authority to grant variances from Tidal Wetlands - Land Use Regulations (6 NYCRR 661), where there are practical difficulties in carrying out any of the provisions of section 661.6 (Development Restrictions).

The property borders on Calf Creek, a tributary of Mecox Bay. Because of its proximity to wetlands, in order to improve the subject property, Petitioners were required to obtain permits from the Town of Southampton Conservation Board, the Town of Southampton Zoning Board of Appeals, the Suffolk County Department of Health Services, and the DEC.

During the hearing it was established that the Southampton Conservation Board approved Petitioners' Wetlands Permit Application by a

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resolution dated May 26, 2004. Furthermore, as a condition of granting the Wetlands Permit., the Town Conservation Board required that the proposed house be built in the northeast corner of the property. As such, it was necessary for Petitioners to also apply for variance relief for the house from the Town of Southampton Zoning Board of Appeals (“ZBA”). By decision dated December 2, 2004, the ZBA granted Petitioners the relief requested. It appeared that all of the necessary permits from the Town of Southampton were in place and that the Suffolk County Department of Health Services’ (“SCDHS”) application was awaiting the issuance of a permit from DEC.

Sometime in August of 2003, the Petitioners applied to the DEC to obtain a Tidal Wetlands Permit for the house, septic system and driveway. Thereafter, during March of 2005 during which revisions to the application were made by Petitioners at the request of the DEC, the DEC accepted, as complete, Petitioners’ application to construct the one family dwelling, sanitary system and driveway at the subject property. The following year, by notice dated April 29, 2006, the DEC denied Petitioners’ application for a Tidal Wetlands Permit. Thereafter, Petitioners’ timely requested a hearing on their application before an Administrative Law Judge. A public hearing on the application was held on July 15 and 16 of 2008, before Administrative Law Judge, Edward Buhrmaster of the DEC.

This proceeding is brought pursuant to Article 78 of the Civil Practice Law and Rules and ECL § 25-0404 for, among other things, a judgment (a) annulling a certain DEC decision dated December 24, 2008, (b) directing the DEC to issue the permit and

#### Appendix B-4

variances sought by Petitioners or, alternatively (c) finding that, as a result of the DEC's decision dated December 24, 2008, the property was effectively taken without compensation. The Court was provided with a copy of the aforementioned decision.

The property is located wholly within a residential zone of the Hamlet of Water Mill, Town of Southampton, County of Suffolk, State of New York, and it is alleged by Petitioners it can only be improved with a single family residence. Petitioners' claim that the property cannot reasonably be used for any other purpose.

The Petition seeks judgment as follows:

(1) Judgment annulling the decision of Respondent, New York State Department of Environmental Conservation dated December 24, 2008;

(2) Directing Respondent, New York State Department of Environmental Conservation to issue the permit and variance sought by Petitioners for the property;

(3) Alternatively,-should the Court fail to grant the relief requested determining that the action of Respondent, New York State Department of Environmental Conservation, resulted in a taking of Petitioners' property without the payment of compensation therefore, and directing pursuant to Environment Conservation Law § 25-0404, that Respondent commence condemnation proceeding to acquire Petitioners' property or issue the requested permit; and



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(4) In the event that the Court deems that the action of Respondent, New York State Department of Environmental Conservation resulted in a taking of Petitioners' property, that Petitioners be awarded temporary taking damages in an amount determined by the Court.

As noted above, a hearing was held before this Court on December 9, 12 and 16, 2014 pursuant to § 25-0404 of the Environmental Conservation Law ("ECL"), which provides that:

In the event that the court may find that the determination of the commissioner constitutes the equivalent of a taking without compensation, and the land so regulated otherwise meets the interest and objectives of this act, it may, at the election of the commissioner, either set aside the order or require the commissioner to acquire the tidal wetlands or such rights in them as have been taken, proceeding under the power of eminent domain.

Therefore, the question before the Court was whether a December 24, 2008 determination by the New York State Department of Environmental Conservation ("DEC")—which denied Petitioners a Tidal Wetlands Permit to construct a single house on their property in Water Mill, New York—constituted the equivalent of a taking without compensation.

The basic test applied to this takings claim is the "ad hoc, factual inquiry" known as the "Penn Central Test," which includes consideration of three

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main factors: economic impact, interference with investment-backed expectations, and the character of the governmental action. *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646 (1978).

The Petitioner submitted a text book case proffering evidence as to every element of their taking claim. As pointed out in Petitioners' post hearing Memorandum, they (Petitioners), establish, through their own appraiser who opined as to a 98% diminution in value and even though the DEC's appraiser acknowledged an 80% diminution, that the DEC's permit denial resulted in a severe economic impact and left the property with a "bare residue" of its value.

Furthermore, Petitioners claim to have established that their "distinct investment-backed expectation" to build a home on this property, for which they paid substantial value at Four Hundred Fifty Thousand Dollars (\$450,000), was "objectively reasonable." Lastly, Petitioners claim to have demonstrated, through evidence showing that the surrounding area in question is almost completely developed (other than Petitioners' property), that the "character of the governmental action," i.e., a complete denial of practical use of the property, imposed a disproportionate burden on Petitioners with no reciprocity of advantage.

Standing alone, it appears that Petitioners submitted a persuasive claim and a persuasive case. However, the history as submitted by the Respondent paints a series of mistakes that lead the Petitioners to a very bad deal.

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Before Petitioners purchased the property, they owned a summer house on the ocean in the Village of Sagaponack, in the Town of Southampton. In 1994, five (5) years before buying the property the Petitioner, Denis Kelleher, applied to the DEC for a Tidal Wetlands Permit to extend an existing bulkhead and restore the dunes at his former (Sagaponack) house. That permit was granted.

Unfortunately, in 1998, the Sagaponack house was washed into the ocean during a powerful storm. Petitioners sought other property in Southampton for a summer house. Thereafter, they purchased the property in 1999 from Calvin Frost. In 2000, the purchase price of the property was Four Hundred Fifty Thousand Dollars (\$450,000) which Petitioner financed with a purchase money mortgage and subsequently satisfied. As noted above, the subject property is 17,743 square feet. It borders Calf Creek, an inlet from Mecox Bay, and is covered with significant amounts of phragmites, and other vegetation associated with wetlands.

It is undisputed that 25% of the property consists of Tidal Wetlands that are subject to regulation under the Tidal Wetlands Act.

Here is where the history gets somewhat sticky. The seller, Calvin Frost owned another vacant lot on Westminster Road, adjacent to the lot be sold to Petitioners. Mr. Frost applied to the DEC in the mid 1990s for a Tidal Wetlands Permit to construct a house on the adjacent vacant lot. Frost submitted a sight plan to the DEC with a house that was less than the required 75 feet from the wetland boundary and two cesspools that were less than the required 100 feet

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from the boundary. He therefore needed variances from the wetland development restrictions. The DEC staff objected and Frost eventually abandoned his permit applications. As pointed out by the Respondent, this was a matter of public record that would have been available to the Kellehers at the time; they purchased the property. In 1998, one year before his sale to the Petitioners, Frost sold the adjacent lot to Nevitt Jenkins for Two Hundred Forty Thousand Dollars (\$240,000). This lot has remained vacant.

In terms of “investment backed expectation” it is undisputed that the Kellehers’ due diligence in connection with the acquisition of the property was appallingly deficient. Denis Kelleher used a real estate agent in his purchase of the property he “did the deal through him.” Before buying the property, the only due diligence that the Petitioner Denis Kelleher exercised was to ask the broker if he could build a house on the property. According to Mr. Kelleher, the broker told him someone in the Town of Southampton had told the broker that Mr. Kelleher could probably build on the property. Mr. Kelleher retained counsel to represent him in connection with the acquisition of the property. That lawyer, Denis Kelleher, Jr., the Petitioners’ son, is a criminal defense lawyer and had no experience in real estate transactions or land use law. Had he done so, perhaps the contract of sale would have been conditioned upon the placement of appropriate permits and/or discovery governmental restrictions.

No one is arguing that the Petitioners are categorically barred from attempting to assert a takings claim by the mere fact that they purchased

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the property post regulation, and the DEC has never contended otherwise. However, as post regulation purchases, Petitioners bare the burden of proving that there was some compelling reason for them to expect that they could build a house on a parcel of land that was too small to meet health-based septic system set back requirements, as well as other regulatory requirements, or that the DEC would grant them an extreme variance from a regulation it promulgated to ensure that pathogens and other deleterious substances do not leech into wetlands from the septic system lichfield and contaminate the creek, the bay and the shell fish that live there. The compelling reason appears to be a comment form a Broker who has a stake in seeing the transaction consummated.

It is therefore the decision of this Court that the Petitioners have failed to meet their burden and all relief sought is **DENIED**.

The foregoing constitutes the decision and **ORDER** of this Court.

**Dated: June 24, 2015**

S/ JERRY GARGUILO  
**HON. JERRY GARGUILO, JSC**

FILED  
JUL 02 2015  
Judith A. Pascale  
CLERK OF SUFFOLK COUNTY

Appendix C-1

*State of New York  
Court of Appeals*

*Decided and Entered on the  
twenty-seventh day of June, 2018*

**Present**, Hon. Janet DiFiore, *Chief Judge*,  
*presiding.*

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Mo. No. 2018-476  
In the Matter of Denis P. Kelleher  
et al.,  
Appellants,  
v.  
New York State Department of  
Environmental Conservation,  
Respondent.

