

In the Matter of the Application of

JARAL PROPERTIES

for a Permit and a Variance to Construct a Parking Lot in a Wild, Scenic and Recreational Rivers System, Pursuant to Environmental Conservation Law Article 15, Title 27 (Wild, Scenic and Recreational Rivers System), and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York Part 666 (Regulation or Administration and Management of the Wild, Scenic and Recreational Rivers System in New York State Excepting Private Land In the Adirondack Park).

RULING ON
MOTION FOR
PROTECTIVE ORDER

DEC Project No.
1-4730-01220/00001

(December 12, 2007)

INTRODUCTION/PROCEEDINGS

In this Wild, Scenic and Recreational Rivers System (WSRR) permit application, Applicant Jaral Properties (Applicant or Jaral) seeks a WSRR permit and a use variance to construct a portion of a paved parking lot within the Peconic River Corridor. The portion of the project proposed within the regulated area is approximately 64 parking spaces and associated landscaped commercial area comprising approximately 26,200 square feet of regulated land. The total project is a paved parking lot of approximately 464 parking spaces, most of which would be located outside the regulated WSRR Peconic River Corridor. The project would support proposed expansion of an existing hotel facility located on property adjacent to the WSRR system Peconic River Corridor.

Staff of the New York State Department of Environmental Conservation (the Department or DEC) is opposed to issuing a permit. Following a legislative hearing and issues conference, an issues ruling dated April 3, 2007 was issued. No petitions for party status were filed; the only parties to the case are the Department Staff and the Applicant. The issues identified for

adjudication are whether the project complies with the permitting standards (6 NYCRR 666.8) and use guidelines (6 NYCRR 666.13) and in addition, whether Applicant's project complies with the use variance standards (6 NYCRR 666.9). Presumably, because Applicant acknowledges that the project does not comply with the permitting standards and use guidelines, the adjudicatory hearing will focus upon whether Applicant's project complies with the use variance standards of subdivision 666.9(a).

Following the issues conference, at the Applicant's request, the matter was adjourned without date to allow for further discovery. Applicant filed a discovery request dated January 30, 2007. By letter dated September 7, 2007, Applicant explained that Department Staff had not responded to the discovery request (nor to a prior demand dated December 20, 2006). Applicant requested an order requiring Department Staff to comply with the request for discovery. (Only the January 30, 2007 discovery request was filed with the Office of Hearings and Mediation Services).

In a September 24, 2007 telephone conference, I accepted Department Staff's representation that the Department's Region 1 Counsel's Office never received the discovery request. In addition, Department Staff requested an opportunity to file a motion for protective order. A schedule for further filings was agreed upon and those filings were received in a timely manner.

The filings are summarized as follows. Applicant filed a two-page Notice for Discovery and Inspection, dated January 30, 2007. In response, Department Staff filed a Notice of Motion and Motion for Protective Order (the Motion), executed by Kari E. Wilkinson, Assistant Regional Attorney (both dated October 15, 2007). Applicant then filed an Affirmation in Opposition to the Department Staff motion (dated October 20, 2007). Finally, Department Staff filed a Reply to the Affirmation in Opposition (dated October 24, 2007).

DISCUSSION

Ultimately, a determination whether to grant or deny this WSRR permit application necessarily focuses on whether this Applicant has demonstrated compliance with the statutory and regulatory requirements of ECL article 15, title 27 and 6 NYCRR part 666, which is the proper subject of this permit hearing. This is a site specific analysis. Evidence of issuance of permits or variances (or denial of permits or variances) for other properties will be of secondary importance (at best), and likely not relevant to determining compliance with the statutory and regulatory requirements of the WSRR program.

Section 624.7(b) of 6 NYCRR provides for discovery in Departmental permit hearings following an issues conference, generally in conformance with the provisions of the New York Civil Practice Law and Rules (CPLR).

Department Staff contends that compliance with this discovery request would overburden staff resources, that the discovery request is overbroad and vague and that, in balancing the respective parties' interests, disclosure would be more harmful to the interests of the government than the interests of the Applicant in obtaining disclosure.

