

ADMINISTRATIVE APPEAL DECISION

**MR. WALLACE POOLE, JR. AND LONESOME DEVELOPMENT
FILE NO. EG-19-980-0934-1
NEW ORLEANS DISTRICT**

October 13, 2000

Review Officer (RO): Martha S. Chieply, U.S. Army Corps of Engineers (USACE), Mississippi Valley Division

Appellants/Applicants: Mr. Wallace Poole, Jr. and Lonesome Development, L.L.C.

Applicants' Representative: Mr. Chris M. Trepagnier, Trepagnier Law Firm

Receipt of Request For Appeal (RFA): June 29, 2000

Site Visit and Appeal Conference Date: September 12, 2000

Background Information: Mr. Poole, and Lonesome Development, L.L.C. (Appellants) submitted a Department of the Army Permit Application on May 28, 1998. The project site is located within the New Orleans District (MVN) near Madisonville, Louisiana. The project described in the Public Notice dated July 14, 1998, proposed to clear, grade, excavate and fill for the development of a residential subdivision on approximately 139.2 acres of land. The wetland acreage to be impacted was 123.7 acres. Lonesome Development, L.L.C. proposed to develop 154 homes sites to meet the \$250,000 to \$500,000 market level. The application was resubmitted to include Mr. Poole as the property owner.

Based on a preliminary evaluation of the revised proposal and agency comments, the MVN's letter and Decision Document (MVN DD), dated May 1, 2000, determined that the proposed project was contrary to the overall public interest and denied the permit. The MVN advised Mr. Poole and Lonesome Development of the Corps of Engineers Administrative Appeal Process.

An affecting party appealing an approved jurisdictional determination, permit denial or declined permit must submit a Request for Appeal (RFA) that is received by the Division Engineer within 60 days of the date of the Notification of Appeal Process (NAP). In a letter dated June 28, 2000,

Mr. Trepagnier, Trepagnier Law Firm, as the appellants' representative submitted the RFA form. The Mississippi Valley Division received the RFA within the requisite 60 days of the date of the NAP. In a letter dated July 13, 2000, the Mississippi Valley Division Commander accepted the RFA.

The RO has conducted an independent review of the administrative record to address the reasons for appeal cited by the Appellant in the RFA. Administrative Appeals Regulations found in 33 CFR Section 331.9 state that the Division Engineer will disapprove the entirety of or any part of the District Engineer's decision only if he determined that the decision on some relevant matter was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corps policy guidance.

Information Received and its Disposition during the Appeal Review:

1. Dr. John Burris with Solutions, Inc., provided a 5-page document entitled Wetlands Evaluation 139-Acre Site St. Tammany Parish, Louisiana, and a series of photographs, which was considered to be clarifying information.

2. Mr. Michael Farabee, project manager for MVN, provided a written response to the questions asked in the appeals conference, which was considered to be clarifying information.

All supplemental clarifying information received was provided to the Appellant and MVN at the appeals conference.

Basis for Appeal as Presented by Appellant (Quoted from the Appellant's RFA and presented in bold print):

Appellant's Reason 1: In the present case the Corps has failed to consider the public's interest and overwhelming need for a residential subdivision in the area of the proposed project. On several occasions the applicant's have provided the Corps with data which indicates a strong public need for housing in St. Tammany Parish and within the market area to be served by the proposed project... The Corps has repeatedly ignored this data, which indicates a strong public need for the proposed project, in contravention of its own regulations and guidelines.

FINDING: This reason for appeal does have partial merit.

ACTION: The MVN shall further document and/or revise conclusions and undertake a new 404 review based on the revised documentation and/or analyses regarding the need for the project.

DISCUSSION: The MVN's consideration of the need for the project was proper and the amount of information requested from the Appellants was reasonable, given the significance of the impacts.

Pursuant to the regulations at 33 CFR, Section 320.4(a)(1), "the decision of whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." The regulation continues as follows: "All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazard, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people." The regulations at 33 CFR Section 320.4(a)(2)(i) requires consideration "in the evaluation of every application: (i) The relative extent of the public and private need for the proposed structure or work."

The Appellant contended that the MVN was excessive in the amount and complexity of information requested in determining the need for the project, citing portions of guidance found in 33 CFR Section 320.4(q):

When private enterprise make application for a permit, it is generally assumed that appropriate economic evaluations have been completed, the proposal is economically viable and is needed in the market place. However, the district engineer in appropriate cases, may make an independent review of the need for the project from the perspective of the overall public interest. The economic benefits of many projects are important to the local community and contribute to needed improvements in the local economic bases, affecting such factors as employment, tax revenues, community cohesion, community services, and property values.

Many projects also contribute to the National Economic Development (NED), i.e., the increase in the net value of the national output of goods and services).

