

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of )

H. Q. CONSTRUCTION CORP. )

For a Declaratory Ruling )

) DECLARATORY  
) RULING  
) DEC 24-09  
)  
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H. Q. Construction Corporation ("Petitioner") seeks a Declaratory Ruling under Section 204 of the State Administrative Procedure Act and 6 NYCRR Part 619, on the applicability of Section 24-1305 of the Environmental Conservation Law ("ECL") to certain lots which form a portion of a realty subdivision which Petitioner owns in the Town of Brookhaven, Suffolk County, New York. ECL §24-1305 contains the "grandfathering" provisions of New York's Freshwater Wetlands Act ("the Act").

In essence, the Petitioner herein seeks a determination that its property is exempt from the permit requirements and land use restrictions contained in the Act. Several of the Department's previous Declaratory Rulings have considered the question of grandfathering pursuant to the Act (See DEC Declaratory Rulings 24-01 through 24-08). However, those Rulings were either made in the context of site plan approval not involving a subdivision of land or of commercial or industrial facilities, such as shopping malls. As set forth above, the instant Petition relates to a residential subdivision of land. Petitioner's subdivision, like others on Long Island, underwent preliminary site preparation

(such as landscaping and installation of streets and curbs) several decades ago. Many of these tracts have existed without further development until very recently, when housing needs have accelerated residential construction. Therefore, it is in the public interest to grant this petition.

Petitioner is the record owner of a tract of land located in the Town of Brookhaven known as "Patchogue Farms". This property contains 52 plots, all of which are zoned for single-family dwellings. None of the lots contain finished structures but Petitioner now intends to develop them. However, four of these lots are located partially within the boundary or adjacent area of a regulated freshwater wetland. On one lot, construction began but has been halted pending the issuance of this Ruling. Unless otherwise exempted by the Act, the excavation and filling operations and housing construction which would be undertaken in furtherance of Petitioner's plans constitute regulated activities for which a permit from the Department of Environmental Conservation ("DEC" or "the Department") is required.

The sole legal issue herein relates to whether Patchogue Farms meets the criteria for grandfathering contained in ECL 24-1305. That section states as follows:

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 [September 1, 1975] 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...;

(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 areas 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.

The definition of "conditional approval of a final plat" is contained in Town Law, §276(2)(d):

(d) Conditional approval of a final plat--conditional approval by a planning board of a final plat is the approval of a final plat subject to conditions set forth by the planning board in a resolution conditionally approving such plat. Such conditional approval does not qualify a final plat for recording nor authorize issuance of building permits prior to the signing of the plat by a duly authorized officer of the planning board and recording of the plat in the office of the county clerk or register in accordance with provisions of this article.

In an earlier Declaratory Ruling, In the Matter of Dwight Enterprises, Inc., DEC 24-03 (September 18, 1979), the Department determined that any land use which meets the requirements of any one of the subdivisions of §24-1305 is grandfathered under the Act. That Ruling states as follows:

Read as a whole, Section 1305 requires that its subsections be applied in sequential order. Thus, one first must 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.

This reading of the statute is consistent with that given in an earlier decision of the Freshwater Wetlands Appeals Board, whose rulings are binding on the Department by virtue of ECL §24-1103(2). In considering a collateral grandfathering issue in the case of William R. Klein and Helgar Realty Corp. v. Peter A.A. Berle, FWAB Docket No. 1977-5 (May 1, 1978), the Board there defined final approval as "(a) approval of a subdivision plat or (b) approval of a site plan, or in cases not covered by either of these approvals then (c) the issuance of a building permit or other authorization...." Id. at pp. 2-3 (emphasis added).

Thus, it is clear that the statute must be read in the disjunctive. Since subdivision (a) applies to this situation, its requirements alone are relevant to the determination of whether Patchogue Farms is exempt from the Act.

It should be noted that the Department, in analyzing any grandfathering request, is constrained to apply §24-1305 in the manner least burdensome to the developer or landowner. DEC's obligation to do so has been established by case law as well as by earlier Declaratory Rulings. The first of the grandfathering Rulings, In the Matter of The City of Rochester, DEC 24-01 (July 13, 1978), adopted a very restrictive interpretation which was

subsequently rejected by the decision in Miracle Mile Associates v. Department of Environmental Conservation, 98 Misc. 2d 519, 73 A.D.2d 807, 423 N.Y.S.2d 732 (4th Dept., 1979). The Miracle Mile opinion quotes the following language from Assemblyman Lee's introductory memorandum to the bill which added the grandfathering amendment to the Act:

The Department ... is presently misinterpreting the Freshwater Wetlands Law as authority to require its approval under the Act on any land development, improvement, or use found to be in a wetland even if the particular development was already commenced prior to the effective date of the law.

