

Secretary's Order No.: **2009-W-001**

RE: WSLs Permit Application of Dorothy's LLC, to construct a road crossing using a 30 inch diameter, 80 foot long culvert pipe and 60 square feet of rip-rap at the outfall; place four utility lines; and regrade 45 linear feet of a stream bank in a tributary to Double Run at the Auburn Hills Subdivision, north of Barratts Chapel Road, near Frederica, Kent County, Delaware

Date of Issuance: January 8, 2009

Effective Date: January 8, 2009

I. Background:

On Thursday, June 19, 2008, the Department of Natural Resources and Environmental Control, the Wetlands and Subaqueous Lands Section, held a public hearing at the DNREC Richardson and Robbins Building auditorium, 89 Kings Highway, Dover, Delaware, in order to receive comment concerning a subaqueous lands application for Dorothy's LLC, to construct a road crossing using a 30 inch diameter, 80 foot long culvert pipe and 60 square feet of rip-rap at the outfall; to place four utility lines; and to regrade 45 linear feet of a stream bank in a tributary to Double Run at the Auburn Hills Subdivision, north of Barratts Chapel Road, near Frederica, Kent County, Delaware. The specific project location area is a headwater stream in a predominantly well-drained upland agricultural field, which is separated from Double Run by a band of forest. The forest also borders the downstream portion of the unnamed tributary east of the proposed road crossing. The

Applicant assures that all of the forest is going to be retained as part of the project.

Of note is the fact that the property is located within a designated growth zone, per the Kent County comprehensive plan, and the proposed subdivision does not exceed the allowable lot density of three units per acre, as per County regulations. This 280-lot subdivision serviced by public sewer has already been approved by Kent County, and the proposed road crossing and storm water outfall has been approved by the U.S. Army Corps of Engineers, along with the project's delineated wetland boundary. All of the proposed work is on private property, but project does impact a small section of private subaqueous lands at the proposed road crossing, over which the Department has jurisdiction. The Applicant has expressed a willingness to mitigate any potential impacts to those private subaqueous lands which may occur as a result of this proposed project.

This hearing was conducted pursuant to the Subaqueous Lands Act, 7 Del.C., Chapter 72, as well as Chapter 60 of the Delaware Code. Proper notice of the hearing was provided, as required by law.

After the hearing, the Hearing Officer performed an evaluation of the evidence entered into the record in this matter. Thereafter, the Hearing Officer prepared her report and recommendation in the form of a Hearing Officer's Report to the Secretary dated December 30, 2008, and

that Report, with its exhibits attached thereto, is expressly incorporated herein by reference.

II. Findings and Conclusions:

1. Proper notice of the hearing was provided, as required by law.
2. The proposed work site is located within a designated growth zone, per the Kent County comprehensive plan, and the proposed subdivision does not exceed the allowable lot density of three units per acre, as per County regulations. This 280-lot subdivision serviced by public sewer has already been approved for development by Kent County, and the proposed road crossing and storm water outfall has already been approved by the U.S. Army Corps of Engineers, along with the project's delineated wetland boundary.
3. All of the Applicant's proposed work is situated on private property, but the project does impact a small section of private subaqueous lands at the proposed road crossing, over which the Department has jurisdiction.
4. The proposed structures will provide necessary access to the residential development, and will allow for discharge from a stormwater management pond. Nevertheless, the structures will also adversely affect the private subaqueous lands, due to the placement of culvert pipes and fill in the natural

5. Despite the potential negative impacts associated with this proposed development site, the Department recognizes the right of the landowner to provide access to his property. The Department believes that the Applicant's WSLs Permit Application can comply with current State of Delaware WSLs Regulations, provided that the permit is conditioned to offset negative impacts.
6. The Applicant, Dorothy's, LLC, has demonstrated a willingness to mitigate any potential negative impacts to those subaqueous lands which may occur as a result of this proposed project.
7. To offset this project's potential negative impacts by providing compensatory mitigation measures, the Department shall condition the Applicant's permit in this matter to include the planning and execution of a comprehensive riparian buffer plan for the unnamed tributary to Double Run.
8. The Applicant's compensation plan shall include the following: (1) planting with native species; (2) educational

signage; (3) deed restrictions; and (4) an approved monitoring plan.

9. The Applicant's compensation plan must receive the approval of the Department's Wetlands and Subaqueous Lands Section prior to construction of any structures in subaqueous lands.