Applicant responds that it paid approximately one million dollars for the small parcel of land at issue, and seeks to locate only 64 parking spaces on the parcel. Without these parking spaces, Applicant contends, it will not be able to further develop the adjoining hotel resulting in a loss of millions of dollars for Applicant.

Following is a discussion of Department Staff's opposition to the discovery request and the Applicant's response.

Paragraphs 1(a) through (c)

In discovery request paragraph #1, Applicant requests:

"(1) The names, addresses and position of employ of all witnesses known to the Department of Environmental Conservation's representatives who:

(a) Have knowledge of the enforcement of the Wild, Scenic and Recreational River Act within the Peconic Bay [*sic*] Corridor.

(b) Any and all individuals who performed inspections of any property for the purposes of an application pertaining to the Wild, Scenic and Recreational Rivers Act within the Peconic Bay [*sic*] Corridor from 1990 to present.

(c) Any and all individuals who had any discussions, correspondence, conversations or contact with the current application by the Applicant, Jaral Properties."

Department Staff contends that this first discovery request is overbroad and irrelevant to the matters at issue in this WSRR permit hearing. Department Staff, citing *Konrad v 136 East 64th Corporation*, 209 AD2d 228 (1st Dept. 1994), contends that document requests "must be relevant, describe documents with 'reasonable particularity,' not impose an undue burden and not represent a 'fishing expedition.'" See also, *Alpha Funding Group*

v Continental Funding, LLC, --- N.Y.S.2d ----, 2007 WL 3084868 (N.Y.Sup.), 2007 N.Y. Slip Op. 27431 (Oct. 23, 2007) (document request seeking disclosure of all loans that financial institution closed regardless of whether they included its competitor's former customers was overbroad and palpably improper, and, thus, institution's answer would not be struck for failure to respond to the document request); *Gilman & Ciocia, Inc. v David Walsh*, 845 N.Y.S.2d 124, 2007 N.Y. Slip Op. 08410 (2d Dept., Nov. 7, 2007) (Supreme Court providently exercised its discretion in denying plaintiff's motion to compel defendants to respond to contested discovery in contract action and in granting defendants' motion for protective order with respect to contested demands, where demands at issue were palpably improper in that they sought, inter alia, irrelevant and/or confidential information, or were overbroad and burdensome).

Preliminarily, Applicant's request for discovery is poorly worded, and consequently unclear. As to paragraph (1) of Applicant's request for discovery, Department Staff must identify the names, addresses and position of all witnesses Staff intends to present in this administrative hearing. Beyond that, it appears that Applicant seeks in subparagraphs (1a) and (1b), to have the Department Staff identify any and all persons who have knowledge of enforcement of the WSRR act within the Peconic River Corridor (Applicant erroneously refers to the 'Peconic Bay Corridor'), or who performed inspections of any properties for purposes of a WSRR permit review. Whether Applicant intends that "any and all persons" is limited to "witnesses" is unclear. Nonetheless, I agree with Department Staff that these requests are overbroad and unduly burdensome. Department Staff's motion for protective order is granted with respect to discovery request (1a) and (1b).

However, in request (1c), Applicant seeks identification of witnesses including "any and all individuals who have had any discussions, correspondence, conversations, or contact with the current application by the Applicant, Jaral Properties." Notice for Discovery and Inspection. This request is limited in scope to the current permit application under review. I direct Department Staff to comply with this discovery request, limited so that Department Staff must identify only those individuals who have reviewed this permit application or who have written or received correspondence pertaining to this permit application. Further, Department Staff must indicate whether any such persons are potential Department Staff witnesses in this matter.

Paragraph 2 and 3

Department Staff contends that it already has provided these documents to Applicant in response to an earlier discovery request dated October 26, 2006. Department Staff offers to provide the material a second time, if requested by Applicant. No protective order is sought with respect to discovery request paragraphs #2 and #3.

