

STATE OF NEW YORK:  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of the  
VILLAGE OF SALTAIRE  
for a Declaratory Ruling

Declaratory  
Ruling  
DEC 24-16

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The Village of Saltaire ("Village" or "Petitioner") by its attorney Irving Like, Special Counsel, Reilly, Like, Tenety & Ambrosino, 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 Environmental Conservation Law §24-1305 exempt certain properties from designation as freshwater wetlands and from regulation as freshwater wetlands. The Petition consists of March 2, 1995 and April 25, 1995 submissions. In its Petition, the Village contends that ECL §24-1305 precluded the Department from designating freshwater wetlands BE-19 in the Village and exempts the Village-owned and privately-owned lots from freshwater wetlands permitting requirements.

Facts

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

Petitioner is the Incorporated Village of Saltaire, Fire

Island, Suffolk County, New York, acting individually and also on behalf of the owners of all properties situated within the boundaries of the incorporated Village whose names and addresses are shown on the Village tax assessment rolls and whose properties are located within freshwater wetland BE-19 on the final freshwater wetland inventory map for Suffolk County.

The Village of Saltaire owns the following properties within BE-19 as shown on the Suffolk County Tax Map: 0503-01-01-020, 0503-01-01-033, 0503-02-01-055.2, 0503-02-01-044.7. The remaining properties are privately owned.

The final freshwater wetlands map for Suffolk County shows that portions of the Village are located in freshwater wetland BE-19. Exhibits B and G to the Petition indicate the extent of development in the Village as of March 7, 1988.

Freshwater wetland BE-19 includes improved and unimproved lots which are located on the Partition Map of 1878, Saltaire Map No. 114 and Supplemental Map No. 484 which were filed respectively, on July 16, 1878, March 29, 1911, and January 20, 1913, in the Suffolk County Clerk's Office.<sup>1</sup> The Village has adopted a Building Construction Administration and Zoning Code

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<sup>1</sup>Pages 2 and 3 of the Petition incorrectly indicate that the Partition Map of 1878 was filed on July 16, 1976. It was filed on July 16, 1878.

("Saltaire Code") which was in effect prior to September 1, 1975.<sup>2</sup> Prior to September 1, 1975, Section 18-6 of the Zoning Code specified that a building permit is required in order to construct buildings or structures or portions thereof in the Village. No other permits, approvals or authorizations were required. The Superintendent of Buildings/Building Inspector is responsible for issuing building permits. Saitaire Code, §18-4. Prior to September 1, 1975, the Village Board of Trustees or other appointed body in the Village of Saitaire was not and are currently not authorized to issue conditional approvals of a final plat as the term is defined in §7-728 of the Village Law or to issue site plan approvals for development.

#### Discussion

I. ECL §24-1305 applies to permit requirements and does not apply to the designation of freshwater wetlands pursuant to ECL §24-0301.

The Petition presents an issue of first impression: whether ECL §24-1305 affects the Commissioner's authority to designate approximately 35 acres of freshwater wetlands in the Village of Saitaire pursuant to ECL §24-0301.<sup>3</sup> Chapter 771 of the Laws of

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<sup>2</sup>Saitaire Code Chapters 18 and 55 as adopted and last amended on September 22, 1973 are pertinent for the purposes of this Ruling.

<sup>3</sup>Pursuant to ECL §24-0301, the Commissioner of Environmental Conservation is required to "identify and map those individual wetlands in the State of New York which shall have an area of at least twelve and four-tenths acres or more..." Freshwater wetlands BE-19 is a Class II wetland and consists of approximately 35 acres. The final map for Suffolk County depicting BE-19 became effective on May 26, 1993.

1976 amended the Freshwater Wetlands Act by adding a new §24-1305. This new section specifically exempted from freshwater wetlands permitting requirements any land development, improvement or other use of land for which certain approvals had been granted by local authorities prior to September 1, 1975. It did not alter the Commissioner's authority to designate lands as freshwater wetlands pursuant to ECL §24-0301. In fact, the statutory provisions of ECL §24-1305 quite clearly and explicitly state:

[t]he 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. (Emphasis added).

They do not refer to the Commissioner's authority to designate freshwater wetlands pursuant to ECL §24-0301 but refer only to certain land uses of such on designated wetlands or portions thereof which have received prescribed approvals.

Where the words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation.

McKinney's Statutes §76.