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Appellants having moved for leave to appeal to  
the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it  
is

ORDERED, that the motion is denied with one  
hundred dollars costs and necessary reproduction  
disbursements.

s/ John P. Asiello  
John P. Asiello  
Clerk of the Court

Appendix D-1

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION  
625 Broadway  
Albany, New York 12233-1010

In the Matter

- of -

the Application for a Tidal Wetlands Permit  
to Develop Property on Westminster Road  
in Water Mill, Town of Southampton,  
Suffolk County,

- by -

DENIS AND CAROL  
KELLEHER

Application No. 1-4736-06413/00001

DECISION OF THE ASSISTANT COMMISSIONER

December 24, 2008

DECISION OF THE ASSISTANT  
COMMISSIONER<sup>1</sup>

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<sup>1</sup> By memorandum dated November 24, 2008, Commissioner Alexander B. Grannis delegated his decision making authority in this matter to Assistant Commissioner for Hearings and Mediation Services Louis A. Alexander. A copy of this memorandum is being forwarded to the parties in this proceeding, together with the Decision.

## Appendix D-2

Denis and Carol Kelleher (“applicants” or “Kellehers”) filed an application with the New York State Department of Environmental Conservation (“Department”) for a tidal wetlands permit to construct a two-story, single-family dwelling with an on-site waste water treatment system on a parcel they own on Westminster Road in Water Mill, Town of Southampton, Suffolk County (“project”).

In conjunction with their permit application, applicants request variances from two development restrictions contained in section 661.6(a) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”), specifically:

(1) the restriction in 6 NYCRR 661.6(a) (1) requiring that principal buildings be set back at least 75 feet landward from the most landward edge of any tidal wetland, in that the residence would be as close as 33 feet from the boundary of a tidal wetland associated with Calf Creek, a tributary of Mecox Bay; and

(2) the restriction in 6 NYCRR 661.6(a) (2) requiring that any on-site sewage disposal system be set back at least 100 feet landward from the most landward edge of any tidal wetland, in that the Kellehers’ system would be as close as 44 feet from the tidal wetland boundary.

The matter was assigned to Administrative Law Judge (“ALJ”) Edward Buhrmaster, who prepared the attached hearing report. The ALJ recommends that the permit application, including the requested variances, be denied. I adopt the ALJ’s



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hearing report as my decision in this matter, subject to my comments below.

The Kellehers have the burden of proof to demonstrate that their project would be in compliance with the provisions governing issuance of a tidal wetlands permit (see 6 NYCRR 624.9[b]), as well as the burden of showing that a variance from any of the relevant development restrictions should be granted (see 6 NYCRR 661.11[a]).

The Kellehers have failed to meet these burdens. As discussed in the ALJ's hearing report, the project would not be compatible with the public health and welfare (see 6 NYCRR 661.9[c] [1]), given, in part, the risk of shellfish contamination, and would have an undue adverse impact on the values of the adjacent tidal wetland (6 NYCRR 661.9[c] [3]), particularly those values for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, and recreational fishing.

Both the proposed residence and the sewage disposal system are not set back sufficiently from the wetland to meet the development restrictions at 6 NYCRR 661.6(a) (1) and (2). Although the Kellehers demonstrated that practical difficulties exist in complying with these development restrictions, granting the requested variances would have an undue adverse impact on wetland values.

In addition, this project must be denied on the basis of the same impacts that support the denial of the variances. An additional ground for permit denial is the project's incompatibility with public health and

## Appendix D-4

welfare, because, as Department staff testified, the pathogens and toxins associated with the septic system could be expected to impact water quality, thereby affecting shellfishing, crabbing, clamming and fishing in the creek and, by extension, the bay to which it is connected.

At the issues conference, Department staff proposed a new objection to permit issuance: an alleged failure of the project to comply with a development restriction at 6 NYCRR 661.6(a) (8), which requires that runoff control measures, including dry wells, be designed and constructed to handle the runoff produced on a project site by a five-year storm (“runoff control measures”). The Kellehers objected to this as an issue for adjudication because it was raised for the first time at the issues conference, with no prior notice so they could develop a response. Department staff stated at the issues conference that it had not identified the issue until the day before the hearing, while reviewing the Kellehers’ dry well design calculations.

Although the ALJ ultimately ruled that the issue be heard, he noted that he shared the Kellehers’ frustration that staff’s review of the application had not been careful enough to identify the issue sooner. The hearing then proceeded on all issues identified through staff’s objections to permit issuance, with the Kellehers offering testimony to show that their dry well is adequately designed for its intended purpose, which is to handle runoff from the roof of their proposed house. The ALJ’s hearing report draws no conclusions about runoff control measures, because,

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as the ALJ explains, the record was insufficiently developed by the parties.

I share the concern that this issue of runoff control measures was not raised until the day of the issues conference. Department staff issued its notice of permit denial to applicants by its letter dated August 29, 2006. No mention of deficiencies in runoff control measures was made at any time prior to the issues conference (see Hearing Transcript, at 28, 29–30, 39–40, 42). Why dry well design calculations were not examined during the review of the permit application or at any time in the two years between Department staff's notice of denial and the day before the hearing is unclear.

Where Department staff identifies an additional ground for permit denial, it must immediately notify an applicant to avoid the kind of surprise that occurred in this proceeding. An applicant is entitled to know the grounds upon which its permit application is denied so that, if it seeks a hearing on the denial, it is able to prepare for that hearing including the identification and preparation of witnesses, as well as to consider appropriate modification or mitigation to the project that may address the concern.

Where Department staff identifies a new ground for denial of a permit application following issuance of a denial letter, Department staff must also provide a reasoned explanation regarding why that ground was not identified at an earlier date. Absent such an explanation, it would be an appropriate exercise of discretion by the ALJ to exclude

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consideration of a newly raised ground for permit denial.

Although the hearing process is intended to address all legitimate environmental concerns, Department staff has an obligation to identify issues upon which its denial is based in a timely fashion to avoid creating unfairness in the hearing context. As noted, however, in this matter the issue of runoff control measures did not serve as a basis for the ALJ's recommendation for permit application denial.

Based on the record of this proceeding and in consideration of the other issues addressed in the ALJ's hearing report, the Kellehers' application for a tidal wetlands permit, and the requested variances, is denied.

### NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

By: s/ Louis Alexander  
Louis A. Alexander  
Assistant Commissioner

Dated: December 24, 2008  
Albany, New York

To:

Denis & Carol Kelleher (Via Certified Mail)  
112 Circle Drive  
Staten Island, NY 10304

Stephen R. Angel, Esq. (Via Certified Mail)  
Esseks, Hefter & Angel, LLP

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108 East Main St.  
P. O. Box 279  
Riverhead, NY 11901-0279

Susan Schindler, Esq. (Via Intra-Agency Mail)  
NYS Department of  
Environmental Conservation  
Region 1 Office  
SUNY at Stony Brook  
50 Circle Rd.  
Stony Brook, NY 11790-3409

Appendix E-1

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION  
625 Broadway  
Albany, NY 12233-1550

In the Matter

- of -

the Application of **DENIS AND CAROL  
KELLEHER** for a tidal wetlands permit  
to develop property on Westminster Road  
in Water Mill, Town of Southampton,  
Suffolk County

Application No. 1-4736-06413/00001

HEARING REPORT

By

s/ Edward Buhrmaster  
Edward Buhrmaster  
Administrative Law Judge

October 31, 2008

**PROCEEDINGS**

Background and Brief Project Description

Denis and Carol Kelleher propose to construct a two-story, single-family dwelling with an on-site waste water treatment system on a 17,334 square-foot

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parcel they own on Westminster Road in Water Mill, Town of Southampton, Suffolk County.

To move ahead with the project, the Kellehers request a tidal wetlands permit pursuant to Environmental Conservation Law (“ECL”) Article 25 and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”). In conjunction with their permit application, the Kellehers request variances from two development restrictions contained in 6 NYCRR 661.6(a):

(1) a restriction in 6 NYCRR 661.6(a) (1) requiring that principal buildings be set back at least 75 feet landward from the most landward edge of any tidal wetland, in that the residence would be as close as 33 feet from the boundary of a tidal wetland associated with Calf Creek, a tributary of Mecox Bay; and

(2) a restriction in 6 NYCRR 661.6(a) (2) requiring that any on-site sewage disposal system be set back at least 100 feet landward from the most landward edge of any tidal wetland, in that the Kellehers’ system would be as close as 44 feet from the tidal wetland boundary.

In accordance with 6 NYCRR 617.5(c) (9), Department of Environmental Conservation (“DEC”) Staff determined that the project is a Type II action not subject to review under the State Environmental Quality Review Act because it involves construction of a single-family residence on an approved lot, along with installation of a septic system. DEC Staff deemed the application complete pursuant to 6 NYCRR Part

### Appendix E-3

621 on March 17, 2005, and issued a notice of permit denial (Exhibit No. 6) on August 29, 2006. The Kellehers, by their attorney, requested a hearing by letter dated September 22, 2006 (Exhibit No. 7), and that request, with supporting documents, was forwarded to DEC's Office of Hearings and Mediation Services ("OHMS"), where it was received on November 6, 2007.

This matter was initially assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick, and was later reassigned to ALJ Richard Wissler for a conference that was held on May 7, 2008, at DEC'S Region 1 office in Stony Brook. On May 19, 2008, the matter was reassigned to me for the purpose of conducting a hearing. I had a conference call with the parties' counsel on May 23, during which the dates and location of the hearing were established.