Paragraph 4

Applicant seeks all documents pertaining to (a) enforcement of the WSRR Act within the Peconic River Corridor from 1990 to present; and (b) any instructions or directives with regard to the WSRR Act within the Peconic River Corridor from 1990 to present, in general. Applicant cites several cases for the general proposition that pursuant to Public Officers Law (POL) Article 6, Freedom of Information Law (FOIL), the Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy. *Matter of Beechwood Restorative Care Center v N.Y.S. Dept. of Health*, 5 NY3d 435, 440 (2005) (*additional citations omitted*). But Applicant has made a discovery request pursuant to 6 NYCRR Part 624, not a FOIL request.

Nonetheless, to the extent that responsive documents are promulgated Departmental "instructions and directives," Department Staff asserts that the Department's policy and guidance documents are available to the public at the Department's webpage. No protective order is sought with respect to discovery request paragraph #4 pertaining to promulgated Departmental "instructions and directives." Department Staff is directed to provide Applicant with the web address(es) for webpages containing responsive policy and guidance or in the alternative, provide copies of responsive policy and guidance documents to Applicant.

However, to the extent responsive documents are intra-agency communications, Department Staff cites *Cirale v 80 Pine Street Corp.*, 35 NY2d 113, 359 NYS2d 1, 316 NE2d 301 (1974) for the proposition that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, and on balance, the overall public interest would be better served by non-disclosure. In elaborating on this point, Department Staff explains that disclosure of intra-agency documents would have a chilling effect upon the Department's policy making process; that if such

documents were subject to discovery, then Department staff would be disinclined to discuss alternative or opposing opinions or fully discuss possible options or scenarios in their review of particular projects, hobbling regulatory functioning to the detriment of the greater public interest.

As presented by Department Staff in the abstract, without viewing any particular contested documents *in camera* and not knowing between what persons the communication occurred, I am unpersuaded that the public interest privilege applies in these circumstances. Nonetheless, to the extent that this request pertains to intra-agency documents, I agree with Department Staff that the request is overbroad and vague, amounting to a "fishing expedition", and further, that compliance with the request would be unduly burdensome to Department Staff's limited resources. *Konrad, supra*. Department Staff's request for protective order is granted with respect to intra-agency documents responsive to Applicant's discovery request paragraph #4.

Paragraphs 5 and 6

Department Staff states it has already responded to these requests through Applicant's earlier discovery request dated October 26, 2007. No protective order is sought with respect to discovery request paragraphs #5 and #6.

Paragraph 7

Applicant requests copies of "any and all engineering reports, impact statement or environmental reviews of any kind, pertaining to the Peconic Bay from 1990 to present." Department Staff contends that the request is not relevant to the permit application proceeding and moreover, that Department Staff is not required to perform Applicant's research.

Again, even assuming the request pertains to the Peconic River Corridor, in which the project is located, rather than Peconic Bay, this request is, on its face, overbroad and reasonably characterized as a "fishing expedition." Department Staff's request for protective order is granted with respect to Applicant's discovery request paragraph #7.

Paragraph 8

In this paragraph, Applicant requests copies of "[a]ny releases, and any other type of settlement agreements between DEC and any other permit applicant, owner or party within the Wild, Scenic and Recreational River Act, within the Peconic Bay Corridor from 1990 to present." Again, Department Staff contends

that this request lacks specificity, is overbroad and vague and that compliance would impose an undue burden upon Department Staff. Department Staff's request for protective order is granted with respect to Applicant's discovery request paragraph #8.

Paragraphs 9 and 11

In these paragraphs, Applicant seeks documents that Department Staff plans to use as evidence at hearing. Department Staff responds that it is not yet fully prepared to go to hearing in this case, and therefore, is unable to respond at present. In setting a hearing schedule in this matter, I will address these requests further or Applicant may renew these requests at that time.

Paragraph 10

Applicant's request #10, without explanation, seeks a "[c]opy of the DEC inspector's disciplinary history, if any." Department Staff states that this request is "totally irrelevant, not material or necessary and has no bearing on any issue in this current permit hearing." Department Staff's request for protective order is granted with respect to Applicant's discovery request paragraph #10.

