

TOWN OF SHELTER ISLAND
PLANNING BOARD

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In the Matter of the Wetlands Application of
Chequit Avenue LLC

DETERMINATION

Address: 7 Chequit Avenue
SCTM #: 700-5.-1-11

____-2023

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HEARING DATE(S): 6/13/20, 7/11/23 and 8/15/23

FINDINGS OF FACT AND DETERMINATION OF THE PLANNING BOARD

The findings of fact and determination made herein are based upon the application, the evidence received at the public hearing before the Board, all documents contained in the Board's file and which were received prior to the close of the record, and any inspections made by the members of this Board.

A. PROJECT DESCRIPTION:

1. **PURPOSE OF APPLICATION:** The applicant is seeking to construct a two-story, 2,287 sq. ft. accessory sleeping structure with 2 bedrooms, living room, den, bar area (no cooking), two full bathrooms and one half-bath, covered porch, outdoor shower on pile foundation, partially within Adjacent Regulated Area.
2. **RELIEF OR APPROVAL SOUGHT:** Applicant is requesting a wetlands permit to allow for the following scope of work:
 - a. To allow the proposed structure to be located 77'-6" from the tidal wetland boundary where 100' is required, for a total structure intrusion of 448 sq. ft within the adjacent regulated area.

B. PROPERTY INFORMATION:

1. LOT SIZE: 0.9 acres
2. ZONING: AA reverting to A
3. OVERLAY DISTRICT: Near Shore Overlay District
4. STREET LOCATION: 7 Chequit Avenue
5. CONTIGUOUS WATER BODIES: Shelter Island Sound

6. SUBDIVISION: Shelter Island Heights
7. SUFFOLK COUNTY TAX MAP NO.: #700-5.-1-11

C. SEORA

The applicant submitted an Environmental Assessment Form Part I pursuant to the State Environmental Quality Review Act (SEQRA). Since this is a request for a wetlands permit for an accessory residential structure, the application is classified as a Type II action under 6 NYCRR § 617.5(c)(12). Accordingly, the application is not subject to further review under SEQRA.

D. FINDINGS OF FACT

1. The applicant is Chequit Avenue LLC and is the reputed owner of a parcel of real property located on the north side of Chequit Avenue (the “subject property” or “property”). The property is located within the Residential A (AA reverting to A) Zoning District and the Near Shore Overlay District and has over 212 feet of frontage on Shelter Island Sound. The size of the subject property is 38,443 sq. ft. and is one of the largest lots in the area.
2. The most recent site plan submitted was prepared by Sherman Engineering and Consulting dated 8/22/2023. The subject property is improved with a two-story residence, covered wood deck, attached garage, detached garage and concrete pool with brick patio.
3. Also submitted with the application are a notice of disapproval from the Town of Shelter Island Building Department dated February 7, 2023, a letter of no jurisdiction dated November 20, 2020, from the New York State Department of Environmental Conservation (the “DEC”).
4. The Town of Shelter Island Conservation Advisory Council (the “CAC”) provided a report to the Board from a CAC meeting held on May 8, 2023. The CAC recommended denial of the application based upon its determination that “accessory apartments are not permitted within the Near Shore Overlay District.” While the Planning Board acknowledges the CAC’s review and recommendation, the Board respectfully disagrees with the CAC’s description of the use as an Accessory Apartment. As noted by the Building Inspector in his letter of denial dated 2/7/2023, the proposed use of the property is an “Accessory Sleeping Structure” and, therefore not an “Accessory Apartment”. There is no prohibition against an “Accessory Sleeping Structure” within the Near Shore Overlay District. The Planning Board and similarly, the CAC, is without authority/jurisdiction to overturn the determination of the Town’s Building Inspector.

