

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of

A Request for a Declaratory Ruling
on the applicability of the regulatory
requirements of the Freshwater
Wetlands Law (Article 24 of the
Environmental Conservation Law) to
the proposed NEWBURGH MALL

Declaratory
Ruling 24-02

Over the course of the last year, numerous oral conversations between representatives of this Department and Pan American Associates, the developer of the proposed Newburgh Mall, have occurred involving discussions of what permits would be required from this Department in connection with construction of the Newburgh Mall.

Approximately one year ago, the developers were informed that a Freshwater Wetlands permit would be required.

By letter dated April 24, 1978, George E. Derrick, of Langan Engineering Associates submitted an engineering report and plans regarding sewage disposal attendant to development of the Newburgh Mall to this Department's White Plains Office. By letter of May 8, 1978, Department staff, noting that the need for a Freshwater Wetlands permit had been discussed on several occasions previously, requested that the developer provide supporting documentation for its position that a Freshwater Wetlands permit was not required.

By letter dated May 25, James R. Loeb, an attorney representing the developer, replied to the Department's May 8 letter,

and stated that the developer believed the Newburgh Mall project received final approval from the Town of Newburgh Planning Board prior to September 1, 1975. In answer to the Department's request for documents in support of that position, Mr. Loeb enclosed a letter dated May 23, 1978 from John J. McDermott III (current chairman of the Town of Newburgh Planning Board), copies of pages 14, 15, 16 and 17 of the minutes of the Planning Board meeting of January 10, 1974 dealing with the Town of Newburgh approval granted to the Newburgh Mall, and a copy of the plan presented to the Planning Board on January 10, 1974 and signed by Joseph A. Favino, then Planning Board Chairman.

The McDermott letter states that approval was granted by the Planning Board on January 10, 1974 subject to review of detailed landscaping plans and the securing of approvals by various Town and County agencies. In addition, the McDermott letter states that the Planning Board met February 16, 1978, reviewed its prior action, and determined that the original approval granted January 10, 1974 was still in full force and effect.

By letter dated June 9, 1978, William E. Steidle, an Environmental Analyst with this Department, informed the developer's attorney that, based on review of the information supplied to the Department, construction of the Newburgh Mall could not commence without first obtaining a Freshwater Wetlands permit. On that same day, Mr. Loeb and Mr. Steidle engaged in a telephone conversation, wherein Mr. Loeb maintained that the project was not

subject to the Freshwater Wetlands Act, and Mr. Steidle responded by requesting additional documentation supporting that position.

In the course of the next week a number of documents were received by this Department, including copies of the Town of Newburgh Zoning Code represented to be in effect at the time that the 1974 Planning Board meeting was held, and copies of the amended Zoning Code for the Town of Newburgh, represented to be in effect at the time this Ruling is issued. In addition, by letter dated June 14, 1978, Donald R. Becker, Town Attorney for the Town of Newburgh, opined that the Newburgh Mall had received final approval from the Town of Newburgh prior to the effective date of the Freshwater Wetlands Act and therefore a Freshwater Wetlands permit would not be required for construction of the project.

On July 25, 1978, Pan American Associates served this Department with a petition under Article 78 of the Civil Practice Law and Rules and an Order to Show Cause why a judgment should not be entered annulling the Department's determination that the proposed Newburgh Mall is subject to the Freshwater Wetlands Act.

On July 26, 1978, the Department's attorneys offered to enter into a Stipulation which would bind the Department to issue a Declaratory Ruling if: (1) a request to do so was made in writing, (2) necessary supporting documentation not heretofore submitted was forthcoming, and (3) the litigation was adjourned for thirty days.

On July 27, 1978, attorneys for the Department and the developer agreed on the terms of a Stipulation which was entered into on July 28, 1978. That Stipulation requested a final determination and ruling regarding the applicability of the Freshwater Wetlands Act to the proposed mall, promised that plans referred to in the Planning Board's minutes of its meeting on January 10, 1974 would be provided to the Department on July 28, and postponed the return date in the litigation to August 7, 1978.

On July 28, 1978, the developer provided the Department with plans prepared by C.T. Male Associates, dated August 24, 1973. The Planning Board minutes of January 10, 1974 mentioned that the Board had before them on that night "detailed plans from C.T. Male Associates." (See Attached "Minutes".)

The statutory language at issue here is Environmental Conservation Law ("ECL") §24-1305, which provides as follows:

"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 7-738 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."

On January 10, 1974, after discussing the Newburgh Mall, the Planning Board of the Town of Newburgh approved the following resolution:

"Reapproval be granted subject to final approval of the agencies involved, posting of the required bond, payment of required fees, review and approval of landscaping plans, final site plan approval by this Planning Board..."

