

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of :

A Request for a Declaratory Ruling by : DECLARATORY
DWIGHT ENTERPRISES, INC., under : RULING 24-03
Section 204 of the State Administrative :
Procedure Act :

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Dwight Enterprises, Inc. ("Dwight") submitted a Petition for a Declaratory Ruling under Section 204 of the State Administrative Procedure Act and the Department of Environmental Conservation ("DEC" or "Department") rules and regulations promulgated thereunder, 6 NYCRR 619, as to the applicability of the regulatory requirements of Article 24 of the Environmental Conservation Law ("Freshwater Wetlands Act") to the further construction of a commercial park in the Town of Geddes, Onondaga County, under letter dated June 19, 1979, and received by the Department June 21, 1979. A further affidavit was submitted by letter dated September 12, 1979, and received September 13, 1979.

At issue here is not whether a Freshwater Wetlands permit should be issued. If the regulatory requirements of the Freshwater Wetlands Act applied, the construction of the commercial park could not continue unless and until a Freshwater Wetlands permit authorizing such construction were issued. The decision as to whether such a permit will be granted is governed by the standards contained in 6 NYCRR Section 662.8:

"(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."

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

The facts and law underlying this Ruling are as hereinafter stated.

On or about April 10, 1967, the Town of Geddes granted Dwight's application for a zone change for its property from Residential "B" to Commercial "C". In consideration for the zone change, Dwight simultaneously agreed to execute an agreement to provide for the construction of sewers, roads and other services to the property. Dwight has paid for the road and a buffer zone of trees, and is paying off its obligation on a municipal bond of \$100,000 for the sewer construction. To date, it has paid \$75,860 on the sewer bond. Affidavit of Joseph H. Beland, Vice President, Dwight Enterprises, Inc., September 10, 1979.

By November 19, 1971, the sewers, laterals, pump stations and fire mains had been approved by the Town and completed. The

plans revealed that Dwight planned to divide the land into twenty parcels. Before September 1, 1975, Dwight had constructed three buildings in the commercial park. Affidavit of Beland.

The Freshwater Wetlands Act went into effect September 1, 1975. By Section 1305 thereof, added in 1976, projects which met specific types of approval by local governments at that time were exempted.

Read as a whole, Section 1305 requires that its subsections be applied in a sequential order. Thus, one must first determine whether subparagraph (a) of Section 1305 is the section which applies to the situation at hand. If it does, the later sections are never reached. Section 1305 reads, in pertinent part:

The provisions of this article shall not apply to any land use, improvement or development for which final approval shall have been obtained prior to the effective date of this article 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 the subdivision of land, conditional approval of a final plat as the term is defined in section two hundred seventy-six of the town law

Subparagraph (a) deals exclusively with situations involving the subdivision of land, and refers to particular provisions in the Town, Village and General City Laws. An examination of these references shows that the procedure being referred to is plat approval, and a further examination of the Town, Village and General City Laws discloses that the plat approval procedure relevant to subdivisions of land is not limited to residential

subdivisions. Commercial subdivisions come within the meaning of the references provided in Section 1305(a). Therefore, subparagraph (a) applies to this commercial park.

Section 276 of the Town Law was amended to define conditional approval in 1972. In the version of the law in effect in 1971 and also in the subsequent and the present versions (1) the petitioner must submit a plat for approval by the planning board or (2) the board may pass and approve the development of plats already filed in the office of the clerk of the county in which such plat is located. However, in order to be "already filed", the plat would have to have been in the county clerk's office by the time Town Law Section 278 was passed in 1932. Section 278 prohibits the filing or recording of plats until approved and endorsed by a planning board.

Dwight at no time sought plat approval from the Town or filed a plat plan with the office of the Onondaga County Clerk, steps required by Section 1305(a) of the Freshwater Wetlands Act. Affidavit of Donald G. Cole, Clerk of the Town of Geddes, August 27, 1979.

Therefore, the question presented by Dwight's petition is whether its commercial park is exempt from the regulatory requirements of the Freshwater Wetlands Act, in spite of its failure to file a plat and thereby meet the requirements of Section 1305(a).

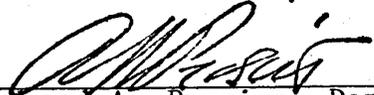
It is my determination that it should. The test set out in Section 1305(a) is a very low threshold for exemption from the act. The petitioner here has made far more substantial commence-

ment of his project. See, R. Anderson, I New York Zoning Law & Practice, §6.16 (1973). The Town of Geddes has clearly been aware of and supportive of the petitioner's development. The intent of the Legislature would be frustrated were the technicality of petitioner's failure to file a plat plan to make the regulatory requirements of the Freshwater Wetlands Act applicable. Miracle Mile Associates v. Department of Environmental Conservation, _____ Misc.2d _____, 414 N.Y.S.2d 277 (1979).

It is inappropriate here to balance economic hardship against substantial commencement in determining whether the developer has already received sufficient benefit from his project to make subjecting him to a new law equitable as the cases there cited in Anderson's treatise do. The legislative intent is to exempt projects where only the first steps had been taken before the Act was passed. In its bill memo, the New York State Department of State set out the clearly generous grandfathering effect of this amendment: "It should be noted that none of the types of approval listed in the bill would be sufficient to exempt an activity from later changes in local zoning or subdivision regulation." Memorandum from Mario M. Cuomo to Hon. Judah Gribetz, July 16, 1976.

Therefore, I find that the rules and regulations of the Freshwater Wetlands Act are inapplicable to Dwight's further construction of a commercial park in the Town of Geddes.

DATED: September 18, 1979
Albany, New York


Richard A. Persico, Deputy
Commissioner and General Counsel