E. PLANNING BOARD PROCEEDINGS

The Planning Board opened the public hearing for this wetlands permit application on June 13, 2023.¹ The applicant, Deborah Shepherd, appeared, along with Matthew Sherman from Sherman Engineering & Consulting, who presented the application to the Board. Many neighbors and representatives from the Shelter Island Heights Property Owners Corporation (the “SIHPOC”) appeared in opposition to the proposed application. Some of the concerns raised by the neighbors and the SIHPOC were tidal flow and the height and size of the proposed structure. The applicant noted that the height of the structure was reduced from what the applicant originally proposed. After a lengthy public hearing, the Board left the hearing and record open to allow all parties to submit additional information. The Board continued the public hearing on July 11, 2023. The applicant noted that tidal flow would not be affected by this project. Many of the same neighbors appeared and spoke at this hearing, repeating the same concerns brought up on the first night. Other concerns raised by the neighbors and SIHPOC were the Board’s SEQRA designation of the project as a Type II action and they requested the Planning Board refer the application to the Zoning Board of Appeals for review. Several of the neighbors were now represented by an attorney at this hearing. The Board again kept the hearing open to allow the applicant and the Board’s counsel time to review the relevant sections of code. The public hearing continued on August 15, 2023. The Board closed the public hearing on August 15, 2023, and kept the record open for two weeks to allow the applicant time to submit additional information requested by the Board. These items were also specifically requested by the neighbors. The applicant submitted the requested information in an August 29, 2023, submission. The Board reviewed and discussed the subject application at its September 14, 2023, meeting.

F. GOVERNING LAW

§ 129-5. Criteria for permit issuance.

A.No permit shall be issued unless the applicant demonstrates, and the Planning Board finds, that the following standards have been met:

- (1) The proposed action and location will not create a risk of impairing the function and value of the wetland and buffer.

¹ Please note that Chairman McDonald recused himself from this application and left the room. Vice Chairman Kaasik chaired the public hearing and review of this application on behalf of the Planning Board.

- (2) The proposed project will not diminish any wetland in size, unless the approving authority finds that the proposed activity is water-dependent or requires access to the wetland as a central element of its basic function and will result in the minimum possible alteration or impairment of the wetland.
- (3) The proposed project will not have a negative impact on the quantity and quality of groundwater.
- (4) The proposed project will not create a net increase in the risk of runoff.
- (5) The applicant has demonstrated that there are no practicable alternatives which allow the project to be constructed outside the regulated area. Practicable alternatives are presumed to be available unless the applicant clearly demonstrates otherwise. In making this determination, note that the Planning Board generally finds that conducting the proposed regulated activity on the side or landward side of the house is highly preferred to conducting it within the regulated area.
- (6) The applicant has submitted information to describe alternative site locations and configurations sufficient for a determination that the proposed work and location would have a less adverse environmental impact than any other practicable alternative in order for it to be approved. Practicable alternatives that are constructed entirely outside the vegetative buffer are presumed to have less adverse impacts on the wetlands than projects that do not meet such standards, unless the applicant clearly demonstrates otherwise.
- (7) The Planning Board has determined that the applicant will voluntarily implement, within three months of the issuance of the permit, adequate mitigation measures that contribute to the protection and enhancement of wetlands and wetland benefits.

B. The Planning Town Board reserves the right to impose any conditions and mitigation measures it deems to be compatible with the purpose and public policy of this chapter.

G. FINDINGS AND CONCLUSIONS

1. The Board heard from several of the neighbors, who are opposed to the application, during the public hearing and in written submissions. The Shelter Island Heights Property Owners Corporation (the "SIHPOC") and neighbors also objected to the proposal on a number of procedural grounds. Specifically, the SIHPOC raised objections concerning the Board's SEQRA designation, FEMA, and jurisdictional issues. The Board addresses those issues herein:

- a. The Board considered but disagrees with the neighbors' concerns that the proposed project is a Type I action. Specifically, the Board maintains that the proposed use is a Type II action pursuant to the New York State Environmental Quality Review Act (SEQRA), and therefore, not subject to further environmental review pursuant to SEQRA. § 617.5(c) lists the Type II actions. Specifically, § 617.5(c)(12) provides:

[c]onstruction, expansion or placement of minor accessory/ appurtenant residential structures, including garages, carports, patios, decks, swimming pools, tennis courts, satellite dishes, fences, barns, storage sheds or other buildings not changing land use or density.

The subject application is “to construct a two-story, 2287 sq. ft. accessory sleeping structure”. The only relief required for this application is a wetlands permit, as determined by the Building Inspector.

