

undertaken on that portion of Petitioner's property lying within freshwater wetland MB-40 or its adjacent area, unless and until the necessary permit is granted by the Department.

For the purposes of this Ruling, the facts as submitted by Petitioner are assumed to be correct and are as follows. Petitioner acquired title to a 250-acre parcel in the Village of Washingtonville in 1971. A certain amount of development has subsequently taken place on the property, including the construction of 54 single-family dwellings and basic infrastructure such as sewer and water lines, roads, a detention pond, and a culvert bridge. The Department's tentative freshwater wetlands map for Orange County compiled in 1980 shows that + 30 acres of wetland MB-40 is located on the property.

Section 24-1305 of ECL Article 24 is entitled "Applicability" and 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 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, and approval as used in section 7-728 of the village law and section thirty-two of the general cities law....

Since this case involves the subdivision of land, subdivision (a) governs the outcome herein. Therefore, it is necessary to examine whether "final approval", in this case

meaning "approval as used in Section 7-728 of the village law", was granted for Newcastle by the Village prior to the September 1, 1975, effective date of the Act.

Section 7-728 of the Village Law is entitled "Approval of plats; development of filed plats" and sets forth the process for review and approval of residential subdivisions of land. Subdivision two thereof contains definitions of certain terms used in that section. Although "approval" is not separately defined, "conditional approval" is defined as "approval of the layout of the proposed subdivision as set forth in such preliminary plat, but subject to approval of the plat, in final form, in accordance with the provisions of subdivision four of this section." Subdivision four states the following:

4. A public hearing shall be held by the planning board after the submission of a plat, in final form, for approval, which hearing shall be advertised at least once in a newspaper of general circulation in such village and a notice of hearing posted in at least three prominent places at least five days before such hearing. The planning board may thereupon approve, modify and approve, or disapprove such plats or the proposed development thereof. The approval required by this section or the refusal to approve shall take place within sixty days from and after the time of the submission of the plat or the proposed development thereof for approval; otherwise such plat or such proposed development shall be deemed to have been approved....

Relative to the Washingtonville Village Planning Board's review, the Petition includes as an attachment the minutes of a long series of Board meetings, during the course of which the project was considered. These minutes show that the Newcastle

plans were first presented to the Board on September 13, 1973, but were rejected "as having too many problems". Exhibit E, p. 2. On September 27, 1973, site plans were submitted for the "proposed Riger Home (sic) development". Exhibit E, p. 3. Discussion of several issues took place but there was no official action by the Board at that meeting. On October 26, 1973, "sketch plan approval" was given. Exhibit E, p. 4. The Board decided on January 31, 1974, to hold a preliminary hearing at its next meeting. Exhibit E, p. 6, 8. The minutes for the February 28, 1974, meeting show that a public hearing was conducted on Newcastle. The minutes also reflect the Board's agreement that certain of the Newcastle lots might be subject to change after an on-site investigation and that "Lots 'AA' and surrounding area apparently are very wet and the Board will need specific recommendations from Mr. Kessler on these particular lots". Exhibit E, pp. 8-10. Brief mention of the project appears in the minutes of the meetings dated March 28, 1974; August 29, 1974; and May 6, 1975. Exhibit E, pp. 13, 18, 24. On July 31, 1975, a hearing was held on final subdivision plans. Exhibit E, p. 28. The following notation appears in the minutes for the Board's August 28, 1975, meeting:

Chairman Spear recommended that the Board withhold final approval until such time as a meeting may be set up with Mr. Doherty and the Soil Conservation Service to discuss certain questions. Mr. John Lanc, engineer for the developer, agreed to an extension of time on the final decision until all questions are resolved.

Exhibit E, p. 29. The Board's next meeting was held on September 25, 1975, subsequent to the Act having become effective. The minutes recount in considerable detail the discussion on specific features of the site plan, concluding as follows:

Mr. Saturno made a motion granting conditional final approval, subject to: 1. Department of Health approval[.] 2. Department of Transportation approval of entrance road[.] 3. Solve problem of "Eye" on Carlyle Drive. 4. The Village Board to solve question of Washington Boulevard outside development. 5. Location of small playground area[.] 6. Dedication of deed, approval of sewer bond, and solution to question of special drainage district. The motion was seconded by Mr. Conley. Motion passed.

The Petition and its supporting exhibits take the position that although final approval of the site plan did not occur on July 31, 1975, the date of the public hearing thereon, the issues resulting in the Board's decision to withhold such approval were resolved during the September 25, 1975, meeting without necessitating modification of the plan as it existed at the time of the hearing. It is therefore urged that final approval should be considered, for ECL Article 24 grandfathering purposes, to be retroactive to July 31, 1975.

In ruling on petitions such as the one before me, I am constrained to apply ECL §24-1305 in a manner consistent with the spirit and intent of the Freshwater Wetlands Act, which is to "preserve, protect, and conserve freshwater wetlands, and the benefits derived therefrom ... consistent with the general

welfare and beneficial economic, social, and agricultural development of the state." ECL §24-0301. The fact that "final approval" as contemplated by ECL §24-1305 was granted to Newcastle by the Washingtonville Village Planning Board on September 25, 1975, is inescapably established by the record herein, and is virtually conceded by the Petitioner. See Petition, Paragraph 11. Final approval for grandfathering purposes can only occur once for any given project, and I am unaware of authority in the Village Law, the ECL, or elsewhere that would allow such approval to be deemed retroactive, as Petitioner suggests should be done here. Under these circumstances and for the foregoing reasons, I conclude that Newcastle is within the Department's regulatory jurisdiction under ECL Article 24.

This result does not mean that the project must be abandoned. Rather, consistent with the necessary balancing of environmental and socio-economic concerns, Region 3 staff of the Department of Environmental Conservation will review the project, when submitted in the form of an ECL Article 24 permit application, and will assist Petitioner in determining what revisions are necessary to minimize or avoid adverse impacts to the subject wetlands. It is, however, premature at this time to speculate on the outcome of the permit review process.

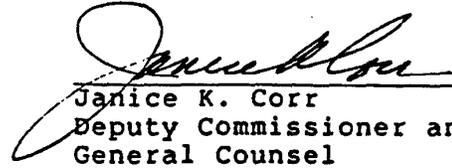
Previous Rulings dealing with the grandfathering issue are consistent with the conclusion in the present case. All but one of these previous Rulings addressed grandfathering under Paragraphs (b) and (c) of §24-1305, and considered projects

requiring site plan approval rather than subdivision approval. In the only earlier case concerning subdivision approval (H.Q. Construction Corp., DEC 24-09, Oct. 24, 1984), the exemption was granted; however, the underlying facts are clearly distinguishable. There, the local government records and the legends, stamps, and signatures appearing on the subdivision map itself unequivocally demonstrated that final approval was given in 1968.

Finally, I have carefully considered the points raised in the affidavits submitted in support of the Petition by the landowner and consulting engineers involved with Newcastle concerning, for example, expenditures made and project planning measures already taken, as well as additional expenditures which may result from project modifications possibly necessitated by the permit process. However, as indicated by the foregoing analysis, my determination in this matter must be governed by an objective application of the grandfathering provision of the Freshwater Wetlands Act to the facts specifically concerning local governmental final approval. This legal analysis as to jurisdiction does not involve an exercise of discretion. The concerns expressed in the affidavits must therefore be addressed

through the permit review process, which provides ample opportunity for the reconciliation of environmental concerns and project objectives recognized by ECL Article 24 and the State Environmental Quality Review Act.

DATED: Albany, New York
October 9, 1986


Janice K. Corr
Deputy Commissioner and
General Counsel