Paragraph 12

Applicant seeks "[a]ny correspondence, memoranda, e-mails or other writings with regard to enforcement of the Wild, Scenic and Recreational River Act within the Peconic Bay Corridor from 1990 to present from Mr. Steve Lorence, Mr. Ray Cowan or any other employee of the DEC." Again, Department Staff asserts that this request is overbroad and vague and that compliance would impose an undue burden upon Department Staff, stating that "[t]hese type of writings are not kept in any one area. It would take a [sic] expansive Department resources [sic] respond to this one request, if it were even possible to locate the requested information which spans back almost 17 years." Department Staff's request for protective order is granted with respect to Applicant's discovery request paragraph #12.

As Department Staff has stated during the issues conference, WSRR permit applications are reviewed on an *ad hoc*, case-by-case basis. Site conditions inevitably will vary even between nearby properties within the Peconic River Corridor. It follows that for sites to be considered the same, one would have to show the same exact conditions exist in all respects. *Compare, Matter of*

Brian Zazulka,¹ Commissioner Decision, December 27, 2004, 2004 WL 3048988 (N.Y.Dept.Env.Conserv.), *affirmed on judicial review*, 25 AD3d 719 (2nd Dept. 2006). Therefore, only if the Applicant can show that another site is the same in all respects, would such a comparison be relevant.

In sum, WSRR determinations are case-by-case decisions based upon compliance with the statutory and regulatory requirements of ECL Article 15, Title 27 and 6 NYCRR part 666. The determination whether to grant this permit (and variance) necessarily focuses on whether this Applicant has demonstrated compliance with the statutory and regulatory requirements of ECL Article 15, Title 27 and 6 NYCRR part 666, which is the proper subject of the anticipated hearing.

RULING SUMMARY

The issue of whether materials are subject to discovery, is separate and distinct from whether any of the material is admissible as evidence at hearing. Standards for scope of discovery necessarily are broader than standards for admission into evidence. Nonetheless, Department Staff has identified legitimate concerns about the scope of this discovery request and the Staff resources necessary to comply with such a request.

In balancing these concerns, I have grant limited discovery to the Applicant on some requested items, while granting Department Staff's motion for protective order for other requests, as follow:

Paragraph 1 : Department Staff's motion for protective order is granted with respect to discovery request (1)(a) and (1)(b); these requests are overbroad and unduly burdensome. However, regarding discovery request (1)(c), I direct Department Staff to comply with this discovery request, limited so that Department Staff must identify only those individuals who have reviewed this permit application or who have written or received correspondence pertaining to this permit application. Further, Department Staff must indicate whether any such persons are potential Department Staff witnesses in this matter.

Paragraph 2 and 3: Department Staff contends that it already has provided these documents to Applicant in response to an earlier discovery request dated October 26, 2006. Department Staff offers

¹ Although *Zazulka* was a freshwater wetland case, the principle regarding comparison of an applicant's site to other sites applies as well to WSRR permit review.

to provide the material a second time, if requested by Applicant. No protective order is sought with respect to discovery request paragraphs #2 and #3.

Paragraph 4: To the extent that responsive documents are promulgated Departmental "instructions and directives," Department Staff is directed to provide Applicant with the web address(es) for webpages containing responsive policy and guidance or in the alternative, provide copies of responsive policy and guidance documents to Applicant. To the extent that this request pertains to intra-agency documents, I agree with Department Staff that the request is overbroad and vague, amounting to a "fishing expedition," and further, that compliance with the request would be unduly burdensome to Department Staff's limited resources. Department Staff's request for protective order is granted with respect to intra-agency documents responsive to Applicant's discovery request paragraph #4.

Paragraphs 5 and 6: Department Staff states it has already responded to these requests through Applicant's earlier discovery request dated October 26, 2007. No protective order is sought with respect to discovery request paragraphs #5 and #6.

Paragraphs 9 and 11: In setting a hearing schedule in this matter, I will address these requests further or Applicant may renew these requests at that time.

Paragraphs 7, 8 and 10: Department Staff's request for protective order is granted with respect to Applicant's discovery request paragraphs #7, #8 and #10.



Kevin J. Casutto
Administrative Law Judge

Albany, New York
December 12, 2007

To: Jaral Service List