According to § 133-5E(1)(e), a permitted accessory use within a Residential A (AA reverting to A) zoning district is “not more than one accessory building for sleeping accommodations.” The proposed structure is an accessory use to the principal use. The Town Code does not restrict the size of an accessory building for sleeping accommodations. This proposed structure is not changing the land use (single-family residence) or adding any additional density to the property, such as a second single family residence or an accessory apartment. Pursuant to the Town Code an Accessory Apartment is defined as:

Separate dwelling unit, including a bathroom and a single set of kitchen facilities (a stove plus either or both a refrigerator and sink) not shared with any other unit, for permanent year-round occupancy established within an existing one-family dwelling or a building accessory to such dwelling.

As the structure does not offer kitchen facilities, as defined in the Town Code, then the proposed project is a Type II action pursuant to SEQRA.

- b. The Town Building Department does not issue a specific FEMA permit. Rather the Building Department will make sure that the project meets the specific flood zone requirements and issue a Flood Elevation Certificate after the project is complete.

- c. During the public hearing on July 11, 2023, and in submissions to the Planning Board by the Shelter Island Heights Property Owners Corporation (SIHPOC) it was requested that the Planning Board refer the application to the Zoning Board for review. Based upon a memorandum provided to the Board by the Board's counsel and for the reasons set forth therein, the Board declined to refer the matter to the ZBA. The Planning Board finds it does not have the authority to refer this application to the Zoning Board of Appeals in this matter.

As the Board's counsel explained in her memorandum dated July 25, 2023,

[t]he Shelter Island Town Code provides that the Zoning Board of Appeals may hear and decide matters referred to it by the Planning Board. (See, §133-32B & F(1)). The Shelter Island Town Code, however, limits the Planning Board's authority to refer code interpretations/questions to the Zoning Board of Appeals. Currently, the Planning Board's power to refer questions to the ZBA regarding Chapter 133 (Zoning) is limited to questions regarding subdivisions. (See, §111-6.2). This addition to the code, which occurred in 2006, was to allow applicants for subdivisions to apply directly to the ZBA for a lot area variance (and any other variances required) without having to request a letter of denial from the Building Inspector.

The Town's wetlands code does not provide the Planning Board with the authority to refer questions of interpretation of Chapter 133 to the Zoning Board, as it does in the Subdivision Code.

In this case, the Building Inspector rendered his notice of disapproval on February 7, 2023. The notice determined that the application was denied because it required a wetlands permit pursuant to §129-2 of the Shelter Island Town Code. There is no mention of the application requiring any variances. According to the notice of denial the project was denied as the "proposed structure intrudes 22'-6" into the adjacent regulated area on a bulkheaded property, holding a distance of 77'-6" from the Tidal Wetlands Boundary, where 100' is required, for a total structure intrusion of 448 sq.ft."

Once the Building Inspector has rendered a determination, the remedies are clear: any aggrieved person may appeal that determination to the ZBA. Here, the relief required to be obtained by the applicant has already been determined by the Building Inspector when he issued the notice of disapproval on February 7, 2023. The applicant then submitted this application on February 9, 2023, to the Town Board, who had jurisdiction at the time, requesting a wetlands permit. In March 2023, neighbors of the subject property began submitting letters regarding this application to the SIHPOC. In turn, those letters were submitted to the Board's file. Had there been concerns regarding the accuracy of the notice of disapproval, the Town Code provides, "[t]he Zoning Board of Appeals may hear and decide appeals from and review any order, requirement, decision, interpretation or determination made by the Building Inspector/ Zoning Officer." (§133-32B). If no timely appeal has been taken from the February 7, 2023, determination, it would appear that the issues resolved by the Building Inspector cannot be revisited. See Matter of Palm Management Corp. v. Goldstein, 8 N.Y.3d 337 (2007).

To my knowledge, no application has been made to the Zoning Board appealing the Building Inspector's February 7, 2023. We note too that New York State courts have consistently held that unless otherwise provided for by local law or ordinance, a zoning board of appeals' jurisdiction is appellate only, and in the absence of an administrative determination to review, a zoning board of appeals is without power to grant a variance or render a de novo determination with respect to an issue not determined by an administrative official. Matter of Capetola v. Town of Riverhead, 192 AD3d 789 (2d Dept 2021).

Therefore, the Planning Board finds it may not circumvent these procedures by referring zoning questions to the ZBA.

