

STATE OF NEW YORK: LAKE GEORGE PARK COMMISSION

In the Matter of the Application of **DAVID JERSEN**
for a Stormwater Management Permit
pursuant to Environmental Conservation Law § 43-0112
and Parts 645 and 646 of Title 6 of the Official
Compilation of Codes, Rules and Regulations
of the State of New York

Issues Ruling

Application No. 5328-13-11
SW2 Major

Background and Proceedings

By application for a stormwater management permit dated September 14, 2011, Dave Jersen sought approval from the Lake George Park Commission (Commission or LGPC) to subdivide a 1.50 acre lot into two parcels and construct on the second lot a new two-story wood frame building with a walk-out basement.¹ The proposed lot 1 contains a two-story wood frame building and shed. The address of the project is 2081 Camp Andrew's Way (Section 64, Block 14-1, Lot 9), Town of Fort Ann, Washington County, New York. The site is located along the Phelps Bay shoreline of Lake George and has 237 feet of shoreline. With the exception of the existing home, the parcel is mainly forested.

The staff of the LGPC deemed this project "major" based upon the location's "constraints such as excessive slopes and challenging soils . . . [and proximity to] water resources." To control stormwater, the applicant proposes to construct a series of catch basins and infiltration chambers. Roof runoff is to be conveyed by roof leader to catch basins for pretreatment prior to conveyance through pipes to infiltration chambers embedded behind a retaining wall. Runoff from the driveway, south of Camp Andrew's Way, is proposed to be treated by a grass-lined swale. The applicant also proposes to install two rain gardens downgradient of the existing dwelling to address major project requirements contained in § 646-4.14(b)(4)(vi) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) pertaining to stormwater management on properties with existing development.

The staff determined that the project was a Type II action pursuant to the State Environmental Quality Review Act, Environmental Conservation Law Article 8. The New York State Office of Parks, Recreation and Historic Preservation determined that it was not located in an archeologically sensitive area. The Town of Fort Ann determined at its November 22, 2010 Fort Ann Planning Board meeting that the project was approvable once Mr. Jersen obtained approval for an onsite wastewater treatment system. On December 2, 2010, Washington County issued approvals for a septic system and shared leach field for the existing and proposed dwellings.

¹ The applicant had previously submitted an application for a similar project (#5328-56-10) in which he requested a variance from the Commission's stormwater criteria. This application was denied on July 26, 2011 and Mr. Jersen withdrew the application.

The Commission retained the services of Chazen Companies to assist in its review of the engineering proposals and stormwater control measures. Chazen and the applicant's consultant, Lansing Engineering, P.C., communicated over a period of six months with respect to Chazen's inquiries and comments regarding the proposal. By letter dated March 13, 2012, Chazen wrote to LGPC staff indicating that all of its technical comments had been satisfied by the applicant.

At its meeting on April 24, 2012, the LGPC discussed the project and adopted a resolution directing staff to issue a notice of intent to deny the permit application on the basis that "the project may have an adverse impact on the health, safety and welfare of the public and the resources of the Lake George Park and may lead to a diminution of water quality, an increase in erosion or an increase in stormwater runoff from the site." By letter dated May 7, 2012, Commission staff issued the notice of intent to deny the permit application to Mr. Jersen. In response, Mr. Jersen e-mailed Joe Thouin of the LGPC requesting a hearing pursuant to subpart 645-6 of 6 NYCRR. By letter dated May 22, 2012, counsel for the LGPC contacted the New York State Department of Environmental Conservation Office of Hearings and Mediation Services (OHMS) to request that an administrative law judge (ALJ) be assigned. Chief ALJ James T. McClymonds assigned the matter to me on May 31, 2012 and, by letter, so informed the parties.

