

In the Matter of the Application for
a Freshwater Wetlands Permit pursuant
to Article 24 of the Environmental
Conservation Law,

by

GHP Development Corp. and
Gregory H. Pecoraro,

Applicants.

**Ruling on Motion for
Protective Order**

DEC #1-4728-02177/00004

April 22, 2008

SUMMARY

This ruling denies a motion for a protective order made by Staff of the Department of Environmental Conservation (DEC Staff) regarding two discovery demands made by GHP Development Corp. and Gregory H. Pecoraro (applicants). The ruling directs DEC Staff to comply with the applicants' discovery demands within thirty days of this ruling.

PROJECT DESCRIPTION

The applicants have applied for a freshwater wetlands permit to construct a dwelling, driveway and floating dock on a lot located on Kime Avenue near the intersection with Arbour Street, West Islip, Suffolk County. The proposed dwelling and driveway would be located in the adjacent area of Class I regulated freshwater wetland BW-2, known as Deer Lake. The dwelling would be within sixteen feet of the wetland boundary. The floating dock would be located in the freshwater wetland. Clearing and ground disturbance is proposed within the adjacent area and ten feet of this freshwater wetland.

PROCEEDINGS

The instant application is one in a series made by the applicants to construct homes on Long Island. At issue in this case are permit applications for homes around Deer Lake, which lies across the border of the Towns of Islip and Babylon in Suffolk County. While the information in the record is far from complete regarding the history of these applications, the following can be gleaned from submissions to date.

On July 30, 1998, the applicants purchased two lots at a tax sale (Suffolk County tax map numbers 500-335-1-2 and 500-335-1-3) bordering Deer Lake (transcript 17 - 19). A home was built on lot #500-335-1-2 and transferred to a person named Homan (t. 23).

Lot #500-335-1-3 was subsequently subdivided into three lots, #500-335-1-3.1, #500-335-1-3.2 and #500-335-1-3.3 (t. 23). Homes were then built on lots #500-335-1-3.1 and #500-335-1-3.2 and these parcels were sold. Both these homes required DEC freshwater wetlands permits which were apparently issued on June 22, 1998 (DEC permit nos. 1-4728-02173/00001 and 1-4728-02175/00001).

Lot #500-335-1-3.3 was then further subdivided into two lots #500-335-1-3.4, and #500-335-1-3.5. Lot #500-335-1-3.4 is approximately five feet wide and may have been transferred to an adjoining neighbor (the record is unclear on this point, because the applicants claim to have transferred it, but DEC Staff indicates that the applicants continue to pay property taxes on it) (t. 26).

Lot #500-335-1-3.5 is the subject of the instant application. It also appears to have been the subject of earlier communications between the applicants and DEC Staff. The record contains a copy of a freshwater wetlands permit (DEC permit #1-4728-2177/00001) dated June 22, 1998 which authorizes the creation of a grassed area, the installation of a vinyl clad chain link fence and planting of a vegetated buffer. At some point after this date and before May 28, 2002, the applicants applied to put a dwelling on this property (DEC application #1-4728-2177/00003). By letter dated May 28, 2002, DEC Staff notified the applicants that the application was incomplete. Apparently, three years later there was a phone conference between Mr. Pecoraro and DEC Staff member Mark Carrara on August 1, 2005 and the applicants provided the information requested by DEC Staff in a letter received by DEC Staff on September 21, 2005. By letter dated September 22, 2005, DEC Staff responded stating that because a timely response was not received with respect to the previous notice of incomplete application, the previous application had been deemed withdrawn.

Under a cover letter dated October 18, 2005, the applicants filed a new application (DEC #1-4728-02177/00004) and associated materials with DEC Staff to construct a new two-story house and driveway on lot #500-335-1-3.5.

By letter dated November 15, 2005, DEC Staff informed the applicants that the application was complete.

By letter dated November 21, 2005, Mr. Pecoraro wrote to DEC Staff and provided additional background regarding this parcel.

A Notice of Complete Application was published in the *Suffolk County News* on December 1, 2005 and in DEC's electronic *Environmental Notice Bulletin* on November 30, 2005.

By letter dated July 21, 2006, DEC Staff denied the application.

By letter received by DEC Staff on August 16, 2006, the applicants requested a hearing on the denial.