On June 11, 2008, James T. McClymonds, DEC'S chief administrative law judge, issued a combined notice of complete application and notice of public hearing (Exhibit No. 1). It was published as a legal notice in the Southampton Press, Eastern Edition, on June 19, 2008 (see affidavit of publication, Exhibit No. 2) and also appeared in DEC'S Environmental Notice Bulletin on June 18, 2008 (as shown in Exhibit No. 3). The notice was released to the parties' counsel under a cover letter (Exhibit No. 4) confirming the hearing arrangements, and was also circulated to other state agencies, and to relevant local officials, on a distribution list prepared by OHMS (Exhibit. No. 5).



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As announced in the notice, the hearing went forward on July 15 and 16, 2008, at the Southampton Town Hall, 116 Hampton Road, Southampton, New York.

DEC Staff appeared by Susan Schindler, Esq., assistant regional attorney at DEC's Region 1 office in Stony Brook, New York.

The Kellehers appeared by Stephen R. Angel, Esq., of Esseks, Hefter & Angel, LLP, in Riverhead, New York.

### Legislative Hearing

The hearing notice provided for written and oral public comments on the project application. No written comments were provided before or at the hearing, and no one appeared at the hearing to offer oral comments.

### Issues Conference

The hearing notice provided an opportunity for persons and organizations to make written filings for party status, and to propose issues for adjudication with regard to the permit application. No filings were received by the deadline set in the hearing notice, or subsequently. As a result, the only participants at the hearing were the Kellehers and DEC Staff, and the only issues that were identified involved DEC Staff's bases for denying the permit application.

DEC Staff's bases for permit denial were stated initially in its letter of August 29, 2006 (Exhibit No. 6). However, as Staff counsel acknowledged when the

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hearing notice was prepared, that letter contained erroneous references, to the standards at 6 NYCRR 661.9(b), concerning permits for proposed regulated activities in a tidal wetland, when in fact all the regulated activities would occur in the area adjacent to a wetland, as to which the standards at 661.9(c) apply. Also as acknowledged by Staff counsel, the hearing referral, though not the denial notice itself, stated erroneously that the project required a variance from a minimum lot size requirement at 6 NYCRR 661.6(a) (5) (ii) , when in fact the project is exempt from that requirement pursuant to 6 NYCRR 661.6(b).

The hearing notice, as issued by Judge McClymonds, identified DEC Staff's bases for permit denial as specified by Staff at the time the notice was prepared. At the issues conference, however, Staff added one new objection to permit issuance: an alleged failure to comply with a development, restriction at 6 FYCRR 661.6(a) (8) which requires that runoff control measures, including dry wells, be designed and constructed to handle the runoff produced on a project site by a five-year storm. The Kellehers objected to this as an issue for adjudication because it was raised for the first time at the issues conference, with no prior notice so they could develop a response. DEC Staff replied that it had not identified the issue until the day before the hearing, while reviewing the Kellehers' dry well design calculations. Ultimately, I ruled that the issue be heard, finding that, Staff having raised it at the issues conference, it was timely presented, though I added that I shared the Kellehers' frustration that Staff's review of the application had not been careful enough

## Appendix E-6

to identify the issue sooner. The hearing then proceeded on all issues identified through Staff's objections to permit issuance, with the Kellehers offering testimony to show that their dry well is adequately designed for its intended purpose, which, is to handle runoff from the roof of their proposed house.

### Adjudicatory Hearing

The hearing issues were adjudicated on the basis of witness testimony on July 15 and 16, 2008. Also, to view conditions at and near the Kelleher property, I conducted a site visit during the late afternoon of July 15, during which I was accompanied by counsel for both parties.

The Kellehers presented as their witnesses Steven Maresca, a licensed professional engineer and owner of Maresca Associates Consulting Engineers in Hampton Bays, and Roy Haje, president of En-Consultants, Inc., in Southampton.

DEC Staff presented as its witness Matthew Richards, a biologist at DEC's Region 1 office in Stony Brook.

### Closing Statements

After my and the parties' receipt of the hearing transcript, I held a conference call on August 15 with the parties' counsel, during which a deadline of September 22, 2008, was established for the postmarking of closing briefs. I received both briefs on September 24, 2008, and the record closed on that

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date, as confirmed in a letter I sent to the parties' counsel on October 23, 2008.

### Transcript Corrections

With my letter of October 23, 2008, I sent the parties' counsel a list of proposed transcript corrections, and gave them until October 31, 2008, to state any objections to them. Both counsel provided e-mails on October 31 indicating they had no objections. Therefore, the corrections are considered adopted, and have been written into the transcript.

## STATEMENT OF HEARING ISSUES

According to 6 NYCRR 624.4(c) (1) (ii), an issue is adjudicable if it relates to a matter cited by DEC Staff as a basis to deny the permit and is contested by the permit applicant. Based on Staff's objections to permit issuance, as identified at the issues conference, the following issues were identified:

- - Whether the project is compatible with the public health and welfare, due to alleged negative impact on water quality and fisheries in Mecox Bay [6 NYCRR 661.9(c) (1)];

- - Whether the dry well proposed as part of the project is designed, or can be designed, to handle the water runoff produced on the project site by a five-year storm [6 NYCRR 661.9(c) (2) and 661.6(a) (8)];

- - Whether the project would have an undue adverse impact on the present or potential value of the

## Appendix E-8

tidal wetlands for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research or open space and aesthetic appreciation, taking into account the social and economic benefits which may be derived from the proposed activity [6 NYCRR 661.9(c) (3)]; and

- - Whether granting the requested variances to the development restrictions at 6 NYCRR 661.6(a) (1) and (2) would ensure that the spirit and intent of these provisions are observed, that public safety and welfare are secured, that substantial justice is done, and that there would be no undue adverse impact on the present or potential values of the tidal wetlands [6 NYCRR 661.11(a)].

### **APPLICATION DOCUMENTS**

By stipulation of the parties, the following documents were received as constituting the permit application:

(1) A completed one-page permit application form, submitted on behalf of the Kellehers on August 13, 2003, for a project described as “construction of a 2-story, single family residence and individual sanitary system on a 17,334 square foot parcel abutting tidal wetlands” (Exhibit No. 8-A)

(2) A map of the Kelleher property, depicting project features and including a profile through the proposed sanitary system, as revised September 23, 2004 (Exhibit No. 8-B)

## Appendix E-9

(3) A statement, filed pursuant to 6 NYCRR 661.11(a), constituting the Kellehers' request for variances from 6 NYCRR 661.6(a) (1) and (2), submitted at the ALJ's request by Mr. Angel, dated May 28, 2008 (Exhibit No. 8-C)

(4) A map illustrating properties within 500 feet of the Kelleher property, prepared October 30, 2003 (Exhibit No. 8-D)

Other documents received as part of the parties' respective cases for and against permit issuance were marked and received, as shown in the exhibit list attached to this report.

### FINDINGS OF FACT

1. Denis and Carol Kelleher of Staten Island, New York, propose to construct a two-story, single-family house on a 17,334 square-foot parcel on Westminster Road in Water Mill, Town of Southampton, Suffolk County.

2. Carol Kelleher purchased the property, which is undeveloped, from Calvin and Anne Frost of Lake Forest, Illinois, on March 12, 1999, according to a deed (Exhibit No. 11) filed with the Suffolk County Clerk's office.

3. The property, which is rectangular, is bounded on the north by Westminster Road, and on the south by Calf Creek, a tributary and arm of Mecox Bay. The property to the east, now or formerly that of Patricia Wood, is developed with a house, and the property to the west, now or formerly that of Nevitt N. Jenkins, is vacant.

## Appendix E-10

4. The Kelleher property is on a stretch of Calf Creek that is developed with houses on both sides, many with docks and floats extending into the water, as shown in a map (Exhibit No. 8-D) depicting the area within a 500-foot radius of the property. In fact, within that radius, the Jenkins property, adjacent to the Kellehers', is the only other property bordering the creek that does not contain a single-family house.

5. The Kelleher property includes both an area of tidal wetland along Calf Creek and an upland area along Westminster Road where the proposed house would be built, as shown on Exhibit No. 8-B, which is a site plan showing the property's anticipated development.

6. The house, which would have three bedrooms, would be built on a footprint of 754 square feet, in the upland area, in the northeast portion of the property. A deck would be built on the south side of the house, facing the creek, and there would be two sets of stairs: one on the east side of the house, connecting to a cellar, and another on the southeast side of the house, connecting to the deck. The southeast corner of the deck, as well as the foot of the stairway leading to the house, would be about 33 feet from the wetland's landward edge, and the southeast corner of the house would be about 34 feet from the wetland's landward edge. The entire house footprint would be within 75 feet of the wetland's landward edge, even with the house being set back only 15 feet from the road.

## Appendix E-11

7. At the far northeast corner of the property, a dry well, eight feet wide and four feet deep, would collect the runoff from the house's roof. The dry well is designed to provide 169 cubic feet of storage, more than enough to handle two inches of rainfall in a one-hour period, which the Town of Southampton considers to be a ten-year storm. If necessary, the dry well could be widened by as much as two feet, and deepened by as much as three feet, to provide more storage capacity.