Legislative Hearing and Issues Conference

On July 2 and 9, 2012, a notice was published in the *Environmental Notice Bulletin* and *The Post-Star*, respectively, regarding the legislative hearing and issues conference to be held on August 7, 2012 at the Lake George Town Center. These proceedings went forward on that date. At the legislative hearing, the representatives for the applicant and the LGPC provided their perspectives on the proposal. Mark Schachner, Esq. of Miller, Mannix, Schachner & Hafner, LLC asserted that the application and documentation demonstrate compliance with the relevant regulations. On behalf of LGPC, Eileen M. Haynes, Esq. of Bartlett, Pontiff, Stewart & Rhodes, P.C. explained that the application looked good on paper but a closer examination revealed that the lack of soil depth and steep grades at the site combined with the extensive engineering required for the project and stormwater management components gave the Commission concerns about the project's effect on water quality, erosion, stormwater runoff, and flooding. Thomas A. Ulasewicz, Esq. of FitzGerald Morris Baker and Firth represented the FUND for Lake George and the Waterkeeper for Lake George, which had petitioned for party status. Mr. Ulasewicz stated that his clients were in agreement with the LGPC but were also not convinced that the project met the technical requirements of the regulations. A resident of Lake George, Melissa Vito, expressed concerns regarding development's impacts on the lake. She stated that the best stormwater management in the best conditions still increases phosphorous loading and given the steep slopes at the project site, it was a poor place for development.

The issues conference immediately followed the legislative hearing. Eileen Haynes and Brian Borie of Bartlett, Pontiff, Stewart & Rhodes, P.C. represented LGPC. Mark Schachner, Esq. of Miller, Mannix, Schachner & Hafner, LLC represented the applicant. Mr. Ulasewicz, Esq. of FitzGerald Morris Baker and Firth represented intervenors, the FUND for Lake George

and the Waterkeeper for Lake George, and with him was Chris Navitsky, the Lake George Waterkeeper. We reviewed the relevant documents that comprise the application, reflect the LGPC's review and related correspondence and marked these records as issues conference exhibits 1-33 (see, list annexed hereto). Next, we adjourned the conference and traveled to the site to view the property.

After the site visit, we reconvened the issues conference to address the respective positions of the parties and intervenors. We spent some time reviewing the statements that were set forth in the position papers that the parties and intervenors submitted prior to the issues conference. After this discussion was concluded, Mr. Schachner suggested that he would circulate a list of proposed issues and if the parties and the intervenors could come to agreement on the issues for adjudication, they could enter into a stipulation, removing the need for an issues ruling. Issues Conference Transcript (TR), pp. 75-78. All the issues conference participants agreed to this process and on that basis the conference was adjourned.

Stipulated Issues

Over the last few months, these participants negotiated the issues to be adjudicated (agreement on the party status of the FUND for Lake George and the Waterkeeper for Lake George was an aspect of the stipulation) and a stipulation was signed by all the parties and submitted to me with a cover letter dated November 2, 2012 from Mr. Schachner (annexed hereto). With the exception of one issue proposed by the FUND for Lake George and the Waterkeeper for Lake George (discussed later in this ruling), the parties were able to agree on the adjudicable issues as follows:

- A. Can the treatment of stormwater on this site meet applicable design requirements and performance standards?
- B. With regard to design and performance, will the hydraulics of the stormwater conveyance system to the infiltrator system adequately move stormwater runoff at this site after construction is completed?
- C. Will the placement of the infiltration systems on a two foot sand layer properly maintain the structural integrity of the stormwater system, including when this sand layer is in a saturated condition?
- D. Will the placement of the infiltration system on the site's slope impact the structural integrity of the stormwater system?
- E. Given the site's limited soil depth, the site's grade and the proposed construction materials, will the rip rap channel adequately prevent erosion to the Lake?
- F. What reliable safeguards, if any, during construction, post-construction and maintenance can be utilized which will not lead to an increase in siltation and erosion to the Lake, not lead to a direct or indirect increase in pollution to the Lake, not lead to an increase in

stormwater runoff from the site, and will not have an undue adverse impact on the health, safety and welfare of the public?

G. What are the actual limits of construction disturbance in detail for installation of a 6 foot wide rip rap channel installed on approximately 40% slopes leading directly to the Lake?

