

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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In the Matter of the Petition of the

NEW YORK STATE

DECLARATORY
RULING 24-14

URBAN DEVELOPMENT CORPORATION
(Audubon New Community)

for a Declaratory Ruling
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The New York State Urban Development Corporation ("UDC") has petitioned for a Declaratory Ruling, pursuant to §204 of the State Administrative Procedure Act and 6 NYCRR Part 619, to determine whether the provisions of the Freshwater Wetlands Act (the "Act"), Article 24 of the Environmental Conservation Law ("ECL"), are applicable to UDC's proposed development of the Audubon New Community project (the "Project") in the Town of Amherst, New York.

In its Petition, UDC contends that the Project is exempt from the permit requirements and regulatory restrictions of the Act by operation of the "grandfathering" clause in ECL §24-1305 because the Town of Amherst approved UDC's Audubon Development Plan and designated Audubon as an approved New Community, modifying the Town zoning map accordingly, before the effective date of the Act. The Petition presents an issue of first impression: whether a project proposed for development on lands primarily owned by State entities and sponsored by a State public benefit corporation formed pursuant to an act of the Legislature may be exempt from compliance with the Act. Having considered the facts,

as set forth in the Petition and its supporting documents, and the applicable law, I conclude that the Project is not exempt from the Act.

FACTS

For the purposes of this Ruling, the facts submitted by Petitioner are assumed to be correct and are as follows. The Project includes approximately 4100 acres in the Town of Amherst on which UDC plans to develop a mixed use community including residential, academic, commercial and light industrial uses. The Audubon New Community concept was conceived by UDC in 1969 as a plan to assist the Town of Amherst in absorbing the direct and indirect impacts of the relocation to Amherst of the State University of New York at Buffalo. By September 1, 1975, the effective date of the Act, UDC owned over 1,818 acres for the proposed new community, the State University of New York at Buffalo owned approximately 2,100 acres, and the remaining acreage was held privately. These lands lie south of Tonowanda creek and on either side of Ellicott Creek in the vicinity of freshwater wetlands designated by DEC and identified as TE-17, TE-20, TE-21 and TE-22.

On or about November 6, 1972, the Town of Amherst Planning Board received UDC's application to incorporate the entire 4,100 acres comprising Audubon into a New Community District in accordance with the Town's zoning ordinance. UDC filed a revision to the application on December 13, 1972, and thereafter the Planning Board transferred the matter to the Town Board with a recommendation for approval of the Audubon Development Plan. On

February 12, 1973, the Town Board approved UDC's Development Plan for Audubon, designating Audubon as an approved New Community for the 4,100 acres comprising the New Community area, and modified the Town zoning map to reflect the change.

The wetlands at issue in this case are Class II wetlands. The final map, as filed on September 10, 1986, lists wetlands comprising approximately 385 acres. Since that time, the wetlands have expanded in size to approximately 768 acres, and the freshwater wetlands map has been tentatively modified to reflect these changed conditions.

DISCUSSION

Although the issue of whether a body of State government may qualify for an exemption under the Act is one of first impression, a similar consideration arose in Declaratory Ruling #24-12 in the context of a municipal government's capacity to have vested rights as against the State under the Freshwater Wetlands Act. That Declaratory Ruling, In the Matter of the Town of Amherst (December 21, 1988), resolved the issue in the negative, determining that a municipal corporation is essentially a creature of the State and that there is nothing in the language of ECL §24-1305 to suggest that vested rights doctrine is rendered inapplicable to political subdivisions of the State.

UDC is a public benefit corporation formed pursuant to the New York State Urban Development Corporation Act of 1968 ("UDC Act") and is a corporate governmental agency of the State constituting a political subdivision thereof. McKinney's

Unconsolidated Laws §§6251 et seq. The UDC Act created UDC in order that the State

may provide or obtain the capital resources necessary to acquire, construct, reconstruct, rehabilitate or improve such industrial, manufacturing, commercial, educational, recreational and cultural facilities, and housing accommodations for persons and families of low income, and facilities incidental or appurtenant thereto, and to carry out the clearance, replanning, reconstruction and rehabilitation of ... substandard and insanitary areas. [Id. at §6252.]

To accomplish these purposes, UDC is authorized, inter alia, to acquire, hold and dispose of property, provide for construction, cause preparation of plans and designs and manage any project authorized by the UDC Act. Id. at §§6254(5), (9), (13) and (14). Clearly UDC is a creature of the State in the manner recognized in the Town of Amherst Declaratory Ruling, and UDC's actions are undertaken to achieve legislated State policies and purposes; whatever authority UDC may have is subject to legitimate governmental power exercised by the Legislature on behalf of the public welfare. Black River Regulating District v. Adirondack League Club, 307 N.Y. 475, 489 (1954).