Even assuming arguendo that the language of ECL §24-1305 is ambiguous, "the primary consideration...is to ascertain and give effect to the intention of the Legislature." McKinney's Statutes

§92. The following excerpt of the Assembly Sponsors' memorandum in support of the 1976 amendments, unquestionably provides that ECL §24-1305 was meant only to address freshwater wetlands permitting and not wetlands designation where a project had already received final approval by local governments prior to September 1, 1975:

This bill would exempt from the provisions of the Freshwater Wetlands Law any land development, improvement or other use of such land for which conditional approval had been granted by the local authorities prior to September 1, 1975 (the effective date of the Freshwater Wetlands Law)... . The Department of Environmental Conservation is presently interpreting 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. Thus, even those land development projects which would, as a matter of law, be determined to have perfected so-called "vested rights" and had gone through whatever local regulations required to obtain approval, if any, from local authorities, are now being required to terminate any further work on the land and to seek permission under this legislation before continuing. (Emphasis added). Memorandum in Support, A.11369, Assemblymen Lee and Robach.<sup>4</sup>

The legislative history and the explicit language of ECL §24-1305 do not support an interpretation that the Commissioner is prohibited from designating freshwater wetlands pursuant to

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<sup>4</sup>See also, Legislative Bill Jacket including July 12, 1976 Memorandum Department of Environmental Conservation; July 14, 1986 Memorandum Division of Budget; and July 16, 1976 Memorandum Department of State. Miracle Mile Associates v. Department of Environmental Conservation, 98 Misc. 2d 519, 526, aff'd 73 AD2d 807 (3rd. Dept., 1979) (the fundamental purpose of the Act was to remedy the gross inequities inuring to owners and developers against whom the Act was retroactively applied).

ECL §24-1305 where local approvals were received for a project prior to September 1, 1975. Consequently, irrespective of a grandfathering determination regarding a specific project, the Commissioner is authorized to designate freshwater wetlands. The Commissioner, therefore was authorized to designate freshwater wetlands BB-19 in the Village of Saltaire pursuant to ECL §24-0301.

II. The provisions of ECL §24-1305 are not applicable to the Village-owned lots.

The Petitioner is seeking a determination that its properties are exempt from freshwater wetlands permitting requirements. The Department's prior Declaratory Ruling in Town of Amherst, DEC 24-12 (December 21, 1988), is applicable in this case. In that Ruling, it was determined that the provisions of ECL §24-1305 were not applicable to the Town of Amherst because it was a municipal corporation. After examining the relevant case law concerning the applicability of a statutory grandfather clause to municipal corporations in the State of New York and the provisions of ECL §24-1305, it was determined that "[t]here is nothing in the language or legislative history of §24-1305 to suggest an intent that the vested rights doctrine be made available to municipalities or by any other means that the 'grandfather clause' should apply to political subdivisions of the State." Town of Amherst, at p.9.

For the purpose of the instant ruling, the Village of Saltaire, like the Town of Amherst, is a municipal corporation. Village Law §1-102. Accordingly, the Village-owned lots are not covered by the exemption in ECL §24-1305. Furthermore, as in the factual situation reviewed in the Amherst ruling, it appears that even if the exemption were applicable to the Village-owned lots, these lots would not be deemed grandfathered pursuant to ECL §24-1305. See Discussion in Point III below.

III. The Petitioner has failed to demonstrate that all of the lots in the Village are grandfathered solely by virtue of the filed maps and the adoption of zoning Code prior to September 1, 1975.

The Petitioner contends that the provisions of ECL §24-1305 are applicable and therefore all lots are grandfathered because certain Maps depicting the Village of Saltaire were filed in the Suffolk County Clerk's Office prior to September 1, 1975. The Petitioner further contends that the Village Zoning Ordinance together with these filed maps constitutes authorization for development of all the lots for residential purposes so that final approval and development of all lands in the Village was authorized prior to September 1, 1975.

It must be determined whether the filed maps constituted final approval for the purposes of ECL §24-1305. The provisions of ECL §24-1305 are to be examined in sequential order. Dwight Enterprises, Inc., DEC 24-03 (September 18, 1979), Klein v.

~~Perle~~, FWAB 77-5, (July 10, 1978).

A. VCL §24-1305(a)

~~Perle~~ §24-1305(a) first provides that:

"final approval" is in the case of a 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 the lots are situated in the Village of Saltaire, it ~~must~~ be determined whether there has been a final approval under ~~Section~~ 7-728 of the Village Law.