The MVN was not remiss in requesting information to address the need for the proposed project.

Accordingly, MVN's requests for information concerning project needs were consistent with the regulatory obligations cited above concerning the public interest review including a needs analysis prior to a permit issuance decision. The Corps should balance the economic need for a project along with other factors of the public interest.

The preamble to the Federal Register, Volume 51, Number 219, November 13, 1986 provides a discussion of public comments and final changes to specific sections of the regulation and references the depth of the evaluation:

The depth of the evaluation would depend on the significance of the impacts and in unusual circumstances could include an independent economic analysis.

I have concluded that because of the acreage impacts and the quality of the wetlands, it was reasonable to require a detailed market analysis for this project.

Additionally, guidance found at 40 CFR 230.10, states that compliance evaluation procedures would vary to reflect the seriousness of the potential for adverse impacts on the aquatic ecosystems. The project site consists of 123.7 acres of moderate quality wetlands, which would be impacted by the proposed residential subdivision development.

The District Engineer's analysis of the need for the project was not supported by an accurate analysis of the needs information provided.

The Appellant provided a detailed and exhaustive market analyses. Prepared by Deano and Associates, dated April 20, 1998 and October 3, 1998, the needs analysis provided convincing information regarding the growing new construction trends in western St. Tammany Parish (Mandeville and Covington), associated with single-family residential construction, all fueled by lower interest rates. The needs analysis dated

October 3, 1998, defined the Market Area as Real Estate Map Area 205 and encompassed the project site. The MVN required the Appellant to expand the Market Area to include Real Estate Market Areas 201 to 204. Although this expansion request was appropriate, the Market Areas 201 to 204 did not meet the applicants' overall project purpose. The Appellant's market analysis listed comparable sales for Real Estate Map Areas 201 to 205, documenting less than a 7.4-month supply of existing homes and less for new homes. The Appellant argued that the 7.4-month supply in the Mandeville market should result in a continued and marked crossover from the Mandeville to Madisonville. The MVN's determination of need did not factor the percentage of market crossover from Mandeville to Madisonville.

The MVN's determination of the 15-year supply of housing within the \$250,000 to \$500,000 price range was questionable. The MVN stated that the project would provide approximately 15 years worth of inventory while competing with existing subdivisions within the market area. In the appeals conference, the MVN project manager stated that he had arrived at the 15-year estimation by utilizing the annual absorption rates for a smaller market area (Map Area 205) and dividing it into the total units proposed (150 units/10 sales a year = 15 years).

In order to have an accurate analysis, MVN should have consulted with the MVN Real Estate Division, Appraisal Branch, to obtain real estate market information such as price range of neighborhood, absorption rates based on neighborhood market conditions, market crossover rates, and historic sales data effective from the date of the Appellant's report. The MVN's Real Estate Division should have conducted the necessary peer review of Deano and Associate's markets needs analyses and provided information as to its accuracy and validity.

The MVN Decision Document stated that the needs analysis failed to consider lots within the market area that were priced below the Appellant's proposed selling price but that are still available and capable of supporting similarly priced housing. Although, the MVN did not specify where these lots were located and their price, this is a moot point, as those alternatives would not meet the Applicants' overall project purpose. In order to properly assess the public need for housing, the MVN should clarify which lots the Appellant should have considered.

The District Engineer should include in determining housing needs, analysis based on solid standard Real Estate practices.

Appellants' Reason 2: Moreover, when considering the quality of the wetlands at the site and the comments of the resource agencies it is clear that the public interest would best be served by granting a permit for the proposed project and allowing the applicant's to mitigate for the unavoidable impacts to the low to moderate quality wetlands at the site.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: During the appeals conference and site visit, the Appellants stated they believed some of the area was non-wetlands. The Appellants' evaluation did not provide a sufficient basis to the effect that the subject wetlands were low quality or non-wetland. Review of the comments provided by the resource agencies and the appeals site visit support the finding that the project site is moderate quality wetlands. The subject site is a large contiguous wetland, relatively unfragmented. The comments by the U.S. Fish and Wildlife Service and the Environmental Protection Agency demonstrate that the project area provides valuable habitat for a variety of migratory birds and terrestrial wildlife. A hardwood component has increased throughout two-thirds of the tract over time due to lack of grazing or fires and provides habitat for terrestrial wildlife. This area was properly characterized by the MVN as a pine/hardwood wetland. The remainder of the site, located in the southeast portion of the tract, consists of tupelo gum and sedges. The MVN characterized this portion of the site as a pine savannah with some tupelo gum.