UDC, although an owner of property slated for development pursuant to its Development Plan, cannot assert property rights against the State as if it were an individual person. The rights of a governmental subdivision do not become vested as against the State. Krull v. Bennett Homes & Lumber Co., 258 A.D. 10 (Fourth Dept. 1939), reh. den. 259 A.D. 790, aff'd 284 N.Y. 645. The exemption from freshwater wetlands regulation in ECL §24-1305 is

therefore unavailable to UDC unless made available by express action of the Legislature.

It is thus relevant to examine the specific language of the Act to determine if it overrides the vested rights doctrine to make grandfathering applicable to a governmental entity such as UDC. The Town of Amherst ruling concluded that the grandfather clause in ECL §24-1305, which is keyed to land use without reference to the type of person conducting the activity, would not change the result arrived at under the vested rights doctrine. Town of Amherst at p. 9. Furthermore, there is nothing in the legislative history of ECL §24-1305 to suggest that the grandfathering provision should apply to political subdivisions of the State. Id.

The reasoning set forth above leads me to the conclusion that ECL §24-1305 does not apply to public benefit corporations, such as UDC, since they are governmental entities. Notwithstanding that conclusion, even if the statute did apply under these circumstances, the facts of the matter presented indicate that the Audubon New Community project would not be grandfathered. The express terms of ECL §24-1305 are as follows:

§24-1305. Applicability

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;

(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.

The plans, maps and other documents in the Development Plan submitted to the Town Board prior to February 1973 indicate that the Audubon New Community will be divided into three general land use areas which represent "neighborhoods", "open space" and "local centers". For purposes of ECL §24-1305(a), none of these documents constitute a final plat as contemplated by §276 of the Town Law, i.e., there is no "layout of a proposed subdivision showing roads, lot layout, approximate dimensions, key plan . . . [and] all proposed facilities unsized at suitable scale and in such detail as local regulation may require." McKinney's Town Law, §276(2)(a) and (b). Furthermore, the approval authorized by act of the Town Board on February 12, 1973, was directed toward UDC's Development Plan and resulted only in an amendment to the zoning map to generically reflect the multiple use features inherent in a New Community Development as featured at the Audubon New Community location. (See the definition of the term "New Community" in the UDC Act, McKinney's Unconsolidated Laws,

§6253(16).) Therefore, the Town Board's approval would not constitute conditional approval of a final plat.

With respect to subdivision (b) of ECL §24-1305, the materials submitted to the Town Board do not comprise a "site plan not involving a subdivision of land". As noted above, UDC's New Community application submittals describe the proposed development in terms of general land use areas, and do not describe or depict specific structures or appurtenances planned for each lot or, for that matter, in each particular land use area. The matter before the Town Board was not an application for site plan approval as to any specific lots providing plans, drawings and renderings descriptive of the precise use intended for such lots. See Matter of Miracle Mile v. DEC, 73 A.D.2d 807 (Fourth Dept., 1979). Instead, the Development Plan application submitted to the Town Board sought and required an amendment to the Town zoning law to establish a multiple use zoning classification over a large piece of property, rather than placement of a specific structure or series of structures (e.g., an industrial park) on a particular site. Thus, the Town Board's approval of the Development Plan does not constitute "final approval" of a site plan so as to grandfather the Project in the manner intended by subdivision (b).

With respect to subdivision (c) of ECL §24-1305, the materials provided by UDC do not indicate that any building permits were issued or any other authorization granted to UDC by the Toan Board or other municipal authority for the commencement of a land use contemplated in the Development Plan.

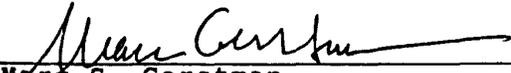
It has already been noted that general zoning approval was extended for the multiple uses contemplated by the New Community Project. However that approval is altogether different in scope and subject from the approval required by subdivision (c) of §24-1305, since the latter focuses on a specific land use, such as a residential or commercial structure, as to which the local government has exercised building approval. Nor were the freshwater wetlands areas in question used, improved or developed prior to September 1, 1975, for the purpose of developing any structures that would pertain to the Project's multiple land uses. As a result the grandfathering provision in subdivision (c) of §24-1305 does not apply in this case.

In any event, UDC's plans for development of the Project have been altered since the Development Plan was approved by the Town Board. The September 1981 land use plan map depicts the three general land uses (neighborhoods, major open space and local centers) in configurations which vary substantially from the land uses laid out in documents included in the 1973 Development Plan. Therefore any approvals rendered by the Town Board, had they been final approvals pursuant to the statute, would no longer apply, at least with respect to those areas modified.

In conclusion, for the reasons stated above, I find that UDC, as a governmental entity, does not have the benefit of the grandfathering exemption from the Freshwater Wetlands Act and, even if UDC could avail itself of the grandfathering exemption,

UDC has not established that the Project meets the statutory criteria for grandfathering.

Dated: Albany, New York
August 23, 1990



Marc S. Gerstman
Deputy Commissioner and
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