8. A sanitary system would be built in the northwest corner of the site. The system would consist of a 1,000-gallon septic tank and five cesspools (each one denoted on the site plan as a circle containing the letters "CP"). Each cesspool would be eight feet wide and two feet deep, and there is a space allowance for two more cesspools (each one denoted on the site plan as a broken circle containing the letter "F") that could be added later. Because of the size limitations of the Kelleher property, the entire sanitary system would be built within 100 feet of the tidal wetland's landward edge. One of the cesspools to be built contemporaneously with the house would be as close as 46 feet from the wetland's landward edge, and one of the cesspools that could be added later, but for which approval is sought now, would be as close as 44 feet from the wetland's landward edge. The septic system would use the existing grade, meaning that its construction would not require the importation of fill. Also, it would be built in a location about 10 feet above mean sea level, so that, the bottoms of the cesspools would be at least three feet above groundwater.



## Appendix E-12

9. A circular gravel driveway would be built between the house and Westminster Road, and pervious footpaths, each five feet wide, would be built along the west and east sides of the house.

10. The Kellehers would limit clearing, grading and ground disturbance to an upland area designated on their site plan (Exhibit No. 8-B), to maintain a densely vegetated zone separating the house and septic system from the tidal wetland associated with Calf Creek. Also, to protect the wetland, no fertilizers would be used in the disturbed areas near the house, including the lawn.

11. Two fingers of tidal wetland extend onto the Kelleher property, and their limits, as flagged by the Town of Southampton, are shown on Exhibit No. 8-B. One encompasses the southwest portion of the property and extends onto the Jenkins property to the west. The other exists along the southeast perimeter of the Kelleher property and extends onto the Wood property to the east. The wetland area of the Kelleher property is classified by DEC as coastal fresh marsh (designated as FM on DEC's tidal wetland inventory map, the relevant portion of which was received as Exhibit No. 22). Coastal fresh marsh is a tidal wetland zone found primarily in the upper tidal limits of riverine systems where significant fresh water inflow dominates the tidal zone [see 6 NYCRR 661.4 (hh) (1), DEC'S definition of coastal fresh marsh].

12. Fresh water enters the tidal wetland from the upland part of the property, through groundwater flow and surface runoff. Within the wetland, which makes up about 25 percent of the

## Appendix E-13

Kelleher property, there are thick stands of phragmites, notably along Calf Creek, but also Baccharis (a high marsh plant that favors salty water and needs occasional flooding), chairmaker's rush (another high marsh species), and rose mallow (which is often found in freshwater-dominant wetlands). In the upland, which makes up the remainder of the property, there is dense vegetation that includes non-wetland species such as raspberry, currant, ironwood, poison ivy, briars and cherry trees.

13. Calf Creek, where it flows past the Kelleher property, is itself a tidal wetland, classified by DEC as littoral zone (with the designation LZ on the tidal wetland map, Exhibit No. 22). Littoral zone consists of all lands under tidal waters which are not included in any other of DEC'S tidal wetland categories, but no littoral zone exists under waters deeper than six feet at mean low water [see 6 NYCRR 661.4 (hh) (4), DEC's definition of littoral zone]. At the Kelleher property, Calf Creek is generally about two feet deep, and its water level is relatively stable. At times, however, the water level recedes so that mud flats are exposed.

14. The portion of Calf Creek south of Mecox Road, including the stretch along the Kelleher property, is regulated as littoral zone with Class SA saline surface waters, indicating suitability for the widest variety of uses. According to 6 NYCRR 701.10, the best usages of Class SA waters are shellfishing for market purposes, primary and secondary contact recreation and fishing, and such waters are deemed suitable for fish, shellfish and wildlife propagation and survival.

## Appendix E-14

15. Despite the SA classification, Calf Creek, in the vicinity of the project site, is closed to shellfishing due to high levels of water contaminants, as determined by DEC. Mecox Bay is open to shellfishing, but only seasonally, while Calf Creek is closed to shellfishing year-round.

16. Unlike other coastal bays on the south shore of Long Island, Mecox Bay is open to the Atlantic Ocean only intermittently, generally a few times each year. For that reason Mecox Bay is less saline than the other bays, and receives less tidal flushing.

17. Openings connecting Mecox Bay to the Atlantic Ocean, mostly man-made but sometimes caused by natural events, occur along a barrier beach separating the two water bodies. Water sometimes empties from the bay to the ocean after heavy rainfalls, and ocean water sometimes enters the bay during storms. Otherwise, water passes between the bay and the ocean through inlets dug by the Town of Southampton, which are created to regulate such things as the bay's water elevation and salinity. The bay's water elevation is raised during the summer to facilitate recreational uses such as fishing and swimming, and the bay's salinity is controlled to support shellfish populations.

18. Mecox Bay is a predominantly freshwater to slightly brackish, shallow coastal bay less than three feet deep, at mean low water. DEC considers it to be irreplaceable significant coastal fish and wildlife habitat, according to a rating form received as Exhibit No. 20. DEC considers Mecox Bay

## Appendix E-15

to be especially significant as a waterfowl wintering area, as well as a productive area for marine finfish and shellfish. The creeks and wetlands that drain into the bay, such as Calf Creek and its associated wetlands, contribute to the biological productivity of the area. The bay contains populations of many estuarine species, including soft clam, American oyster, blue claw crab and white perch. Significant opportunities for recreational or commercial shellfishing exist in Mecox Bay, though the health of the resource depends on there being an open inlet to provide adequate water circulation and mixing.

19. Tidal wetlands constitute one of the most vital and productive areas of the natural world and have many values that include, but are not limited to, marine food production, wildlife habitat, flood and hurricane and storm control, recreation, cleansing ecosystems, sedimentation control, education and research, and open space and aesthetic appreciation. [See 6 NYCRR 661.2(a).]

20. The tidal wetland at the Kelleher property provides value for marine food production by converting nutrients and decomposing vegetation into food for plants and animals. Clearing associated with construction of a house would reduce the size of the vegetative buffer that protects the wetland, creating the possibility that excessive amounts of nutrients -- as well as contaminants, toxins, and pathogens associated with the septic system -- would reach Calf Creek. An increase in nutrients would facilitate the growth of water-clouding algae which make it both more difficult for marine species to feed, and more

## Appendix E-16

likely for vegetation growth to be curbed at depths where sunlight cannot penetrate.

21. The tidal wetland at the Kelleher property provides value as habitat for upland mammals including deer, raccoons, and opossums whose sheltering area is limited by development in the surrounding neighborhood. The Kellehers would minimize impacts on wildlife by limiting clearing of the property to that area closest to Westminster Road. However, the presence of the house and proximity to human activity would deter some species from using the property, even as others (like deer) would be attracted by features such as plants used for landscaping.

22. The tidal wetland at the Kelleher property serves as bird habitat, both for waterfowl and wading birds that use Calf Creek, and for songbirds like robins and red-winged-blackbirds. Project construction would eliminate nesting areas in the wetland's adjacent area, but birds are not likely to abandon their use of the wetland for feeding, resting, and other purposes, provided there remains an adequate buffer between the house and the creek.

23. Shellfish, clams and crabs reside in the wetlands along the Kelleher property, and the wetlands are also a nursery for juvenile fish. The health of these resources would be jeopardized by contaminants, particularly fecal coliform bacteria, viruses and pathogens from the planned septic system, all of which could reach the wetland through groundwater.

## Appendix E-17

24. Runoff and contaminants from the septic system also create the possibility that phragmites would become more dominant in the fresh marsh, squeezing out other vegetation that deer and other animals depend on for food and cover.

25. The tidal wetland at the Kelleher property provides value for flood, hurricane and storm control, by absorbing water from surges and flooding that are commonly associated with hurricanes and large storms. Wave energy is dissipated by the dense vegetation, particularly by the strong *Baccharis* shrubs, which are more effective in this regard than standard reeds and rushes, but at risk of displacement by phragmites.

26. The tidal wetland at the Kelleher property provides value for cleansing ecosystems, metabolizing nutrients and filtering contaminants before they can reach Calf Creek. Should the project go forward, there is some risk that the wetland could be overwhelmed by upland inputs, particularly given the close proximity of the septic system.

27. The tidal wetland at the Kelleher property provides value for absorbing silt and organic material, slowing water flows and acting as a strainer to reduce turbidity and maintain water quality in Calf Creek. Construction of a house in the upland would reduce the buffer of dense vegetation that now protects the wetland, and would result in an increase in runoff and the possibility that some wetland plant species could be smothered by the silt and organics in that runoff.

## Appendix E-18

28. The tidal wetland at the Kelleher property provides values for recreation, open space and aesthetic appreciation, particularly for boaters, bird watchers and people fishing on Calf Creek. These values would largely be retained because the house, as viewed from the creek, would be obscured by the remaining vegetation in the area where no ground disturbance is intended, an area that, directly between the house and the creek, would remain quite extensive (as shown on Exhibit No. 8-B). However, fishing could be jeopardized by contaminants entering the creek from the Kelleher property.

29. As private property, the tidal wetland at the Kelleher property provides no significant value for education and research, and it would not gain such value if a house were built there.

### **DISCUSSION**

The Issues in this hearing concern whether the Kellehers' application meets permitting standards at 6 NYCRR 661.9(c) for regulated activities in the adjacent area of a tidal wetland, and whether variances from certain development restrictions at 6 NYCRR 661.6 are warranted. The Kellehers have the burden of proof to demonstrate that their proposal will be in compliance with the provisions governing issuance of a tidal wetlands permit [6 NYCRR 624.9(b)], as well as the burden of showing that a variance to any of the relevant development restrictions should be granted. To meet these burdens, the Kellehers presented their case first, offering testimony from two witnesses: Steven Maresca, an engineer who addressed the design of the sanitary

## Appendix E-19

system and dry well, and Roy Haje, an environmental scientist who considered what impacts the project would have on the wetlands at and near the project site. After the Kellehers' witnesses testified, Matthew Richards, a DEC biologist, testified primarily about tidal wetland values and how they would be affected if the project goes forward as planned.