On December 15, 2006, the matter was referred to DEC's Office of Hearings and Mediation Services. On December 18, 2006, I was assigned to the matter.

A conference call was held with the applicants and DEC Staff on January 10, 2007. On this call it was agreed DEC Staff would propose hearing dates.

Another conference call was held on April 4, 2007, and on this call it was agreed that the hearing would occur on October 23 and 24, 2007, the earliest date DEC Staff was available. During this call, the applicants disclosed that they would be appearing *pro se* through Mr. Pecoraro and he intended to call only one witness, DEC Staff member Steven Lorence, who in the past had served as a manager of DEC's Bureau of Habitat in DEC's Region 1 (t. 11). Mr. Lorence remains with DEC Staff, but has since moved to Region 4 (Albany area). The applicant seeks Mr. Lorence's testimony regarding a conversation that was had while Mr. Lorence was still in Region 1, probably in the Spring of 1998. According to the applicant, Mr. Lorence at one point had proposed putting a home on the lot now in question (t. 13).

By letter dated April 12, 2007, DEC Staff requested a demonstration from the applicants of the relevance of Mr. Lorence's testimony before inquiring as to the availability of Mr. Lorence to testify at the hearing.

By e-mail dated April 18, 2007, the applicants responded.

By e-mail dated June 4, 2007, DEC Staff responded that it believed Mr. Lorence's testimony would not be material to the hearing and should be excluded.

A conference call was held during which the dispute regarding Mr. Lorence's testimony was discussed and not resolved.

In addition, the parties could not agree on what the issue to be adjudicated should be. DEC Staff argued for a narrower issue: does the application for a freshwater wetlands permit meet permit issuance standards based on the most recent application materials. The applicants argued that the issue should also include earlier application materials and discussions involving the other lots owned and developed by the applicants. Because of these disputes, it was determined that only the legislative hearing and issues conference should be held on October 23, 2007. The adjudicatory hearing would be held at a later date, after a written issues ruling and appeals had been decided. This was memorialized in an October 1, 2007 email from the ALJ.

A Notice of Legislative Public Hearing and Issues Conference was published in DEC's electronic *Environmental Notice Bulletin* on September 26, 2007 and in *Newsday* on October 2, 2007.

By email dated October 15, 2007, DEC Staff changed its position on both Mr. Lorence's testimony and the issue for adjudication. In this email, DEC Staff requested that the adjudicatory hearing begin after the issues conference. However, Mr. Lorence was not available on October 23, 2007, so the adjudicatory hearing could not be convened.

By letter dated October 16, 2007, the Town of Islip stated its opposition to the application.

On October 23, 2007, the legislative hearing occurred at 10:00 a.m. at the West Islip Fire Department, 177 Watts Place, West Islip, NY. No members of the public attended. The applicants provided a packet of information for the legislative hearing record, including four letters in support of the application, written comments by Joseph Guarino, aerial photographs of the proposed project's site, a copy of a 2/15/94 DEC permit to construct three homes on property adjacent to the site, other documents referenced above, and a copy of a June 22, 1998 DEC permit for construction of another home.

Immediately following the legislative hearing, a site visit occurred. DEC Staff representatives and Mr. Pecoraro walked the site and provided background information to the ALJ.

Following the site visit, the issues conference was convened.

At the issues conference, the parties stipulated to the issue for adjudication: does the instant application to construct a home on Suffolk County tax map #500-335-1-3.5 meet permit

issuance standards, in light of the instant application materials and information regarding the previous applications for homes on lots #500-335-1-2, #500-335-1-3.2 and #500-335-1-3.3? (t. 29). DEC Staff also seeks to introduce information regarding cumulative impacts of the proposed project, and the applicant did not object (p. 35).

The transcript of the legislative hearing and issues conference were received on November 13, 2007.

By email dated November 21, 2007, the applicants requested permission to allow a local church to use the lot for a community garden while the hearing process continued. DEC Staff responded later that day that the proposed garden was acceptable, if kept out of the buffer area described in earlier permits and no pesticides were used.