III. Order:

In view of the above findings, it is hereby ordered that the Subaqueous Permit Application of Dorothy's, LLC, to construct a road crossing using a 30 inch diameter, 80 foot long culvert pipe and 60 square feet of rip-rap at the outfall; place four utility lines; and regrade 45 linear feet of a stream bank in a tributary to Double Run at the Auburn Hills Subdivision, north of Barratts Chapel Road, near Frederica, Kent County, Delaware, be ***granted, with certain permit conditions***, as set forth both herein and in the Department's Response Document of December 18, 2008.

IV. Reasons:

The record does warrant, and Dorothy's, LLC, has reasonably justified to the Department, its request for a WSLs permit in this matter. However, due to certain potential negative impacts associated with this

project, it is necessary to condition the Applicant's permit to include the planning and execution of a comprehensive riparian buffer plan as noted above, in order to protect the unnamed tributary in Double Run on this property. It is the Department's duty to protect this stream with such conditioning, as failure to do so could adversely affect and/or fail to protect the public's interest in subaqueous lands, and thus fail to assure that the disposal and use of these lands are, in fact, in the public interest.

In granting this conditional permit, the Department recognizes the right of the landowner to provide access to his property, while simultaneously providing the highest level of protection for Delaware's natural resources, and balancing the public policy of this State to protect and preserve its productive wetlands, in furtherance of the policy and purposes of 7 Del. C., Ch. 60.

/s/ John A. Hughes

John A. Hughes
Secretary

Ahear/Dorothys.Ord.

HEARING OFFICER'S REPORT

Regarding: WSLs Permit Application of Dorothy's LLC, to construct a road crossing using a 30 inch diameter, 80 foot long culvert pipe and 60 square feet of rip-rap at the outfall; place four utility lines; and regrade 45 linear feet of a stream bank in a tributary to Double Run at the Auburn Hills Subdivision, north of Barratts Chapel Road, near Frederica, Kent County, Delaware

Lisa A. Vest
Hearing Officer

December 30, 2008

I. Background Findings:

On Thursday, June 19, 2008, the Department of Natural Resources and Environmental Control, the Wetlands and Subaqueous Lands Section, held a public hearing at the DNREC Richardson and Robbins Building auditorium, 89 Kings Highway, Dover, Delaware, in order to receive comment concerning a subaqueous lands application for Dorothy's LLC, to construct a road crossing using a 30 inch diameter, 80 foot long culvert pipe and 60 square feet of rip-rap at the outfall; to place four utility lines; and to regrade 45 linear feet of a stream bank in a tributary to Double Run at the Auburn Hills Subdivision, north of Barratts Chapel Road, near Frederica, Kent County, Delaware. The specific project location area is a headwater stream in a predominantly well-drained upland agricultural field, which is separated from Double Run by a band of forest. The forest also borders the downstream portion of the unnamed tributary east of the proposed road crossing. The

Applicant assures that all of the forest is going to be retained as part of the project.

Of note is the fact that the property is located within a designated growth zone, per the Kent County comprehensive plan, and the proposed subdivision does not exceed the allowable lot density of three units per acre, as per County regulations. This 280-lot subdivision serviced by public sewer has already been approved by Kent County, and the proposed road crossing and storm water outfall has been approved by the U.S. Army Corps of Engineers, along with the project's delineated wetland boundary. All of the proposed work is on private property, but the project does impact a small section of private subaqueous lands at the proposed road crossing, over which the Department has jurisdiction. The Applicant has expressed a willingness to mitigate any potential impacts to those subaqueous lands which may occur as a result of this proposed project.

A few members of the public attended this hearing, and their comments regarding this matter are addressed below. This hearing was conducted pursuant to the Subaqueous Lands Act, 7 Del.C., Chapter 72, as well as Chapter 60 of the Delaware Code. Proper notice of the hearing was provided, as required by law.

II. Summary of Record:

A. Department Presentation:

Both Jim Chaconas and Joanne Lee, Environmental Scientists with DNREC's Wetlands and Subaqueous Lands Section (WSLS), represented the Department at this public hearing. After some introductory remarks from Ms. Lee to ensure that the public fully understood the Department's neutrality at that time with regard to the Applicant's pending permit application, as well as the importance of receiving public input concerning the same, Mr. Chaconas introduced 10 exhibits to be submitted into the formal record regarding this hearing.

B. Applicant Presentation:

Subsequent to the Department entering its exhibits into the record, Ed Launay, consultant from Environmental Resources, Inc., provided a brief discussion for the record concerning the Applicant's pending permit applications. Mr. Launay began by explaining that this project had already been approved by Kent County Levy Court at their meeting held on May 27, 2008. A copy of the documentation provided to the Department by Mr. Launay with regard to such approval is attached hereto as Attachment "A", and is expressly incorporated herein to this Hearing Officer's Report.