On January 10, 1974, Joseph A. Favino, Chairman of the Town of Newburgh Planning Board, signed a document labelled "Site Leasing Plan" prepared by Evantash, Friedman Associates bearing the caption "Newburgh Mall" and an "issue date" of September 18, 1973 with the following words, "Subject to conditions set forth at Planning Board meeting 1/10/74, in resolution thereof. Joseph A. Favino, P.B. Chairman 1/10/74."

Under the provisions of the local zoning code which was then in effect, the proposed project was subject to "plan approval" by the Planning Board. Therefore, the relevant statutory provision is §24-1305(b), dealing with site plan approval.

At the outset, it is clear that the local government's retroactive interpretation of its prior action is not dispositive of the kind of approval which was given prior to the effective date of the Freshwater Wetlands Act.

The Planning Board minutes show that the Board's action on January 10, 1974 was contingent on approvals to be obtained some time in the future from the following: the Town Water Superintendent, Town Highway Superintendent, Town Board of Fire Commissioners, Orange County Board of Health, Orange County Highway (for approval of curb cuts, road drainage, traffic flow), the Thruway Authority (for drainage into the Algonquin), the State (for permission to place a 48" pipe under Route 84 and a 60" pipe under Route 52), and the County (for permission to place a 60" pipe under Union Avenue). (Pages 16 and 17 of the Minutes.)

This Department has previously interpreted §24-1305(b) as requiring final site plan approval, i.e., mere preliminary or conditional site plan approval is not sufficient to invoke §24-1305(b). (See Declaratory Ruling, dated June 13, 1978, issued at the request of the City of Rochester). However, the facts upon which that previous ruling was based differ significantly from those in this case. In Rochester, the local zoning code did not require a site plan approval for the project at issue. While the Town maintained that it had given final site plan approval, the Town Board could not rely upon a procedure which did not exist.

The zoning code, however, did require site plan approval for projects in certain zoning districts. The site plan procedure made a distinction between "preliminary" and "final" site plan

approval and the procedures for obtaining "preliminary" and "final" site plan approval were outlined in great detail. Examination of the procedure actually followed by the Town Board in that case showed that the consideration given to the project did not even equate that required for preliminary site plan approval.

In this case, the applicable provisions of the Town of Newburgh Zoning Code clearly require Planning Board "plan approval and authorization" for this project. However, the plan approval and authorization procedure contained in the code makes no mention of, and no distinction between, preliminary and final site plan approval.

In Rochester, the Town Board attached explicit substantive conditions to the approval given. In fact, the conditions required the submission of numerous detailed plans, including site drainage plans which would enable the Town Board to assess any flood hazards created by the project. Flood protection, of course, is a primary regulatory concern of the Freshwater Wetlands Act.

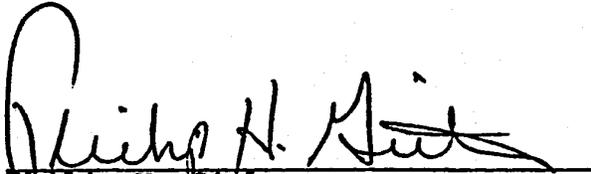
In this case, however, there is nothing in the record to indicate that the conditions which attached to the Newburgh Planning Board's approval were substantive, or that the Board retained any significant discretionary, rather than ministerial, powers of project review after January 10, 1974.

On this record, the only discretionary power which the Board retained beyond January 10, 1974 concerned landscaping. While landscaping may perhaps, in the context of a particular project, include matters relevant to storm water runoff and permeability of surfaces, both of which would be relevant to flood control concerns addressed by the Freshwater Wetlands Act, there is nothing in this record to indicate that the expressed concern about landscaping is here relevant to matters with which the Freshwater Wetland Act is concerned. Most likely, in the context of the discussion which occurred on January 10, 1974, and the applicable zoning provisions, the Board was concerned with aesthetics. The record clearly shows that the Board did, independently of its concern for landscaping details, address the issue of drainage (which would be relevant to flood control) in detail on January 10, 1974, as the applicable zoning provisions required.

While it is true that the Board's resolution does contain the words "final site plan approval" and indicates that this will occur at some time in the future, there is nothing in the record to indicate that, approvals of other agencies having been received, the Board had any discretion to later approve or disapprove the project. Thus, the mere use of the words, "final site plan approval", unaccompanied by substantive conditions or discretionary review powers will not serve to subject a project to the regulatory requirements of the Freshwater Wetlands Act.

Therefore, §24-1305(b) applying, the proposed Newburgh Mall is not subject to the regulatory requirements of the Freshwater Wetlands Act.

DATED: Albany, New York
August 4, 1978


Philip H. Gitlen
General Counsel