98 Misc. 2d at 526 (emphasis in the original).

The Appellate Division went on to state that "the fundamental purpose of the [amendment] was to remedy the gross inequities inuring to owners and developers against whom the [wetlands] act was retroactively applied." Id. This language demonstrates that courts will interpret the provision liberally in favor of a party seeking the exemption wherever possible.

Subdivision (a) of §24-1305 was subsequently applied in accordance with the foregoing in In the Matter of Dwight Enterprises, Inc., DEC 24-03 (September 18, 1979). There, a commercial park was found to have satisfied the requirements for grandfathering even though the developer had neither received final approval nor filed a plat with the Town. The Ruling

recognized a "very low threshold for exemption from the act", and, citing Miracle Mile, stated that "the legislative intent is to exempt projects where only the first steps had been taken before the Act was passed."

In support of its contention that Patchogue Farms received "final approval" prior to the effective date of the Act, petitioner has submitted supporting documents including deeds, a performance bond, a subdivision map, and a letter from the Planning Board of the Town of Brookhaven ("Board").

The following language appears in the Board's letter to a predecessor in interest of Petitioner, dated May 24, 1967, and annexed hereto as Exhibit "A":

At a regular meeting of the Planning Board, held on May 22, 1967, the proposed subdivision known as 'PATCHOGUE FARMS'... was granted final approval, subject to:

1. Recreational satisfaction;
2. Change in street name;
3. Health Department stamp of approval;
4. Making the required revisions in the plat and drainage plan; and
5. The recording of the plat and the posting of the performance bond, prior to August 20, 1967, in the

amount of \$92,000, to run for a period of one year. The bond represents the cost of public improvements to be constructed in accordance with the specifications of the Town of Brookhaven.

Again, "final approval" under ECL §24-1305(a) is equated with "conditional approval of a final plat" under the Town Law §276. The language of the Town's letter shows that this requirement has been satisfied. Moreover, documentation provided by Petitioner substantiates that the above conditions have been fulfilled, leading to final plat approval of the subdivision map. The map bears various legends and signatures including: 1) "Approved By The Town of Brookhaven Planning Board," along with the signatures of that body's chairman and secretary, dated February 15, 1968; 2) the Suffolk County Health Department's endorsement of water supply and sewage disposal arrangements, signed and dated January 9, 1967; and 3) the Suffolk County Clerk's certification that the plat was filed in that office on February 16, 1968.

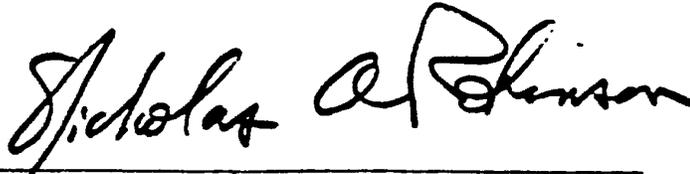
The facts which constitute the predicate for this declaratory ruling demonstrate that Petitioner's development received "final approval," as that term is used in §24-1305(a), prior to the September 1, 1975 effective date of the Act. Accordingly, by operation of law, the Freshwater Wetlands Act does not apply to petitioner's development. Furthermore, although substantial

expenditure has been made in providing streets, curbing, landscaping, storm drains, and other public improvements within the Patchogue Farms parcel, Petitioner has made an effort to cooperate with the Town and DEC in devising a siting scheme which seeks to minimize or eliminate damage to the wetlands from structures on the four lots in question. Setback variances are being sought from the Town for this purpose. Although exempt from the letter of the law, the Petitioner has demonstrated a commendable willingness to comply with the spirit of the law. Freshwater wetlands are a valuable natural resource for which the Legislature has found a need for careful protection. Petitioner's enlightened self-interest acknowledges and acts to accommodate this finding.

The conclusion herein is expressly limited to the facts stated above in the context of wetland regulation by the Department pursuant to the Freshwater Wetlands Act. Administrative bodies at the county or municipal level may independently regulate wetlands through local ordinances or local implementation of the Act pursuant to Title 5 thereof. Furthermore, in doing so, local governments are free to be more protective of the resource; that is, they may enact wetlands laws more stringent than ECL Article 24. Thus, although this Petitioner's project happens to be grandfathered under both the State and Town statutes, exemption from ECL Article 24 will not represent total exemption from wetlands development restrictions in every case.

Accordingly, Patchogue Farms meets the "grandfathering" requirements of §24-1305. Petitioner need not obtain an Article 24 permit before continuing with development plans for the subdivision.

DATED: Albany, New York  
October 24, 1984



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Nicholas A. Robinson  
Deputy Commissioner/General Counsel