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. A Village Board of Trustees may authorize and empower a planning ~~Board~~ or Commission to approve the development of plats entirely ~~or~~ partially developed which have been filed in the County ~~Clerk's~~ office. Absent this authorization, a Planning Board or ~~Commission~~ cannot authorize the approval of the layout of ~~proposed~~ subdivisions as contemplated by the Village Law. There ~~is no~~ indication in the record that the Village of Saltaire Board ~~of Trustees~~ were authorized to approve of subdivision plats as ~~contemplated~~ by Village Law §7-728 or that subdivision approval  ~~pursuant~~ to Village Law §7-728 was obtained for any of the lots  ~~within~~ the Village of Saltaire. The Petition and the Saltaire

Code further indicate that prior to September 1, 1975, no governmental body in the Village was authorized to approve plats or the development of plats as set forth and contemplated by Village Law §7-728. Accordingly, because no such approval could have been granted prior to September 1, 1975, the provisions of ECL §24-1305(a) are not applicable in this case.

The three maps<sup>5</sup> depicting the Village of Saltaire are not substitutes for subdivision approval in Village Law §7-728 by their reference in the Village Code.<sup>6</sup> The Partition Map of 1878 was filed by the Fire Island Land Development Company to merely indicate the boundaries of lots depicted thereon. The remaining maps are further versions of the 1878 Map. Section 55-1 of the Saltaire Code refers to all three of these maps only in order to

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<sup>5</sup> The Partition Map of 1878, filed July 16, 1878, the Map of Saltaire Property of the Fire Island Development Company, filed March 29, 1911 as Map No. 114 Town of Islip; Supplemental Map of Saltaire filed January 20, 1913 as File No. 484, Town of Islip).

<sup>6</sup> "Conditional approval" is defined in the Village Law 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 Section [7-728]." 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.

designate which lands constitute residential, business and utility districts and to designate which lots constitute bay front, ocean front, interior lotted and unlotted acreage areas. Sections 55-6 through 55-8 of the Saltaire Code define the permitted uses in each of the Districts established in the Village. Nothing contained on the maps, in the Saltaire Code or in the record in this matter, indicates that these maps were filed in the Clerk's office pursuant to Village Law §7-728 in order to involve or represent the exercise of any governmental approval or authorization for commencement of construction on the lots depicted thereon. In fact, the Saltaire Code specifically requires that building permits must be obtained prior to the commencement of any construction activity.<sup>7</sup> The Declaratory Ruling 24-15, Matter of Shumway Group Inc., DEC 24-15 (January 27, 1993), rejected arguments that a subdivision was grandfathered merely because a map depicting a subdivision was filed in the County Clerk's office. The subdivision map filing was found to not be the equivalent to the approval contained in Village Law §7-728.<sup>8</sup>

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<sup>7</sup>Prior to September 1, 1975, section 18-19 of the Saltaire Code made it unlawful to construct, alter, repair, move, remove, demolish any building or structure without first obtaining a valid building permit.

<sup>8</sup> In the Shumway ruling, the Village of Saugerties had not authorized or empowered the Planning Commission to approve plats or the development of plats as set forth and contemplated by Village Law §7-728. Because §7-728 was not applicable it was necessary to review the other provisions in ECL §24-1305 to ascertain whether they were applicable.

The facts and circumstances in the Shumway ruling are similar to the facts and circumstances involving Village of Saltaire's Petition. While the Saltaire Code recognizes the lot boundaries, these boundaries were not authorized pursuant to the procedures set forth in Village Law §7-728. Moreover, the Saltaire Code requires building permits before a permitted use may be undertaken, making it clear that the Village reviews and approves development through a permit process rather than through subdivision or site plan approval process. The February 27, 1995 certification from the Village's Attorney further reiterates that "the Village Zoning and Land Use Practices since its incorporation as evidenced by the filed mapping and lotting of properties in the Village, the issuance of building permits, certificates of occupancy constituted final approval so as to authorize the development and construction of one family houses and other uses permitted by the Code, of each undeveloped lot..."(emphasis added). Petition Exhibit J. The Village Attorney's certification therefore confirms that a building permit was needed because the filed maps alone did not constitute approval to undertake construction.

In summary, prior to September 1, 1975 the Saltaire Code did not require approval as used in Section 7-728 of the Village Law. The filed maps were not the equivalent of approval used in Section 7-728 of the Village Law. Accordingly, subsection (a) of §24-1305 is not applicable.