Mr. Launay stated that the project impacts to subaqueous lands involve a road crossing on the property where a 30 inch concrete pipe, 80 feet long, is to be placed in an existing ditch. At the specific area of

impact, there will be some rip-rap placed at the end of the pipe to prevent erosion and scour. The area of the impact is 793 square feet, or 0.17 acre. The utilities will be placed in the upper portion of the road bed overtop the pipe. The second part of the proposed work is to regrade 45 feet of ditch bank at the upper end of the subaqueous lands jurisdiction. However, only 20 linear feet along the actual edge of subaqueous lands is involved with this portion of the proposed work, which that amounts to 48 square feet, or only 0.001 acre.

The storm water management system for the subdivision has been designed in accordance with the Kent County Conversation District regulations. The grading is at the proposed discharged site of a proposed storm water outfall, which will discharge treated storm water. The rip-rap outfall, which was originally proposed within the channel, was redesigned so that it will be installed outside the existing channel to further reduce impacts to the drainage way and subaqueous lands.

In order to connect the storm water pond outfall to the existing channel, a section of stream bank needs to be graded below the ordinary water mark, thus resulting in the aforementioned minor impacts at this specific location of the project. The current location is necessary, according to Mr. Launay, because it is a natural drainage point, and thus, from an engineering standpoint, the best location for placement of the storm water basin. It is also sited to be downstream of the existing farm lane, because the pipe under said lane is necessary to gain access

around the storm water management pond for maintenance purposes. Mr. Launay further explained that it would be much better to have the drainage point for the storm water outfall on the downstream side of the smaller pipe, because there is better hydraulic continuity of the channel at that point.

The road crossing itself has also been redesigned in order to minimize subaqueous impacts. The original design had an impact to the wooded area, so the Applicant has relocated it in its current application further upstream to avoid any impact to forest resources.

DelDOT has required the main entrance into Auburn Hills be located as shown on the current application before the Department. In order for the main entrance to effectively access the east half of the subdivision, a proposed crossing is required. As a matter of public safety and welfare, the road crossing improves circulation within the subdivision, thus allowing greater access for emergency equipment, as well as reducing car travel time within the subdivision. Other designs suggested would not been as effective at splitting the traffic within the subdivision so that it is metered out equally between the two entrances. Thus, Mr. Launay is confident that the design of the road crossing is necessary the way that it is currently proposed.

In regard to the overall project design, the Applicant notes that significant measures have been taken to avoid environmental impacts on the property. All of the federally regulated wetlands and State natural

areas located on the site have been avoided. In response to DNREC's recommendations for buffers from Double Run and its tributary during Departmental review of this project, Mr. Launay stated that a buffer from all federally regulated wetlands and water is being established in order to protect water quality. According to the Applicant, this buffer includes all of the land within 100 feet from the edge of the stream terrace along the unnamed tributary, thus providing greater than a 100-foot buffer, and, in some cases, over a 140-foot buffer from the wetland boundary. Mr. Launay further noted that the Kent County requirement for such buffer zones is only 25 feet. Other buffers in the development provide either a 50 or 100-foot buffer from the wetland boundary. While some lot lines and storm water management basins fall within the buffer, the Applicant contends that the development envelope within the lots will be reassigned so that the buildable area is excluded from all buffers.

In conclusion, Mr. Launay noted that the proposed location of the work site is within a channelized ditch, which is most likely man-made. Flow of water in that ditch is intermittent at best, and very low in volume. Terrestrial wetland vegetation, not aquatic vegetation, is present. Thus, it is the opinion of the Applicant that the proposed work site is, at best, at the upper limit of what could possibly be considered a "regulated subaqueous land". That being said, Mr. Launay did state on the record at the time of the hearing that the Applicant would be open to having a discussion with the Department about possible mitigations,

such as reforesting a portion of the buffer zone, being a condition of the permit in this matter.

C. Public Comment:

Only one couple, Randy and Terry Cole, were present at the hearing to offer public comment for the record in this matter. Mr. Cole's comments offered at the time of this hearing, however, pertained to his personal concern for housing density and stormwater management issues concerning this proposed development site. Mr. Cole was reminded at the hearing that all of his comments were completely unassociated with the impact to the stream (which was the narrow scope of this hearing), and that this project had already been reviewed and approved by the zoning boards at the county level. Thus, there was no public comment submitted to the Department to be reviewed in the light of the Subaqueous Lands Act concerning this permit application.

