

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
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In the Matter of

A Request for a Declaratory Ruling  
by the CITY OF ROCHESTER under  
Section 204 of the State Administrative  
Procedure Act

Declaratory  
Ruling 24-01

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A petition for a Declaratory Ruling, under Section 204 of the State Administrative Procedure Act and the Department of Environmental Conservation's ("DEC" or "Department") rules and regulations promulgated thereunder, 6 NYCRR Part 619, as to the applicability of the regulatory requirements of Article 24 of the Environmental Conservation Law ("Freshwater Wetlands Act") to the construction of a proposed shopping center known as the Marketplace (the "Project") was submitted to the Department under letter of May 12, 1978 by the City of Rochester and was received by the Department on May 15, 1978. A copy of the Petition is attached hereto as Exhibit "A".

Pursuant to 6 NYCRR §619.1, by letter dated May 22, 1978, a copy of which is attached hereto as Exhibit "B", the undersigned advised the City that the Petition was incomplete and requested certain additional information.

By letter dated May 31, 1978, the City of Rochester submitted the additional information, a copy of which is attached hereto as Exhibit "C". The developer of the Project, Wilmorite, Inc., submitted its views as to the additional information requested to complete the Petition by letter of June 1, 1978 from its counsel,

a copy of which is attached hereto as Exhibit "D". By letter of June 1, the undersigned informed the City that the Petition was complete.

At issue here is not whether the Project, as proposed, will or will not be built. If the regulatory requirements of the Freshwater Wetlands Act apply to the Project, construction of the Project may not commence unless and until a Freshwater Wetlands permit authorizing such construction is issued. The decision as to whether such a permit will be granted is governed by the standards contained in 6 NYCRR Part 662:

"(c) No interim permit shall be issued pursuant to this Part unless the commissioner determines that the proposed alteration:

- (1) is consistent with the policy of the act to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoilation and destruction of freshwater wetlands, and to regulate the use and development of such wetlands in order to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the State;
- (2) is compatible with the public health and welfare;
- (3) is reasonable and necessary; and
- (4) has no reasonable alternative on a site which is not a freshwater wetland or adjacent area." 6 NYCRR §662.8

The application of these standards to the Project is not within the scope of this Ruling.

The facts underlying this Ruling are as hereinafter stated.

On December 4, 1974, the Town Board of Henrietta rezoned the site of the proposed Project from "Industrial" to "A Commercial".

The rezoning resolution provides in relevant part:

"A. That the specific use of this land for a shopping mall is hereby approved without the need for further site plan approval, except as hereinafter enumerated, and that those areas designated on the developers' plans as of the date of the public hearing, which are marked "undeveloped" or "yet to be developed" shall be subject to preliminary and final site plan approval by the Henrietta Planning Board in the manner presently required by the present Henrietta Planned Unit Development Ordinance. Among other matters deemed to be pertinent by the Planning Board, particular effort shall be directed toward securing realistic means of vehicular and pedestrian ingress and egress to the subject site from contiguous lands so as to provide coordination of facility with such contiguous lands.

B. That prior to construction of the mall, all provisions of the existing Drainage Ordinance of the Town of Henrietta shall be met, and detailed drainage plans shall be submitted to the Town Engineer for his review and approval, and, in addition thereto, all flood control measures presently in effect in the Town of Henrietta shall be met, but the developer shall be given the option of presenting his own flood control data to the Town Board for its review and approval.\*

C. That the developer shall present to the Town Board for its review and approval detailed landscaping, lighting, sign and parking plans. Such parking and landscaping plans shall provide the minimum number of parking spaces which are economically feasible."

On December 17, 1975, the Town Board approved the concepts of drainage incorporated in materials submitted to the Town's consulting engineer on October 31, 1975 by Sear-Brown Associates.

\* It is important to note that the Henrietta Town Board's concern with potential flooding arising from the construction of the proposed Project coincides with one of the primary regulatory purposes of the Freshwater Wetlands Act, i.e., flood protection. See ECL §24-0105(7)(a).

The provisions of §24-1305 of the Environmental Conservation Law ("ECL") are central to this Ruling. That section provides:

"the provisions of this article [the Freshwater Wetlands Act] shall not apply to any land use, improvement or development, for which final approval shall have been obtained from the local governmental authority or authorities having jurisdiction over such land use. As used in this Section, the term 'final approval' shall mean:

- (a) in the case of a subdivision of land, conditional approval of a final plat as the term is defined in section two hundred seventy-six of the town law, and approval as used in section 7-728 of the village law and section thirty-two of the general cities law;
- (b) in the case of a site plan not involving the subdivision of land, approval by the appropriate body or office of a city, village or town of the site plan; and
- (c) in those cases not covered by subdivision (a) or (b) above, the issuance of a building permit or other authorization for the commencement of the use, improvement or development for which such permit or authorization was issued or in those local governments which do not require such permits or authorizations, the actual commencement of the use, improvement or development of the land."

Succinctly stated, the question of law presented by the Petition is whether, under the section of law set forth above, the Project is excluded from the regulatory requirements of the Freshwater Wetlands Act. Since each of the subdivisions of ECL §24-1305 requires a particular type of local government approval in order for a specific project to be excluded from the Freshwater Wetlands Act's regulatory requirements, it follows that the ruling in this matter will turn upon a close examination of the local approval[s] granted in connection with the proposed Project.

No cases involving the construction of ECL §24-1305 have arisen in the courts. Although the Freshwater Wetlands Appeals

Board has construed this section in William R. Klein, Helgar Realty v. DEC (Docket #1977-5, decision dated May 1, 1978), the facts before the Board in that case differ substantially from those here, and the specific language within §24-1305(c) which is dispositive of this case was not addressed by the Board. In Klein, the developer had received no local approval whatsoever (because none were applicable to his project) but did eventually have to apply for a building permit, and the Board's decision turned on that requirement, holding that the Freshwater Wetlands Act did apply to the developer's project.