The parties agreed that if blasting into bedrock becomes a necessity for this project, the applicant would be required to seek a new or amended permit from the LGPC.

The parties also agreed that pre-filed testimony would be submitted on the designated issues for adjudication and that they would propose a schedule for these submissions shortly after this ruling was received by the parties.

The one matter that the parties were unable to agree upon with respect to adjudicable issues was the “Nutrient Removal” issue proposed by the FUND for Lake George and the Lake George Waterkeeper (collectively referred to as the FUND or intervenors hereinafter), addressed below.

Nutrient Removal

The applicant and the intervenors submitted position statements on the issue proposed by the FUND with respect to nutrient removal. In a letter to me dated November 5, 2012, the LGPC staff declared itself neutral on this matter, stating that “it takes no position with regard to this issue.” It appears that while the LGPC may not have a position on whether this matter should be adjudicated or not, as explained further below, the staff did take a position on the issue itself.

In its “Statement of Position to Obtain Party Status” dated July 23, 2012 and citing to four letters that had previously raised grounds of opposition to the project by the Waterkeeper, the FUND provided in its Grounds of Opposition to the Project: 7.a) “The two (2) foot sand filter proposed will not provide adequate treatment of nutrients in stormwater.” In Section C. of this filing, the FUND provides that Christopher Navitsky, the Lake George Waterkeeper and licensed New York State engineer will provide expert testimony and evidence in support of this position (and the others set forth therein and that are now defined in the parties’ stipulation). With respect to the nutrient issue, the statement provides that a). “Sand filter media is not primarily used for nutrient removal.”

In the Lake George Waterkeeper’s letter of April 19, 2011 to Joe Thouin of the LGPC, Mr. Navitsky reiterates that the two-foot sand filter will not provide adequate treatment for nutrients in stormwater. Specifically, the Waterkeeper states that “sand does not provide adequate contact time for the nutrient removal, unless the sand has specific chemical properties to promote precipitation. Therefore, the stormwater management system with the proposed sand filter will not mitigate potential negative impacts from stormwater created by the development.” In the July 18, 2011 and October 10, 2011 correspondence to Mr. Thouin, Mr. Navitsky reiterates these same concerns stressing that “the stormwater management system with the proposed sand filter will not mitigate potential negative impacts from stormwater created by the development.”

At the issues conference, Mr. Navitsky explained that pursuant to the Park Commission regulations set forth in 6 NYCRR § 646-4.14, stormwater control measures must prevent increased pollution. He contended that the sand filter is not effective at addressing nutrients. TR 45-46. Mr. Navitsky argued that even though the runoff in question is from a roof, “there is still nutrients in that runoff and they will not be treated.” TR 46.

Because this matter was not resolved by the stipulation, I must determine whether or not it is appropriate for adjudication. As proposed by the FUND in its October 18, 2012 letter, the proposed issue is framed as:

“Can the proposed stormwater management system with its proposed sand filter media achieve a level of nutrient removal adequate to prevent pollution to Lake George and not pose any threat of undue adverse impact on the health, safety and welfare of the public?”

The regulations governing these proceedings are contained in 6 NYCRR Part 645 and 646. With respect to identification of issues, 6 NYCRR § 645-6.6(c) provides that the hearing officer’s determination of what issues are to be heard in an adjudicatory hearing “shall be based on whether the issues raised are substantive and significant, and resolution of such issues may result in permit denial, require major modification to the project or the imposition of significant permit conditions.” While I did not find a definition of “substantive” and “significant” in these regulations, the regulations governing the Department of Environmental Conservation’s permit proceedings, 6 NYCRR § 624.4(c)(2) *Standards for adjudicable issues*, provide that “an issue is substantive if there is sufficient doubt about the applicant’s ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. . . . (3) an issue is significant if it has the potential to result in the denial of the permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit.”

