

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the application of

BERNARD MUSCHEL

for a Declaratory Ruling.

DECLARATORY
RULING
DEC 24-13

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Bernard Muschel ("Petitioner"), by his attorneys, Jacobowitz and Gubits, has petitioned for a Declaratory Ruling, pursuant to section 204 of the State Administrative Procedure Act and 6 NYCRR §619, to determine whether the Freshwater Wetlands Act (the "Act"), Article 24 of the Environmental Conservation Law ("ECL"), applies to Petitioner's proposal to develop a 66-unit apartment complex on a 4.72-acre parcel of land in the Village of Walden, New York, approximately 4.2 acres of which is freshwater wetlands or 100-foot adjacent area (mapped as Freshwater Wetland WD-15).

ISSUE

At issue in this petition is whether ECL §24-1305, the "grandfathering" provision of the Act, exempts Petitioner's project because Petitioner obtained final approval prior to the September 1, 1975, effective date of the Act. For the reasons set forth below, I conclude that the project is grandfathered.

FACTS

For the purpose of this Ruling, the facts as submitted by Petitioner are assumed to be correct and are as follows.

Petitioner is one of two principals in Cedar Cliff Realty.

Inc. ("Cedar Cliff"), which purchased the subject property in October 1965. On May 3, 1967, upon the application of Cedar Cliff, the Village of Walden Planning Board granted its "consensus to approve" Petitioner's application to construct a 66-unit garden apartment complex on the property in question, provided that "the parking, set back, lot coverage and other regulations were met by the plan to be submitted to the Board". (Exhibit A.)

On October 6, 1971, the Village of Walden Planning Board recommended that, based on Cedar Cliff's February 11, 1971, plan for a 66-unit apartment project, a building permit for construction of multiple dwellings be issued by the Building Inspector. The recommendation was conditioned on a number of prerequisites to be undertaken by Cedar Cliff: (i) conveying title to a portion of "Penny Lane" to the Village for road widening, (ii) quitclaiming all interest in Penny Lane to the Village, (iii) installing a water main from Windrift Lane to a specified point with a hydrant at its end point and (iv) contributing a \$750 assessment towards reconstruction of Penny Lane as a public street. (Exhibit E).

On December 4, 1973, Robert Diehl, Village Manager for the Village of Walden, issued a letter stating that:

On October 6, 1971, site plan approval for a plan dated February 11, 1971, was granted and the Planning Board recommended issuance of the building permit by the building inspector conditioned on various items. The building permit has expired.

The site plan approval is in effect provided a building permit application for construction of the buildings in accordance with the site plan approval and New York State Building Construction Code is

submitted and approved by the building inspector.

(Exhibit F.)

On May 16, 1974, Mr. Diehl issued a second letter confirming that the site plan approval of October 6, 1971, remained in effect, conditioned upon the acquisition of a building permit.

(Exhibit G.)

In late 1984, an alternative development plan was submitted to the Village Planning Board for the construction of 48 townhouse/condominium units on this property. Final approval for this amended project was never granted because an amendment to the DEC Freshwater Wetlands Map for Orange County included Petitioner's property within the boundary of wetlands or adjacent area, requiring the project to obtain approval under the Act before proceeding to development.

In August 1987, Petitioner applied for a freshwater wetlands permit to allow construction of a 43-unit townhouse/condominium project on the property. On October 16, 1989, after an adjudicatory hearing held in April 1989 to review the merits of the permit, the Commissioner issued a Decision which, inter alia, denied the permit application. On November 15, 1989, Petitioner brought an action under Article 78 of the New York Civil Practice Law and Rules seeking reversal of the Commissioner's Decision. Shortly thereafter, on or about December 5, 1989, the Department's Office of General Counsel received the instant Declaratory Ruling petition. Subsequently, the Article 78 action was adjourned by consent of the parties pending Counsel's consideration of that

request; it being recognized that the issuance of a Declaratory Ruling which determined the Act inapplicable would provide Petitioner with a site development option that did not require a permit from the Department.

I determined that, since there was a prior hearing on the subject of development of this property, it was in the public interest to solicit public comments by publishing a notice of the request for a Declaratory Ruling in the Environmental Notice Bulletin ("ENB") consistent with 6 NYCRR §619.2(e). A miscellaneous public notice was published in the ENB on December 20, 1989, and again on January 31, 1990, soliciting public comment on the Declaratory Ruling request. The only comment received by the Office of General Counsel was a January 3, 1990, letter from the Village of Walden by its attorney, James Cupero, stating that "the Village makes 'no comment' in respect to Bernard Muschel's declaratory ruling request regarding the grandfathering of an approved 66-unit garden apartment complex in the Village."

ANALYSIS

The pertinent parts of the statute governing the grandfathering exemptions from the applicability of the Act, ECL §24-1305, are 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:

(b) in the case of a site plan not involving the

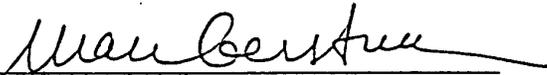
subdivision of land, approval by the appropriate body or office of a city, village or town of the site plan....

The ruling on this petition thus turns on the question whether the site plan for the apartment project was given the appropriate final approval prior to the September 1, 1975, effective date of the Act. The materials provided with the petition indicate that, on May 3, 1967, the Village of Walden Planning Board indicated its consensus to approve 66 units of Cedar Cliffs' proposal to construct garden apartments on its property provided the site plan meet certain requirements. On October 6, 1971, the Planning Board recommended a building permit be issued to Cedar Cliff "for construction of multiple dwellings shown on [its] plan ... dated February 11, 1971." Although this vague description of that submittal makes it difficult to determine the object of the Planning Board's recommendation, the two subsequent letters by Village Manager Robert Diehl, dated December 4, 1973, and May 16, 1974, state that the Planning Board had exercised "site plan approval" based on the February 11, 1971, plan to construct the 66-unit apartment complex. These letters clarify that the Planning Board's action was a final site plan approval, within the meaning of ECL §24-1305(b).

Because final site plan approval was obtained prior to the September 1, 1975, effective date of the Act, I conclude that the Act does not apply to the 66-unit apartment complex proposal set forth in the site plan dated February 11, 1971, as approved by the Village of Walden Planning Board on October 6, 1971.

However, it should be noted that, although the project is exempt from wetlands regulation under State law, there exists the separate jurisdiction of the United States Army Corps of Engineers under §404 of the Federal Clean Water Act ("CWA"), the applicability of which is not within this Department's authority to determine. If a CWA §404 permit is required by federal law, Petitioner will be required pursuant to CWA §401 to obtain a water quality certification from this Department.

DATED: July 11, 1990
Albany, New York



Marc S. Gerstman
Deputy Commissioner and
General Counsel