Mr. Haje was not involved in the application's development, but reviewed it after being retained as a consultant in May 2008. Mr. Haje visited the Kelleher property twice in July 2008, specifically to examine the wetland, and Mr. Richards visited the property in December 2006 and July 2008 for the same purpose. Of the two witnesses, I find that Mr. Richards provided a more comprehensive depiction of both the wetland and its functions, as well as the potential impacts of site development, and my findings on these points are taken primarily from his testimony.

Construction of single family dwellings and installation of sewage disposal septic tanks and cesspools (uses 46 and 45 respectively in the use guideline chart at 6 NYCRR 661.5(b)) are considered generally compatible with a tidal wetland's adjacent area and with the preservation, protection and enhancement of the present or potential value of the wetland if undertaken in the adjacent area. However, as noted in 6 NYCRR 661.5(a) (2), such construction is subject to the permit requirements of Part 661, and the compatibility of a particular use depends on the particular location, design and probable impact of the proposed use.

In this case, the locations of the house and septic system are of particular concern, since, as the



## Appendix E-20

Kellehers acknowledge, these features do not comply with two development restrictions at 6 NYCRR 661.6: a restriction at 6 NYCRR 661.6(a) (1) requiring that principal buildings and all other structures that are in excess of 100 square feet be set back at least 75 feet landward from the most landward edge of any tidal wetland, and a restriction at 6 NYCRR 661.6(a) (2) requiring that any on-site sewage disposal septic tank or cesspool be set back at least 100 feet landward from the most landward edge of any tidal wetland.

As noted in the Kellehers' variance application (Exhibit No. 8-C) and confirmed in their site plan (Exhibit No. 8-B) and my findings of fact, the landward edge of the tidal wetland is at its closest to these features, 34 feet from the proposed house, 33 feet from the house's rear deck, and 44 feet from the proposed sewage disposal system. All these features would be twice as close to the wetland boundary as the development restrictions anticipate, meaning that the requested variances are quite substantial.

According to the variance provisions of the DEC'S tidal wetland regulations, where there are "practical difficulties" in the way of carrying out any of the provisions of the development restrictions, DEC shall have the authority in connection with its review of a permit application to vary or modify the application of any provisions "in such a manner that the spirit and intent of the pertinent provisions shall be observed, that public safety and welfare are secured and substantial justice done and that action pursuant to the variance will not have an undue adverse impact on the present or potential value of any tidal wetland for marine food production, wildlife

## Appendix E-21

habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research, or open space and aesthetic appreciation” [6 NYCRR 661.11(a)].

Variance applications are to be made in conjunction with permit applications, and include a discussion of the practical difficulties claimed, possibilities in relation to alternate sites and changes of project objective, and environmental impact reduction or mitigation measures to be employed [6 NYCRR 661.11(a)].

The Kellehers’ permit application was deemed complete by DEC Staff even though it was clear from the site plan that the above referenced variances were needed and no applications for them had been made. To correct this deficiency and to eliminate surprise at the hearing, I directed Mr. Angel, the Kellehers’ counsel, to make a written variance application, as required by Section 661.11(a), when the matter was assigned to me for hearing.

In that variance application (Exhibit No. 8-C), which is dated May 28, 2008, Mr. Angel says the Kelleher property cannot be used without the requested variances, and that this constitutes practical difficulties. As he argues, and as was confirmed at the hearing by testimony from Mr. Haje, the Kellehers have already reduced the size of their proposed house to less than the minimum required under the Town of Southampton zoning code. Mr. Haje testified that a first floor size of 800 square feet is mandated by the zoning code for a house in an R-15

## Appendix E-22

residential zone (a zone with a minimum lot size is 15,000 square feet). According to the DEC permit application, the Kelleher property is 17,334 square feet in size; however, the footprint of the house would be only 754 square feet, according to the “description of permitted activity” in the town’s wetlands permit (Exhibit No. 15-A). The Kellehers have received a variance from the town zoning board of appeals (Exhibit No. 17) which allows the area of the first floor to be 750 square feet, rather than 800 square feet as required by local law.

Mr. Angel also says that the Kellehers have sited the house and the septic system as close to the road and as far from the landward edge of the tidal wetlands as possible. According to the site plan (Exhibit No. 8-B), the front of the house is set back only 15 feet from Westminster Road, less than the 40 feet Mr. Haje said is required by town code. Mr. Haje said the Kellehers received a variance from this requirement as well, so that the distance from the back of the house to the wetlands would be maximized.

Even with variances as to the size of the house and its proximity to the road, the house’s setback from the wetland is not even half the 75 feet required by DEC regulation. In fact, given the size of the Kelleher property and the location of the wetland boundary, one could not site the house on a footprint where compliance with 6 NYCRR 661.6(a) would be achieved. As shown on the site plan (Exhibit No. 8-B), the land closest to Westminster Road is more than 10 feet above sea level, so that, pursuant to 6 NYCRR 661.4(b) (iii), it is not considered wetland adjacent

## Appendix E-23

area, despite its proximity to the wetland. A house built beyond the adjacent area would not require a tidal wetlands permit; however, there is not enough area above the 10-foot contour line to situate a house that would not be virtually at the roadside.

There is no evidence whether the Kellehers own other property on which to build a house, and likewise no evidence about other allowable uses they could make of the project site. The variance application states that the property is located in a residentially zoned area, which is essentially fully developed with single-family homes on similarly sized lots each served by its own on-site sewage disposal system. Furthermore, the application states that failure to grant a variance would be, in effect, a condemnation of the Kellehers' property without compensation.

Based on the available information, there are practical difficulties maintaining the required separation of the house from the tidal wetland, and these difficulties extend to the sewage disposal system as well. Like the house, the septic system is, at its closest to the wetland, less than half as far from the wetland as DEC'S development restriction intends (44 feet, rather than 100 feet). Mr. Maresea testified that the system employs a design, in terms of the sizes of the septic tank and cesspools, that has been pre-qualified by Suffolk County for use in areas of high groundwater, though it fails to meet the county's requirements that the tank be set back 75 feet from a wetland (the actual setback for the tank is 56 feet), and that the cesspools (or, as the county refers to them, leaching pools) be set back 100 feet from the wetland. Mr. Maresca said that, in other cases, he has

## Appendix E-24

been successful in obtaining variances from the county's setback requirements, but added, under cross-examination, that the county defers to DEC to establish approvable distances from wetlands, and would not grant its variances unless DEC issued its own permit, including all required DEC variances, first.

Given the lot size and the location of the wetlands on the property, the sewage disposal system, like the house, cannot be moved sufficiently far from the wetland to maintain compliance with DEC's development restrictions, nor can it be feasibly moved outside the adjacent area altogether, given how close it is to the road already.

The practical difficulties encountered by the Kellehers allow DEC the authority to grant the requested variances, but only to the extent that the spirit and intent of the development restrictions are observed, that public safety and welfare are secured, that substantial justice is done, and that the action pursuant to the variance will not have an undue adverse impact on the wetland values. Here, the spirit and intent of the development restrictions are to provide an adequate buffer between the wetland, on the one hand, and the house and septic system on the other. That buffer would be significantly diminished -- and wetland values significantly impacted -- if variances as great as those sought were granted.

For instance, if the variance for the house were granted, there would be an increased risk of surface water runoff entering the wetland, particularly on the east side of the property, where there would be

## Appendix E-25

considerable thinning of the adjacent area buffer, which is now covered by thick vegetation. As Mr. Richards explained, silt and organic material that is carried in the runoff can fill in wetland areas, smothering vegetation and causing certain plants, particularly phragmites, to dominate, while reducing species diversity. According to Mr. Richards, a wetland exhibiting a variety of wetland plants, such as this one, has enhanced value because each species fulfills wetland values in its own unique way. As an example, he cited the Baccharis shrub, which, because of its strength, is better than reeds or rushes in dissipating wave energies associated with large-scale storms. Mr. Richards added that many animal species need more than phragmites for food, cover and general survival, and that wetland overtaken by phragmites has diminished value for wildlife such as deer.

Not only is the wetland at risk from surface runoff, it is at risk from contaminants emanating from the proposed sewage disposal system, Mr. Richards explained. If a variance for this system were granted, its close proximity to the wetland increases the likelihood that fecal coliform, viruses and other pathogens would pass through the groundwater from the cesspools to the wetland, jeopardizing the health of the shellfish population. As Mr. Richards explained, an appropriate distance between septic systems and wetlands is needed so that subsurface soils can filter contaminants from groundwater. The development restriction intends that there be a 100-foot separation, but here that separation would be reduced to as little as 44 feet.

## Appendix E-26

According to Mr. Richards, sandy soils exhibit the highest rates for percolation and groundwater flow, both of which enhance contaminant travel. In response to my question, he said he did not know enough about the soil at the Kelleher property to make a site-specific assessment. However, the Kellehers' own test hole data, for a location between the septic system and the wetland, indicate that the top three feet of soil is "mixed sand and loam," and that, at a depth from six to 13 feet, there is "water in pale brown fine to coarse sand." (The test hole data and test hole location are shown on Exhibit No. 8-B.)