The applicant opposed the inclusion of the nutrient treatment issue in its position statement of November 2, 2012, maintaining that there was “no authority requiring the removal of nutrients from runoff related to this project.” The applicant posits further that the runoff involved is “clean” and requires no nutrient treatment. In support of this position, the applicant points to LGPC’s comments at the issues conference that the applicant’s proposal was an “acceptable practice” and “was not a concern of the staff’s [specifically with respect to nutrients].” TR 41, 71. The applicant agrees that while the “applicable regulatory language requires that a project not increase pollution in the Lake, it does not require nutrient removal from all runoff. There will be no addition of nutrients to runoff due to this project, as runoff from structures’ roofs does not contain nutrients beyond what exists in rainfall.” Applicant’s Statement, p. 3 citing TR 48-49, 70.

In addressing the FUND’s argument stated in its September 19, 2012 letter that 6 NYCRR § 646-4.14(b)(4)(i)(d) requires that for major projects, best management practices be employed for the removal of pollutants, the applicant contends that this argument misses the point “that the project will not increase the amount of nutrients (i.e. pollution) beyond what is naturally found in rainfall at the site.” Applicant’s Statement, p. 3. Specifically, the applicant

cites 6 NYCRR § 646-4.14(b)(4)(iii) that requires pretreatment for removal of pollutants naming “runoff from paved areas or other areas subject to human-induced pollution including grease and oils, fertilizers, chemicals, road salt, sediments, organic materials and settleable solids.” *Id.*

In its supplemental argument set forth in its letter of November 2, 2012, the FUND set forth in eight numbered arguments the reasons why the nutrient issue is properly one for adjudication in this forum. Essentially, in these arguments the FUND argues that development accelerates eutrophication and that the appropriate measures must be selected to ensure that pollutant removal is maximized. In this statement, the FUND reiterates that the applicant’s proposals are insufficient to address the increase in nutrient pollution that will result from development.

I find this issue does not warrant adjudication in this matter. While the FUND makes many general arguments regarding the need for appropriate treatment of nutrients, it fails to meet the arguments of the applicant. The FUND fails to explain how the proposed project will add untreated nutrients to the environment beyond what rainfall would bring. As noted by the applicant, the regulations specifically do call for pretreatment with respect to runoff from paved areas or other areas where pollutants such as grease and oils, fertilizers, chemicals, etc. are involved. 6 NYCRR § 646-4.14(b)(4)(iii). The FUND’s many arguments fail to make the link between its arguments that development generally will increase nutrient pollution and this specific project.

As recently stated in the DEC Commissioner’s Interim Decision, *Matter of Seneca Meadows* (October 26, 2012), “submission of a petition for party status is not a *pro forma* exercise.” General expressions of concern or conclusory statements are not sufficient to raise an adjudicable issue. *Id.* And, as also noted in the *Seneca Meadows* Interim Decision, deference to agency staff is important in determining adjudicability of an issue. Here, the LGPC staff has set forth several concerns regarding the project but has deemed applicant’s proposed handling of runoff as “acceptable.” For these reasons, I have determined that this proposed issue is not appropriate for adjudication.

Conclusions

Based upon the parties’ stipulation entered into October 2012, the agreed upon issues will be adjudicated. As also provided in the stipulation, the FUND for Lake George and the Lake George Waterkeeper are parties to this proceeding. I deny the FUND’s petition to adjudicate the nutrient treatment issue.

I applaud the parties’ cooperation on defining most of the issues and as suggested in Mr. Schachner’s letter of November 2, 2012, I request that the parties propose a schedule for filing pre-filed direct testimony on the designated issues for adjudication.

Appeals

Pursuant to 6 NYCRR § 645-6.4(f) and 645-6.6(d), rulings concerning requests for party status and issues for adjudication may be appealed to the Commission within seven days of the

ruling. The other parties may submit briefs in support of or in opposition to the ALJ's rulings. The Commission will decide any appeals at its regularly scheduled meeting on December 17, 2012.

In addition to filing copies of any appeals and replies with the Commission, the parties, as identified above, must provide the other participants and the ALJ with copies of any appeals and replies at the same time and in the same manner as any submissions filed with the Commission.

_____/s/_____
Helene G. Goldberger
Administrative Law Judge

Dated: Albany, New York
November 19, 2012

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