The Appellants contend that portions of the project site contain more non-wetlands than identified in the MVN's jurisdiction determination. They based their conclusion on the existence of non-hydrophytic herbaceous species, scattered larger non-hydrophytic vegetation, and the absence of buttressed tree trunks. The MVN contends that the presence of herbaceous non-hydrophytic vegetation is a result of the 3-year drought and does not indicate a lack of jurisdiction, i.e. a regulated Water of the United States.

The site evaluation provided by the Appellants shows variances of site conditions throughout the tract. While the Appellants provided clarifying information noting ecological variances throughout site, there was not sufficient evidence documenting the Appellants' assertion that the majority of the site

contained low quality wetlands or non-wetlands. The Appellants based their assessment on the presence of scattered, larger non-hydrophytic vegetation and the absence of buttressed tree trunks in the northwest portion of the site. Buttressed tree trunks, which are commonly flared or enlarged, are a morphological adaptation found in tree species in response to frequent inundation. Buttressed tree trunks are a secondary indicator for meeting the hydrology criteria and represent an extreme morphological adaptation. The presence of larger scattered, non-hydrophytic vegetation does not automatically result in a determination that a site is not a wetland. The 1987 Wetlands Research Program Technical Report Y-87-1 Corps of Engineers Wetlands Delineation Manual (Handbook) provides guidance for determining whether the hydrophytic vegetation criteria is met. Section D (Routine Determinations) of the Handbook states when more than 50% of the dominant species have an indicator status of Obligate, Facultative Wet, and/or Facultative, hydrophytic vegetation is present. Accordingly, some of a site's vegetation may be non-hydrophytic and the area may still be properly considered a jurisdictional wetland. As such, the MVN properly determined that the presence of herbaceous non-hydrophytic vegetation is a result of a 3-year drought and that the site was properly identified as a jurisdictional wetland.

Appellant's Reason 3: Additionally, the Corps failed to follow the 404(b)(1) Guidelines, regarding less damaging practicable alternatives. The applicant's own the proposed project site, therefore the purchase of another site or avoidance of the site is not a practicable alternative. However, the applicant attempted to minimize the impacts to wetlands at the site by proposing that the project be constructed in phases. Phasing construction would lessen temporal and spatial impacts and could possibly reduce wetland impacts at the project site. At no time did the Corps seriously consider this proposal beyond a cursory review.

FINDING: This reason for appeal does have merit.

ACTION: The MVN shall further document and/or revise conclusions and undertake a new 404 review based on the revised documentation and/or analyses regarding practicable alternatives.

DISCUSSION: In making the analysis of practicable alternatives, MVN's requests for information as to amount and type of information were appropriate, given the significance and acreage of the wetland impacts. The MVN requested additional

information regarding alternatives, including onsite avoidance and minimization. The MVN adequately demonstrated that the phasing of the project would not significantly lessen the temporal and spatial wetland impacts on the majority of the site. The MVN's determination that other practicable sites were available was not supported by substantial evidence in the administrative record. The MVN did not provide the necessary information and/or analysis of why some alternatives should be practicable to the Appellants.

The Appellant provided detailed alternative analyses, prepared by Deano and Associates, dated April 20, 1998 and October 3, 1998. These alternative analyses provided detailed information regarding four alternative parcels of land (Parcels #1 -#4). Five evaluation features or amenities were identified. These were:

1. Proximity to Club Community offering Club Facilities;
2. Access to central water and sewer facilities;
3. Location in flood zones;
4. Proximity to interstate highways; and,
5. Extent of wetlands.

The Corps has adopted the position that practicable alternatives must be reasonable and be available and practicable to the applicant. The Corps determines what project features are reasonable. Practicability is defined in 40 CFR 230.3(q) as *"available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purposes."*

The MVN did not adequately analyze why alternatives that are not within one mile of the interstate highway system and do not have access to sewerage/water facilities would be practicable. Parcels #3 and #4 are located in more remote areas. Parcel #2 was not located in proximity to an interstate highway system. Based on the site visit and appeals conference, some rural roads in St. Tammany Parish are substandard. To bring these roads to grade may require significant resources. The Appellants stated that the St. Tammany Parish does not have the resources to widen and construct the required rights-of-way to handle increased traffic associated with a residential subdivision. Similarly, central utilities were not available in Parcels #1-4. The MVN did not properly analyze how the economic impacts associated with upgrading roadways and constructing central sewerage and water facilities would be practicable to the Appellants.

The MVN appropriately determined that alternatives not located in the proximity to the club facilities would still be considered practicable. The proximity of the club facilities would not necessarily be a limiting feature. The MVN did reasonably consider the locations of flood zones and wetlands in each alternative.

CONCLUSION: For the reasons stated above, I conclude that Appellant's Reasons 1 and 3 for this administrative appeal have merit.

Encl

EDWIN J. ARNOLD, JR.
Brigadier General, USA
Commanding