Testimony at the hearing and observations from the site visit both indicate that Calf Creek suffers from eutrophication, a process by which its water has become enriched in dissolved nutrients that stimulate the growth of aquatic plant life, which depletes the dissolved oxygen and makes the waters less suitable for fish and invertebrates. According to the testimony of Mr. Haje for the Kellehers and Mr. Richards for DEC Staff, the nutrients are carried to the creek via overland runoff and, in the case of cesspools, groundwater flow. The water in the creek then enters Mecox Bay, which likewise suffers.

Eutrophication is exhibited by the cloudy, greenish water in the creek, and the brown tides that appear in many of Long Island's bays. According to Mr. Richards, it results in algae blooms that have reduced visibility in Mecox Bay to about two inches, so much that it affects the ability of fish to feed, and inhibits the penetration of light through the water column. Eutrophication is a particular problem for Mecox Bay because, as noted in my findings of fact, it

## Appendix E-27

receives little tidal flushing, having no permanent opening to the ocean.

On behalf of the Kellehers, Mr. Haje sought to portray their project as typical of the development that now exists along Calf Creek and in the Mecox Bay basin, noting at one point that if there were to be cumulative impacts of such development, they would already have occurred, and referring to the undeveloped Kelleher lot as “one of the last of the Mohicans.” It was noted that while the waters of the creek, at least in the site vicinity, are classified as having a best use for shellfishing, they are now closed to shellfishing due to water contamination. While one could argue that, given the scope of past development, one more house would not make a difference to the creek and bay ecology, one could likewise argue that it would not help restore these waters to the best use for which they are still designated, and would likely further diminish wetland values, particularly given the risks posed by a septic system so close to the wetland boundary. The wetland marsh on the Kelleher property, with its diversity of plant life, is an unusual feature along Calf Creek, and serves tidal wetland values not provided by the littoral zone within the creek itself, which makes it especially worthy of protection.

As to whether the project would have “undue” impacts on wetland values, one must note, as Mr. Richards did, that building a house serves the interests of the Kellehers while providing no public benefit. The standards for tidal wetland permits say one must take into account “social and economic benefits” which may be derived from proposed



## Appendix E-28

activities, in determining whether the impacts of those activities are “undue.” [See 6 NYCRR 661.9(c) (3), standards for permits on adjacent areas.] Here, such benefits do not exist, as the house serves no public purpose, and there is no public interest behind its construction.

The conclusions that granting the requested variances would not be consistent with the intent of the relevant development restrictions, and would have an undue adverse impact on wetland values, are sufficient to warrant denial of the variances. Also, the project itself may be denied on the basis of the same impacts that support the denial of the variances, and the failure to comply with the development restrictions unless the variances are approved. A separate ground for permit denial is the project’s incompatibility with public health and welfare, because, as Mr. Richards testified, the pathogens and toxins associated with the septic system could be expected to impact water quality, thereby affecting shellfishing, crabbing, clamming and fishing in the creek and, by extension, the bay to which it is connected.

The Kellehers’ arguments on behalf of the requested variances, and on behalf of permit issuance, emphasize the measures they have taken to mitigate project impacts, which include siting the house and septic system as close to Westminster Road and as far from the landward edge of the tidal wetland as possible. These measures, though commendable, do not warrant permit issuance, because given the size of the site and the location of the wetland boundary, which both parties agree to, there is no way to allow the project to go forward and adequately protect the

## Appendix E-29

wetland at the same time. Whether a denial of the permit would constitute a taking of the property without just compensation, as the Kellehers argue, is not an issue for this hearing to determine, and must be litigated in civil court. However, it should be emphasized that Mrs. Kelleher purchased the property in 1999, more than two decades after the tidal wetland regulations were promulgated, and knew or should have known the problems she and her husband would encounter in building a house there.

As for the development restriction at 6 NYCRR 661.6(a) (8), the Kellehers deny that a variance is needed, maintaining, on the basis of Mr. Maresca's testimony, that their dry well can be enlarged to handle roof runoff produced by a five-year storm. According to Mr. Richards, a map included among state guidelines for urban erosion and sediment control (and received as part of Exhibit No. 23) indicates that, for Long Island, a five-year storm consists of four inches of rainfall over a 24-hour period. The dry wells were not designed with this standard in mind, and Mr. Richards, who is not an engineer, offered no opinion whether the proposed dry well would comply with the development restriction or, if it would not, if or how it could be redesigned to do so. This report draws no conclusions about these matters, because, as to them, the record was insufficiently developed. However, it must be emphasized that the dry well was not designed for runoff from the property generally, and it can be expected that some of this runoff, particularly in heavy storms, would reach Calf Creek.

## Appendix E-30

As reflected in the hearing notice (Exhibit No. 1), DEC Staff contends that the project would have cumulative impacts if approved, though Staff did not explain or develop this contention at the hearing. In a similar tidal wetland permitting case, Matter of Palmeri (Decision of the Acting Executive Deputy Commissioner, March 26, 2007), DEC Staff argued that if the application, which there too was for a house, were approved, it would have cumulative impacts upon tidal wetlands generally, as there were other small pockets of undeveloped wetland, in the vicinity of the project site, and other; similar applications could follow from approval of the one that was then under review. In that case, I responded that should other, similar applications be made, they would have to be reviewed on their own merits, and issuance of a permit in one matter would not dictate the same result elsewhere, as each project is unique, as is the setting for which it is proposed (Palmeri, ALJ's report, pages 33 and 34, attached to the Commissioner's decision). For the same reasons, it follows that denial of a permit in one matter would not dictate the same result elsewhere.

In this case, as in Palmeri, DEC Staff said it was raising cumulative impacts as an issue under ECL 3-0301(1) (b). That provision requires the Commissioner to take into account the cumulative impact upon water, land, fish, wildlife and air resources in making permitting decisions. Here, all relevant project impacts have been considered through application of the standards for issuance of tidal wetland permits. According to those standards [at 6 NYCRR 661.9], in determining whether to issue a permit for a proposed regulated activity, DEC must

## Appendix E-31

consider the adverse impact such activity would have on various specified values, as delineated in this report, that wetlands have.

ECL 3-0301(1) (b) does not require that impacts of one project be evaluated with impacts of other, similar but unrelated projects that may be proposed in the future. For that reason, I said in Palmeri and repeat here, any reliance on ECL 3-0301(1) (b) is misplaced.

### CONCLUSIONS

The regulated activities proposed by the Kellehers, which involve construction of a house and sewage disposal system, do not meet the standards for issuance of a tidal wetlands permit.

More particularly, these activities would not be compatible with the public health and welfare [6 NYCRR 661.9(c) (1)], particularly given the risk of shellfish contamination, and would have an undue adverse impact on the values of the adjacent tidal wetland [6 NYCRR 661.9(c) (3)], particularly those values for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, and recreational fishing.

Finally, both the house and the sewage disposal system, as proposed, are not set back sufficiently from the wetland to meet the development restrictions at 6 NYCRR 661.6(a) (1) and (2) [6 NYCRR 661.9(c) (2)]. The Kellehers have demonstrated that there are practical difficulties in the way of compliance with these provisions. However, granting them the

## Appendix E-32

variances they have requested would not ensure that the spirit and intent of the pertinent provisions are observed, and would have undue adverse impact on wetland values [6 NYCRR 661.11]

### RECOMMENDATION

The permit application, including the requested variances, should be denied.

### EXHIBIT LIST

DENIS AND CAROL KELLEHER  
TIDAL WETLANDS PERMIT HEARING  
Application No. 1-4736-06413/00001

1. Combined Notice of Complete Application and Notice of Public Hearing (6/11/08)
2. Affidavit of publication of hearing notice in Southampton Press, Eastern Edition (6/19/08), along with copy of notice as published
3. Hearing notice, as it appeared in DEC'S Environmental Notice Bulletin (6/18/08)
4. ALJ's transmittal letter for hearing notice (6/11/08)
5. Hearing notice distribution list (6/11/08)
6. Notice of permit denial (8/29/06)
7. Request for hearing, filed by Gilbert G. Flanagan, Esq., for the Kellehers (9/22/06)
- 8-A. Joint Application for Permit (8/13/03)
- 8-B. Map of Kelleher property, with site plans (as revised, 9/23/04)
- 8-C. Variance request (5/28/08)
- 8-D. Map of 500-foot radius from Kelleher property (10/30/03)

## Appendix E-33

9. Suffolk County tax map, sheet No. 103, depicting Kelleher property and vicinity
10. Google Earth map, depicting Kelleher property and vicinity
11. Kelleher deed (3/12/99)
12. Resume of Steven L. Maresca
13. Town of Southampton Wetlands Permit (No. 03-86), issued to Kellehers (5/26/04)
14. Modification of Town of Southampton Wetlands Permit (10/27/04)
- 15-A. Extension of Town of Southampton Wetlands Permit (effective 5/26/07)
- 15-B. Extension of Town of Southampton Wetlands Permit (effective 5/26/08)
16. Covenants and Restrictions recorded against Kelleher property
17. Variances issued by Town of Southampton Zoning Board of Appeals (12/2/04)
18. Curriculum Vitae of Roy L. Haje
19. Resume of Matthew Richards
20. Coastal Fish and Wildlife Habitat Rating Form for Mecox Bay and Beach (3/15/87)
21. DEC tidal wetlands map (No. 724-532)
22. Portion of DEC tidal wetlands map, depicting Kelleher property and Calf Creek
23. New York Guidelines for Urban Erosion and Sediment Control, pages 10.30 to 10.34 (October 1991 Third Printing)

Appendix F-1

**Town of Southampton**  
116 Hampton Road  
Southampton, NY 11968

**HARRY S. LUDLOW**  
CHAIRMAN

Telephone 631 287-5710  
Fax 631 287-5706

TOWN CONSERVATION BOARD

---

TO: Marietta Seaman  
Town Clerk

FROM: Harry S. Ludlow, Chairman  
Southampton Town Conservation Board

DATE: May 26, 2004

RE: Denis and Carol Kelleher. - Wetlands  
Application No. 03-86 115 Westminster  
Road, Water Mill SCTM No. 0900-103-1-  
62

The Southampton Town Conservation Board adopted the following resolution at their meeting on May 26, 2004.