B. ECL §24-1305(b)

ECL §24-1305(b) provides that "final approval" is "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 Petition does not indicate nor provide any evidence that the Village or other approval authority possessed site plan approval authority before the effective date of the Act. The Saltaire Code contains no authorization for site plan approval. Consequently, this subsection (b) of §24-1305 is not applicable.

C. ECL §24-1305(c)

As it has been determined that neither subsection (a) nor (b) is applicable, it must then be determined whether subsection (c) of ECL §24-1305 is applicable. Subsection (c) provides that "final approval" is:

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. (Emphasis added)

Prior to September 1, 1975 anyone wishing to commence construction or otherwise develop a lot in the Village was required to obtain a building permit. Saltaire Code, §18-9.

Absent a building permit, a "permitted use" could not occur on a conforming lot in the Village. Therefore, ECL §24-1305(c) is applicable and does grandfather land use, improvements or development which secured a valid building permit prior to September 1, 1975. This determination is limited, however to only land uses, improvements, or development for which building permits were secured prior to September 1, 1975. In other words, if a building permit was not secured for a regulated activity prior to September 1, 1975, a freshwater wetlands permit would be required thereafter.<sup>9</sup> Because the Petition does not provide any evidence concerning whether building permits were issued for individual lots prior to September 1, 1975, we are unable to make a case-by-case determination with respect to development on each individual lot. Accordingly, it will be incumbent upon the Region 1 Permit Administrator, in coordination with the Regional Attorney or Wetlands Program Counsel, to make case-by-case determinations pursuant to 6 NYCRR §663.3(o) utilizing the guidance provided by this Ruling.<sup>10</sup> Furthermore, if certain lots

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<sup>9</sup>Regulated activities are defined in ECL §24-0701(2) and more particularly in 6 NYCRR §663.3(z).

<sup>10</sup>6 NYCRR §663.3(o) provides in pertinent part that "[p]ersons wishing to rely on an approval given by the local government prior to September 1, 1975 should request a decision from the regional permit administrator as to whether the approval given meets the requirements of section 24-1305 of the act. To request such a decision, permit applicants should write to the regional permit administrator, giving details of the approval relied upon and enclosing supporting documentation. The burden of showing the exemption from the permit requirements of the act rests on the person seeking to benefit from the exemption."

in the Village have been improved pursuant to validly-issued building permits, this does not "grandfather" all future regulated activities on those lots. This determination is limited to the scope of the development authorized by the building permit which was secured prior to September 1, 1975.

The Memorandum of Law accompanying the Petition urges that two prior Declaratory Rulings are applicable-Dwight Enterprises, (DEC 24-03) and Bernard Muschel (DEC 24-13). I find that both rulings are reconcilable with the instant ruling. In Dwight Enterprises, although site plan approval was required, the Petitioner had already undertaken improvements associated with a commercial park project which previously received town approval. In the instant Petition, construction could not commence in Saltaire without a building permit. In Bernard Muschel, the Petitioner received site plan approval for a 66 unit apartment complex. Again, for the purposes of the instant Petition, site plan approval was not required in order to commence construction.

In addition, I am constrained by the provisions of ECL §24-1305 to find that the filed maps did not constitute final approval. The provisions of ECL §24-1305 cannot be liberally interpreted. Matter of Biggica v. State of New York, 70 AD2d 59 (2nd Dept., 1979).

CONCLUSION

This ruling does not mean that further development which is not exempt pursuant to ECL §24-1305 in the Village must be curtailed. Rather, consistent with the necessary balancing of environmental and socio-economic concerns, Region 1 personnel of the Department of Environmental Conservation will evaluate these project applications, when submitted in the form of an ECL Article 24 permit application, and will continue to assist Village residents in their efforts so that any adverse impacts to the subject wetlands can be minimized and avoided. It should be noted that Department personnel have also been willing to address and assess Village-wide wetlands impacts and concerns in connection with freshwater wetlands permitting in the Village. Village residents should continue to work with the Department personnel in this regard.

It should also be noted that, although certain projects may be exempt from wetlands regulation under state law, the United States Army Corps of Engineers has jurisdiction, under §404 of the Federal Clean Water Act ("CWA"). The Department has no authority to determine the applicability of this Federal Law. If

A CWA §404 permit is required by federal law, a water quality  
certification pursuant to CWA §401 must be obtained from this  
Department.

  
Frank V. Bifera  
Acting General Counsel

Dated: July 27, 1995  
Albany, New York

QuineBlue5/Sabaire

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