It is clear that the proposed Project cannot be excluded from the regulatory requirements of the Freshwater Wetlands Act under ECL §24-1305(a) since this matter does not in any way involve a subdivision of land and, accordingly, there has been no conditional approval of a final plat as required by that section.

With respect to ECL §24-1305(b), relating to site plan approval, the Town's Zoning Ordinance in effect at the time of rezoning of the subject site provided that site plan approval was only required for projects in districts zoned for Planned Unit Development. As noted above, in this case the site in question was initially zoned Industrial and by the December 4, 1974 resolution of the Henrietta Town Board, rezoned A Commercial. At no relevant time was the site of the proposed project zoned for Planned Unit Development.

While the rezoning resolution specifically makes mention of site plan approvals with regard to the subject site, it does so

only in two contexts, neither of which operate to make §24-1305(b) applicable here.

First, the resolution provides that site plan approval procedures shall apply at some future date to those portions of the site which are not to be developed as part of the shopping center itself. The question of applicability of the regulatory requirements of the Freshwater Wetlands Act to those portions of the site which are not to be developed in conjunction with the proposed Project is not within the scope of this Ruling.

Second, the resolution provides that the use of the site is specifically approved "without the need for further site plan approval except as hereinafter enumerated...". Despite the use of the words "site plan approval", the fact remains that there was no requirement or procedure for site plan approval for the proposed Project at the time the site was rezoned. The mere use of certain words cannot serve to invoke the exceptions to the Freshwater Wetlands Act contained in ECL §24-1305.

The key language in the 1974 resolution of the Town Board of Henrietta, "...specific use of this land for a shopping mall is hereby approved without the need for further site plan approval...", reflects the fact that although the Town's zoning ordinance provided that retail stores and shops were an allowable use in A Commercial districts, persons wishing to conduct any other business or commercial use, e.g., a shopping mall, not specifically prohibited in that district must obtain a special use permit.

Accordingly, the rezoning resolution, when viewed in the context of the then existing zoning ordinance for the Town of Henrietta, constitutes the granting of a special use permit, albeit one that is subject to conditions subsequent. It does not constitute site plan approval since none was required for any development within the A Commercial district.

Even if, by the terms of the December 4, 1974 resolution, the Town Board of Henrietta intended to give a form of site plan approval to the proposed Project in a manner not contemplated by the Town of Henrietta Zoning Ordinance, it must be determined whether that approval is sufficient to invoke the provisions of ECL §24-1305(b).

In this connection, the Zoning Ordinance of the Town of Henrietta prescribes the information which must be submitted in order to receive preliminary site plan approval. The required information includes:

"...A site plan showing...all parking...areas...location of all existing or proposed site improvements, including drains, culverts...location and size of all signs...location and design of lighting facilities...a tracing overlay showing all soil areas and their classifications, and those areas, if any, with moderate to high susceptibility to flooding..." Henrietta Zoning Ordinance §39-22D.

Since the December 4, 1974 resolution of the Town Board of Henrietta provides, inter alia, "[T]hat the specific use of this land for a shopping mall is hereby approved without the need for further site plan approval, except" that detailed drainage, lighting, sign, landscaping and parking plans shall be submitted to the Town Board for approval, it is clear that if any site plan

approval was given by the resolution, such approval was based upon even less information than that normally required for preliminary site plan approval for a project in a Planned Unit Development. Therefore, the conditions placed upon the rezoning, as stated above, make any site plan approval which was given, at best, only "conditional" or "preliminary".

Preliminary or conditional site plan approval is not sufficient to invoke ECL §24-1305(b). Where the Legislature intended to make a local approval which was conditional sufficient to exclude a project from the Freshwater Wetlands Act it did so, e.g., "conditional approval of a final plat" in ECL §24-1305(a).

ECL §24-1305 does not explicitly mention the granting of special use permits as exempting a project from the regulatory requirements of the Freshwater Wetlands Act. Thus the question becomes whether the granting of a special use permit comes within the meaning of ECL §24-1305(c) which provides, inter alia, that the regulatory requirements of the Freshwater Wetlands Act do not apply where "...a building permit or other authorization for the commencement of the use, improvement or development for which such permit or authorization was issued..."

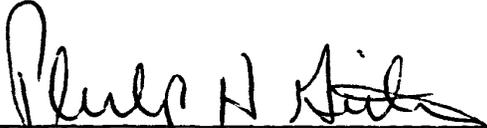
While the granting of a special use permit constitutes an authorization for a use, the language of §24-1305 clearly requires something beyond mere authorization for a use. Specifically, the statute requires authorization for the commencement of the use and that authorization has not been given here.

In order for the Project sponsor to commence the use of the subject site as a shopping mall, it must first satisfy the conditions to the special use permit granted by the December 4, 1974 resolution, i.e., the proposed Project must be subjected to the discretionary judgment of the Town Board for its approval on drainage, flood control, landscaping, lighting, sign and parking plans. Even after those conditions are satisfied, in order for the Project sponsor to commence the use of the subject site as a shopping mall it must also obtain a building permit from the Town of Henrietta.

Therefore, none of the exceptions contained in ECL §24-1305 applying, the proposed Project is subject to the regulatory requirements of the Freshwater Wetlands Act.

Accordingly, the Project sponsors should make application for a Freshwater Wetlands permit to Elmer Wagner, Regional Permit Administrator, at the Department's Regional Office in Avon. An application form is being forwarded under separate cover. Department staff will assist in the preparation of the permit application.

DATED: Albany, New York  
June 13, 1978

  
Philip H. Gitlen  
General Counsel