WHEREAS, a wetland permit application for Denis and Carol Kelleher, Inc. was received by the Conservation Board on September 9, 2003; and

WHEREAS, the proposed project is located Westminster Road, Water Mill and is within a regulated area under Town Wetland Law; and

WHEREAS, the applicant sought approval to construct a two story residence with a footprint of

## Appendix F-2

1,174 square feet located 35 feet from the wetland boundary, a ±266 square foot deck located 35 feet from the wetland boundary, a 20 linear foot retaining wall located 52 feet from the wetland boundary, a sanitary system with the leaching pools located 44 feet from the wetland boundary, and the septic tank located 56 feet from the wetland boundary, and to construct a driveway located 47 feet from the wetland boundary on a parcel of land fronting on Calf Creek, which contains freshwater/brackish wetlands; and

WHEREAS, an Environmental Division Report was reviewed and accepted by the Conservation Board at their meeting on November 5, 2003; and

WHEREAS, the Conservation Board, as lead agency, classified the proposed project a Type II Action pursuant to the State Environmental Quality Review Act; and

WHEREAS, as a Type II Action, the proposed project is exempt from further review under SEQRA; and

WHEREAS, a Notice of Public Hearing was published in two Town- designated newspapers on November 13, 2003; and

WHEREAS, public hearing was held on December 3, 2003, January 7, 2004, February 11, 2004, February 25, 2004, April 14, 2004, April 28, 2004, and May 12, 2004 during which testimony was received from the applicant, the Town Environment Division staff, and the public regarding, among others: project compatibility with Chapter 325; maximum practicable buffer zones; reasonable



### Appendix F-3

mitigation measures; practicability of alternatives; impacts on wildlife; impacts on wetlands and surface water quality; and mitigative measures that contribute to the protection and enhancement of wetlands and wetland benefits; and

WHEREAS, the public hearing was closed on May 12, 2004; and

NOW THEREFORE BE IT RESOLVED, that the Conservation Board grants approval to construct a two-story, three-bedroom, single-family residence with a footprint of 754 square feet, with a total first and second floor area of 1,300 square feet, located 34 feet from the wetland boundary, to construct a 242 square foot deck located 33 feet from the wetland boundary, to construct a 22 square foot stairway on the west side of the deck located 47 feet from the wetland boundary and an 18 square foot stairway on the east side of the deck located 33 feet from the wetland boundary, to install a sanitary system with the leaching pools located 44 feet from the wetland boundary, and septic tank located 56 feet from the wetland boundary, to construct a previous gravel driveway located 58 feet from the wetland boundary, to construct a 5-foot wide pervious path constructed on the west side of the house located 50 feet from the wetland boundary and a 5-foot wide pervious path on the east side of the house located 30 feet from the wetland boundary, to install an 8 ft diameter X 4 ft deep drywell for catchment of roof runoff located 56 feet from the wetland boundary, to clear natural vegetation 30 feet from wetlands, and to install a water service line 55 feet from wetlands on a parcel of land fronting on Calf Creek, which contains

#### Appendix F-4

freshwater/brackish wetlands in Water Mill, Town of Southampton, Suffolk County, New York; and

BE IT FURTHER RESOLVED, that such approval is conditioned upon mitigative measures to protect wetlands including establishment of a non-disturbance/non-fertilization buffer, extending landward from the wetland boundary to the proposed limit of clearing, grading and ground disturbance, as depicted on the survey prepared by Karl W. Weisenbacher of Squires, Holden, Weisenbacher & Smith, dated November 18, 2002, last revised May 25, 2004, through submission of a covenant in a form approved by the Town Attorney's Office which prohibits any construction, clearing, filling and/or fertilization within its boundary; establishment of a non-fertilization buffer, extending landward from the wetland boundary to the proposed limit of clearing, grading and ground disturbance, as depicted on the survey prepared by Karl W. Weisenbacher of Squires, Holden, Weisenbacher & Smith, dated November 18, 2002 last revised May 25, 2004, through submission of a covenant in a form approved by the Town Attorney's Office which prohibits any fertilization within its boundary; all on-site landscaping shall be accomplished using native plants; placement and addition of fill for the purposes of house construction or sanitary installation is prohibited; installation of a project-limiting fence; and installation of leaders and gutters that empty into drywalls; and

BE IT FURTHER RESOLVED, that a wetlands permit be issued to Denis and Carol Kelleher for the proposed project upon the terms and conditions set forth therein.

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Board Member	Approve	Disapprove	Abstain	Absent
Harry Ludlow	X			
George Heine	X			
Tom Rickenbach	X			
Gilbert Foster				X
Wayne Grothe	X			
John D. Zuccarelli	X			
Brian Tymann				X

Dated: May 26, 2004

Signed: S/ Harry S. Ludlow  
Harry S. Ludlow, Chairman  
Southampton Town Conservation Board

cc: Applicant

Appendix G-1

**Town of Southampton**  
116 Hampton Road  
Southampton, NY 11968

**Harry S. Ludlow**  
CHAIRMAN

Telephone 631 287-5710  
Fax 631 287-5706

TOWN CONSERVATION BOARD

---

CONSERVATION BOARD WETLANDS PERMIT  
CHAPTER 325  
OF THE TOWN CODE

PERMIT ISSUED TO: *Denis and Carol Kelleher*

PERMIT NUMBER: 03-86

LOCATION OF PROJECT: *115 Westminster Road,  
Water Mill*

Map of Lot No. 11 & p/o Lot No. 10, Block "C"  
Subdivision Map "A" Part of Bridgehampton Estates  
SCTM NO. 0900-103-1-62

ADDRESS OF PERMITTEE: Julie Cummings-Bosch,  
Land Planning Services, P.O. Box 1313, East  
Hampton, NY 11937 (631) 537-8500

EFFECTIVE DATE: May 26, 2004

EXPIRATION DATE: May 26, 2007

**Description of Permitted Activity:** To construct a two-story, three-bedroom, single-family residence with a footprint of 754 square feet, with a total first and second floor area of 1,300 square feet, located 34 feet from the wetland boundary, to construct a 242 square foot deck located 33 feet from the wetland boundary, to construct a 22 square foot stairway on the west side of the deck located 47 feet from the wetland boundary and an 18 square foot stairway on the east side of the deck located 33 feet from the

## Appendix G-2

wetland boundary, to install a sanitary system with the leaching pools located 44 feet from the wetland boundary, and septic tank located 56 feet from the wetland boundary, to construct a pervious gravel driveway located 58 feet from the wetland boundary, to construct a 5-foot wide pervious path constructed on the west side of the house located 50 feet from the wetland boundary and 5-foot wide pervious path on the east side of the house located 30 feet from the wetland boundary, an 8 ft diameter X 4 ft deep drywell for catchment of roof runoff located 56 feet from the wetland boundary, to clear natural vegetation 30 feet from wetlands, and to install a water service line 55 feet from wetlands on a parcel of land fronting on Calf Creek, which contains freshwater/brackish wetlands in Water Mill, Town of Southampton, New York.

### **Special Conditions:**

1. All activities authorized by this permit must be in strict conformance with the plans prepared by Karl W. Weisenbacher of Squires, Holden, Weisenbacher & Smith, dated November 18, 2002, last revised May 25, 2004, and stamped approved by the Town Conservation Board.

2. A non-disturbance/non-fertilization buffer, extending landward from the wetland boundary to the proposed limit of clearing, grading and ground disturbance as depicted on the survey prepared by Karl W. Weisenbacher of Squires, Holden, Weisenbacher & Smith, dated November 18, 2002, last revised May 25, 2004, shall be established through submission of a covenant in a form approved

### Appendix G-3

by the Town Attorney's Office which prohibits any construction, clearing, filling and/or fertilization within its boundary.

3. A non-fertilization buffer, extending landward from the wetland boundary to the proposed limit of clearing, grading and ground disturbance, as depicted on the survey prepared by Karl W. Weisenbacher of Squires, Holden, Weisenbacher & Smith, dated November 18, 2002, last revised May 25, 2004, shall be established through submission of a covenant in a form approved by the Town Attorney's Office which prohibits any fertilization within its boundary.

4. All on-site landscaping shall be accomplished using native plants.

5. Placement and addition of fill for the purposes of house construction or sanitary installation is prohibited.

6. Any work or disturbance, and storage of construction materials shall be confined to the limit of clearing and/or ground disturbance shown on the approved plans.

7. Prior to the commencement of any construction activities, a continuous line of silt screen (maximum opening size of U.S. Sieve #20) shall be staked at the limit of clearing and ground disturbance shown on the approved plans. The screen shall be maintained, repaired and replaced as often as necessary to ensure proper function, until all

#### Appendix G-4

disturbed areas are permanently vegetated. Sediments trapped by the screen shall be removed away from the screen to an approved upland location before the screen is removed.

