

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of

HENRY KESSLER et al.

For a Declaratory Ruling Pursuant
to Section 204 of the State Administrative
Procedures Act

DECLARATORY
RULING
25-01

Henry Kessler and his associates ("KESSLER") have applied for a declaratory ruling pursuant to Section 204 of the State Administrative Procedure Act and Section 619 of 6 NYCRR. Kessler has applied to this Department for a permit to subdivide an area parts of which are mapped as tidal wetlands on Shelter Island. TW 15282-0114. A hearing was held on May 6, 1981, by this Department and Kessler awaits a decision from the Commissioner. Kessler proposes to prepare deeds for each of the four parcels into which he intends to subdivide the property. Each deed would convey a fee on limitation, the so-called "fee single determinable," that would last so long as the Department has not denied the permit. If the Department denies the permit, the fee would revert to the grantor. In other words, if the permit is not granted, between the parties the conveyances will be automatically rescinded and the fee will revert. Nothing more will be done to the land before the Commissioner's decision.

Kessler wishes to know whether this is a violation in this case, without either any assurance as to the likelihood or probability that a permit will issue from this Department or any indication as to whether I would decide any other matter in the same way.

DISCUSSION:

Pursuant to the Tidal Wetlands Act and regulations, no

subdivision of land can be done without a permit. ECL §25-0302 and 6 NYCRR 661.5(b)(57). Failure to comply with the tidal wetlands regulations is a violation for the first offense and a misdemeanor thereafter pursuant to ECL §71-2503(2).

Kessler has referred me to section 15.20(2)(d) of the Penal Law, which provides that "A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless such mistaken belief is founded upon an official statement of the law contained in...an interpretation of the statute or law relating to the offense, officially made or issued by a public servant, agency or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law."

Further, section 204 of the State Administrative Procedure Act holds that [a] declaratory ruling shall be binding upon the agency unless it is altered or set aside by a court. The agency may not retroactively change a valid declaratory ruling...."

In light of Kessler's situation and offering Kessler no indication as to whether his tidal wetlands permit will be issued, I hereby find that I will not prosecute as a violation or misdemeanor the above-described subdivision of land pursuant to deeds conveying a fee on limitation.

DATED: May 19, 1981
Albany, New York

Richard A. Persico
General Counsel/Deputy Commissioner