DISCOVERY

In several emails following the issues conference, the applicants requested information from DEC Staff. In order to more efficiently manage this matter, by email dated December 20, 2007, I directed the applicants to consolidate their information requests into a single, written discovery demand. After discovery was complete, I explained in my email, the adjudicatory hearing would be scheduled.

The applicants responded with a letter dated December 20, 2007 in which four discovery demands were made:

- (1) copies of any and all communications between Mark Carrera and Steve Lorence regarding this property to date, including email and written communications;
- (2) copies of everything that DEC Staff intends to produce at the hearing;
- (3) correspondence between any and all DEC Staff members regarding this property going back as far as the original subdivision that included this lot;
- (4) the application (and all related items) of Karagiannis (DEC #1-4722-01650/00004).

DEC Staff responded by email dated January 3, 2007. According to this email, applicants' discovery demands were received by DEC Staff on December 21, 2007, but were not placed in DEC Staff's counsel's mailbox until January 3, 2008. Also, in

this email, DEC Staff counsel provided a preliminary response to applicant's discovery request. With respect to demand #2, DEC Staff stated that she would make copies of all documents DEC Staff intended to produce at the hearing and share them with the applicant. With respect to demand #4, she stated that the applicant could make an appointment to review the Karagiannis file at DEC's Region 1 office. With respect to demand #1, DEC Staff counsel stated she was attempting to locate the information and on demand #3 she stated the demand was overbroad and potentially privileged.

By papers dated January 17, 2008, DEC Staff filed a motion seeking a protective order pursuant to 6 NYCRR 624.7(d) for items described in discovery demands #1 and #3. The grounds cited by DEC Staff for such protective order include that these demands: are vague and overbroad; are not relevant to the issue for adjudication; fail to describe the requested documents with reasonable particularity; and represent a "fishing expedition." DEC Staff continues that it only saves email communication for 90 days and older emails may not be available. DEC Staff also argues that some documents may be protected by attorney client privilege or attorney work product privilege.

By email dated January 23, 2008, the applicants responded that the documents requested are relevant because the instant application is tied to previous applications involving neighboring lots owned by the applicants. The applicants also maintained that they were not seeking privileged information. The applicants also asked that a forensic search be done of DEC's email system to identify emails from the past. In response to DEC Staff's claim of a fishing expedition, Mr. Pecoraro responded that he didn't even like fishing.

By email dated February 12, 2008, the applicants confirmed that the January 23, 2008 email was the complete response to DEC Staff's motion.

RULING

At the issues conference, the parties stipulated to the issue for adjudication: Does the instant application to construct a home on Suffolk County tax map #500-335-1-3.5 meet permit issuance standards, in light of the instant application materials and information regarding the previous applications for homes on lots #500-335-1-2, #500-335-1-3.2 and #500-335-1-3.3? (t. 29).

This issue will allow the parties to introduce evidence at the hearing beyond information involving only the instant

application. Because of this, information regarding the applications for permits on all tax map lots identified in the issue for adjudication could be relevant at the hearing, and therefore, the applicants' discovery demands for information about them is not irrelevant nor is it a fishing expedition.

DEC Staff's claim that discovery demands #1 and #3 fail to describe the requested documents with specific particularity is also rejected. Because the applicant is *pro se*, the demands may not be in the usual form, but they are easily understood.

The first demand for "copies of any and all communications between Mark Carrera and Steve Lorence regarding this property to date, including email and written communications" is not unclear. The reference to "this property" includes all the tax map lots listed in the issue for adjudication and "to date" includes communications from July 30, 1998 (when the applicant bought the properties) until December 20, 2007 (the date of the discovery demand).

The third demand for "correspondence between any and all DEC Staff members regarding this property going back as far as the original subdivision that this lot was part of" should be similarly interpreted.

Since the applicants do not seek privileged documents, DEC Staff's arguments on this point are moot.

With respect to applicants' request for a forensic search of DEC's email system, this request is denied. DEC Staff states that emails are only retained for 90 days, however, many DEC employees archive emails electronically and/or print them out in order to save them (as I have done with the emails relevant to this ruling). DEC Staff shall search its electronic archives and relevant files in order to comply with the applicants' request.

DEC Staff shall comply with the applicants' discovery demands within 30 days of this ruling.

April 22, 2008
Albany, NY

/s/
P. Nicholas Garlick
Administrative Law Judge

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