8. Prior to the commencement of any construction activities, a continuous row of staked straw or hay bales shall be staked end to end at the base of the required silt screen. The bales shall be maintained, repaired and replaced as often as is necessary to ensure proper function, until all disturbed areas are permanently vegetated. The average useful life of a bale is 3-4 months. Sediments trapped by the bales shall be removed away from the bales to an approved upland location before the bales themselves are removed.

9. Straw bales shall be recessed to two to four inches into the ground.

10. Silt screen shall be recessed by trenching six inches into the ground.

11. Leaders and gutters that empty into drywells shall be installed on the proposed residence. Drywell capacity shall be calculated based on the following: Total square feet of structure (ground floor only) and/or impervious surface X 0.166 = Total required cubic feet of drywell. Proposed driveways must be constructed of permeable materials.

12. All areas of soil disturbance resulting from project shall be seeded with appropriate native vegetation, and mulched with

## Appendix G-5

straw immediately upon completion of the project, within two (2) days of final grading, or by the expiration date of the building permit, whichever is first. Mulch shall be maintained until a suitable vegetative cover is established. If seeding is impractical due to time of year, temporary mulch shall be applied and final seeding performed as soon as weather conditions favor germination and growth.

S/ Harry S. Ludlow

HARRY S. LUDLOW  
CONSERVATION BOARD CHAIRMAN  
DATE: May 26, 2004

### **General Conditions of Permit:**

1. The permittee shall notify the Office of Conservation at least 24 hours in advance of the time work is to commence. Permittee shall also notify the Office of Conservation when work has been completed.
2. The permitted work shall be subject to inspection by authorized Town officials who may suspend work if the public interest so requires.
3. As a condition of the issuance of this permit, the applicant has accepted expressly, by the execution of the application, the full legal responsibility for all damages, direct or indirect, of whatever nature, and by whom suffered, arising out of the project described herein and has agreed to indemnify and save harmless the Town from suits, actions, damages and costs of every name and description resulting from the said project.



## Appendix G-6

4. All work carried out under this permit shall be performed in accordance with established engineering practice and in a workmanlike manner.

5. The Town reserves the right to reconsider this approval at any time as circumstances require, after due notice and hearing, to continue, rescind or modify this permit in such a manner as may be found to be just and equitable. If, upon the expiration or revocation of this permit, the work hereby authorized has not been completed, the Board may require the applicant, without expense to the Town, and to such extent and in such time and manner as the Town may require, to remove all or any portion of the uncompleted structure or fill and restore the site to its former condition. No claim shall be made against the Town on account of any such removal or alteration.

6. This permit shall not be construed as conveying to the applicant any right to trespass upon the lands or interfere with riparian rights of others to perform the permitted work or as authorizing the impairment of any rights, title or interest in real or personal property held or vested in a person not a party to the permit.

7. The permittee is responsible for obtaining any other permits, approvals, lands, easements and rights-of-way which may be required for this project.

8. By acceptance of this permit, the permittee agrees that the permit is contingent upon strict compliance with the special conditions listed

## Appendix G-7

below.

9. The permittee or his agent must submit a written request for any modifications, renewals or transfers of this permit. Major modifications or revisions to this project may require the submission of a new application. If an extension of time is needed to complete the project, the permittee or his agent must submit a written request briefly explaining the circumstances. Such request must be made in writing and delivered to the Conservation Board at least 30 days prior to the permit expiration date. Should the affected property be sold to a new owner, the permit must also be transferred to the new owner. A transfer of permit may be granted upon request by the new owner when accompanied by written consent from the prior permit owner and upon payment of the required fee.

Appendix H-1

**Suffolk County Tax Map Number:** 473689

103,000-0001-062.000

Subdivision Map of Bridgehampton Estates Map A

Map No. 85

DECISION NO. D011575 / Page 1

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**Town of Southampton**

**Board of Appeals**

*This is Not a Building Permit*

---

**DECISION NO.** D011575

**DECISION DATE:** December 2, 2004

**VARIANCE IS HEREBY GRANTED**

**OWNER:** Carol Kelleher  
112 Circle Rd  
Staten Island, NY 10304

**LOCATION:** 115 Westminsteer Road, Mecox

**DETERMINATION:**

This Board grants applicants the following relief: 1. A variance from Section 330-11, for rear yard from 50 feet to 15 feet; 2. A variance from Section 330-84D (pyramid height) of 565 cubic feet; 3. A variance from Section 330-105 (minimum floor area) for first floor from 800 square feet to 750 square feet; and 4. A variance from Section 330-106 (least overall dimension) from 20 feet to 17 feet.

## Appendix H-2

Pursuant to application, and survey and conditions as approved by the Board of Appeals.

NOTE: The holder of this variance is requested to familiarize himself with the ordinance under which said variance is granted. Any violation of the provisions of said ordinance shall render the offender liable for the penalties provided therein, and in addition thereto, may result in the immediate revocation of the building permit.

*This notice must be kept on the premises until full completion of the work authorized.*

**PER**

S/ Herbert E. Phillips

Herbert E. Phillips  
Chairman

Appendix I-1

ZONING BOARD OF APPEALS  
TOWN OF SOUTHAMPTON

---

In the Matter of the Application

of

DENNIS AND CAROL KELLEHER

---

FINDINGS AND DETERMINATION

Based upon the application, all documents contained in the Board's file, and the evidence received at the Public Hearing on this application, the Zoning Board of Appeals finds and determines as follows:

1. Applicants seek a variance from the provisions of Southampton Town Code Section 330-11 (residence district dimensional regulations) for rear yard from 50' to 15'; from §330-84D (pyramid/height); from §330-105 (minimum floor area) for first floor from 800 sq. ft. to 750 sq. ft.; and from §330-106 (least overall dimension) from 20' to 17'. All relief is for a proposed one family residence, and any other relief necessary.

2. Subject premises consist of a parcel containing 17,334 sq. ft., are situate 115 Westminster Road, Mecox, and are identified on the Suffolk County Tax Map as parcel #900-103-1-62. Premises are located in a R-15 zoning district.

3. This Board finds the subject application to be a type II action under the State Environmental

## Appendix I-2

Quality Review Act (SEQRA) and relevant provisions of the Town Code. A negative declaration pursuant to SEQRA is hereby made.

4. In order for this Board to grant applicant the requested relief, applicant must demonstrate, pursuant to Section 330-166(C) of the Town Code, that the proposed variance meets the standards set forth in that section.

5. At the Public Hearing held herein, testimony and evidence was offered by applicants as follows:

A. Applicants seek to construct a modest 2-story home on a lot which is conforming in area but is extremely constrained by the existence of wetlands on the parcel. The requirements imposed by the Conservation Board and the Health Department have pushed the proposed home into northeast corner of the property, where it requires rear yard relief off Westminster Road, as well as pyramid relief and dimensional relief for the dwelling's undersized first floor and its shallow depth.

B. Pursuant to §330-83K, the Building Inspector could permit a reduced rear yard of 20' in these circumstances, where the wetlands require a larger front yard, but applicants require an additional 5' rear yard reduction, to meet the requirements of their permit from the Conservation Board. Applicants could not reasonably be expected to further reduce the depth of the dwelling, since they already require a variance to permit the smaller than required dimension of the side of the house, and a variance to permit less than 800 sq. ft. of first floor area. As a result of several Conservation Board hearings,

### Appendix I-3

applicants reduced the size of their original proposal to its current dimensions, in order to meet the concerns of the Conservation Board.

C. Applicants also require 565 cu. ft. of pyramid relief. The dwelling was designed in such a way as to minimize the need for pyramid relief, and the amount requested is insubstantial.

6. Several neighbors appeared and wrote letters in opposition to the application. They indicated that they believed that reducing the distance of the dwelling from the street would result in a negative change in the community, since the other dwellings on the street are a greater distance from it. On the other hand, since many of these dwellings which exist farther from the street are also significantly closer to the wetlands, one could view this proposal as having a positive impact on the community, as did the Conservation Board. The neighbors also expressed concern about the height of the dwelling, and worried that the proposed basement would become an additional floor, but at less than 27', the height is well within the requirements of the Code, and a basement for storage seems not unreasonable for such a small house, which will have no garage.

7. This board often holds that the goals of protecting the environment may require greater leniency in applying the Zoning Code. In this instance, none of the requested relief is substantial, but the denial of the relief would render the lot unbuildable. We therefore find that the benefit to the applicants of granting the requested relief outweighs any negligible detriment to the community.

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Therefore, in the interests of justice and for the reasons set forth herein, this Board grants applicants the following relief:

1. A variance from the provisions of Southampton Town Code Section 330-11 (residence district dimensional regulations) for rear yard from 50' to 15';
2. A variance from §330-84D (pyramid/height) of 565 cubic feet;
3. A variance from §330-105 (minimum floor area) for first floor from 800 sq. ft. to 750 sq. ft.; and
4. A variance from §330-106 (least overall dimension) from 20' to 17'.

All of the foregoing is as shown on a survey of the premises by Karl Weisenbacher, last dated September 23, 2004, and the plans of Frank greenwald, architect, showing the calculation of pyramid relief, both of which were submitted with the application and are incorporated herein. The relief granted herein is conditioned upon applicants compliance with the terms and conditions of such other permits as applicant has heretofore required or may otherwise be necessary. .

Dated: December 2, 2004