III. Findings:

Subsequent to the hearing, the Department reviewed this permit application in detail, and provided this Hearing Officer with a detailed and comprehensive Response Document, dated December 18, 2008. For the Secretary's review and complete understanding, this Response Document is attached hereto as Attachment "B", and is expressly incorporated into this Hearing Officer's Report at this time.

The Department's review concluded that the proposed structures on the Applicant's proposed site will provided necessary access to the

residential development, and will allow for discharge from a stormwater management pond. Nevertheless, the structures will also adversely affect the private subaqueous lands, due to the placement of culvert pipes and fill in the natural stream channel. Thus, the Department suggests that these potential negative impacts to the private subaqueous lands be offset by a comprehensive riparian buffer planting plan for the unnamed tributary of Double Run, as well as an inclusion of deed restrictions to minimize the impact the buffer zone by individual lot owners.

The Department's aforementioned Response Document details the concerns of the aforementioned potential negative impacts associated with this project, and suggests compensatory mitigation measures to be taken by the Applicant, namely, to plan and execute a comprehensive riparian buffer plan for the unnamed tributary of Double Run, which should include the following:

- plantings with native species;
- educational signage;
- deed restrictions; and
- approved monitoring plan.

Such a comprehensive plan should receive the approval of WSLs prior to construction of the structures in subaqueous lands.

IV. Conclusions and Recommendations:

Based on the record developed in the course of this hearing, it is my opinion that the record does warrant, and the Applicant has reasonably justified, the pending request for a WSLs permit application for work in an unnamed tributary to Double Run at the Auburn Hills Subdivision, 3683 Barratts Chapel Road, in Frederica, Kent County, Delaware. While it is true that the project as a whole has already been approved by Kent County to move forward as is, the Department has determined that placing certain permit conditions on this WSLs application will offset any potential negative impacts as noted above.

For the reasons stated above, I hereby recommend that the Subaqueous Permit Application of Dorothy's, LLC, to construct a road crossing using a 30 inch diameter, 80 foot long culvert pipe and 60 square feet of rip-rap at the outfall; place four utility lines; and regrade 45 linear feet of a stream bank in a tributary to Double Run at the Auburn Hills Subdivision, north of Barratts Chapel Road, near Frederica, Kent County, Delaware, be **granted, with certain permit conditions**, as set forth both herein this present report and in the Department's Response Document of December 18, 2008. I also recommend that the following findings be made with regard to this matter:

10. Proper notice of the hearing was provided, as required by law.

11. The proposed work site is located within a designated growth zone, per the Kent County comprehensive plan, and the proposed subdivision does not exceed the allowable lot density of three units per acre, as per County regulations. This 280-lot subdivision serviced by public sewer has already been approved for development by Kent County, and the proposed road crossing and storm water outfall has already been approved by the U.S. Army Corps of Engineers, along with the project's delineated wetland boundary.
12. All of the Applicant's proposed work is situated on private property, but the project does impact a small section of private subaqueous lands at the proposed road crossing, over which the Department has jurisdiction.
13. The proposed structures will provide necessary access to the residential development, and will allow for discharge from a stormwater management pond. Nevertheless, the structures will also adversely affect the private subaqueous lands, due to the placement of culvert pipes and fill in the natural stream channel. Thus, some sort of offsetting by the Applicant is necessary in order to protect the unnamed tributary to Double Run at the work site.
14. Despite potential negative impacts associated with this proposed development site, the Department recognizes the

right of the landowner to provide access to his property. The Department believes that the Applicant's WSLs Permit Application can comply with current State of Delaware WSLs Regulations, provided that the permit is conditioned to offset negative impacts.

15. The Applicant, Dorothy's, LLC, has demonstrated a willingness to mitigate any potential negative impacts to those subaqueous lands which may occur as a result of this proposed project.
16. To offset this project's potential negative impacts by providing compensatory mitigation measures, the Department suggests conditioning the Applicant's permit in this matter to include the planning and execution of a comprehensive riparian buffer plan for the unnamed tributary to Double Run.
17. The Applicant's compensation plan should include the following: (1) planting with native species; (2) educational signage; (3) deed restrictions; and (4) an approved monitoring plan.
18. The Applicant's compensation plan must receive the approval of the Department's Wetlands and Subaqueous Lands Section prior to construction of any structures in subaqueous lands.

In addition, I recommend issuing the attached Secretary's Order to effectuate this purpose and adopting the Hearing Officer's findings and conclusions as expressed hereinabove.

 /s/ Lisa A. Vest .
LISA A. VEST,
Hearing Officer

/ahear/Dorothy's LLC