With respect to the statutory requirements for a wetlands permit, the Board finds as follows:

2. The Board's review of this application and all wetland permit applications is limited to whether the Planning Board finds that the proposed application meets the criteria set forth in § 129-5 of the Town Code.
3. Specifically, the Board finds that the proposed project will not negatively impact value, function, or size of the wetlands because the project site is a bulkheaded property that currently maintains a wide native vegetation buffer. The applicant noted in the revegetation plan that this vegetative buffer will not be impacted by the proposed project. The existing turf grass will remain on Willow Path and the rest of the regulated area. The vegetative buffer will offset any negative impacts to the wetlands caused by the proposed project.
4. The proposed project will not have a negative impact on the quantity or quality of groundwater because no dewatering is required. Also, the Board finds that because only 488 sq. ft. of the accessory structure will be located within the adjacent area, potential impact to groundwater is limited. Moreover, all stormwater will be collected and recharged to groundwater through a system of drywells .
5. The applicants have demonstrated that the proposed project will not create a net increase in the risk of runoff because all stormwater will be collected and recharged to groundwater. Additionally, a limited grade change within the project site will further prevent the risk of runoff. As noted by the applicant's engineer in his grading plan submitted on August 29, 2023, the majority of the regrading is for less than a 12" change and will remain equal to or lower than the maximum existing elevation which is on the water side of the property. Therefore, according to the project engineer, the minimal grade adjustments will have minimal impacts on the stormwater flow and drainage.
6. Due to the siting of the existing residence and swimming pool, there are no other practicable alternative locations to add the proposed accessory structure. As depicted on the applicant's site plan and as explained at public hearing, the applicant cannot push the proposed structure farther from the wetlands as it would encroach into the front yard setbacks. The applicant is also unable to rotate the proposed structure because the existing swimming pool and side yard setback requirements limit its location. The Board also notes that the applicant is only requesting 488 sq. ft. of the 2,287 sq. ft. structure, which with the 100 sq. ft. exception equates to about 17% of the structure encroaching into the adjacent area. As the Town has no limit on the size of accessory sleeping quarters and it meets all dimensional requirements of the Town Code, the Board finds there to be no practicable alternatives.
7. As set forth herein, the Board finds that the applicant meets the criteria necessary to issue a wetlands permit for the proposed project.

H. CONDITIONS OF APPROVAL

Approval of the wetlands permit herein is conditioned upon compliance with the conditions set forth in this section of the determination. All improvements shall be made, built, installed or maintained in accordance with the survey and plans referenced below.

1. APPROVED SITE PLAN: Prepared by Sherman Engineering & Consulting P.A. dated 8/22/2023.
2. APPROVED VEGETATION PLAN: Prepared by Sherman Engineering & Consulting P.A. dated 8/22/2023.
3. ADDITIONAL CONDITIONS AND TIME LIMITATIONS:
 - a. Prior to any construction, applicant shall install wire backed silt fence to prevent runoff, siltation and sedimentation during construction and until disturbed areas are stabilized.
 - b. Applicant shall provide and install stormwater collection and recharge drywells. Said stormwater collection and drywells shall be in conformance with the approved site plan.
 - c. Applicants swimming pool shall utilize salt cell pool disinfection and cartridge pool filter.
 - d. The subject property shall be revegetated in accordance with the approved vegetation plan.
 - e. During construction, the applicant shall adhere to the construction parking plan set forth in the approved landscape plan.
 - f. This permit shall only be valid for construction commencing within two years of the date of this approval.
 - g. Upon completion of the permitted project the applicant shall contact the Town's Environmental Consultant, fees to be incurred by the applicant, to confirm that the subject buffer, if any, meets the requirements of this Chapter and the conditions of the permit. If confirmed, and all of the other terms are met, the Building Inspector shall issue a certificate of wetlands compliance.

I. VALIDITY OF APPROVAL

If any condition of this determination is not met or is not met within the prescribed time period(s), all approvals, permits or authorization granted hereby shall be deemed void and of no effect.

CONCUR:

MARCUS KAASIK, *Deputy Chairman*
MATTHEW FOX, *Member*
DAVID AUSTIN, *Member*

DISSENT:

JULIA WEISENBERG, *Member*

This Resolution was duly adopted (3-1).

Marcus Kaasik, Deputy Chairperson
Approved for filing __/__/2023

Dated: September 12, 2023

cc: Applicant