

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter

- of -

the Application for a Freshwater Wetlands Permit
Pursuant to Article 24 of the Environmental Conservation Law
and Part 663 of Title 6 of the
Official Compilation of Codes, Rules and Regulations
of the State of New York,

- by -

AUGUST J. LARUFFA, JR.,

Applicant.

Permit Application No. 1-4724-01628/00001

RULING OF THE COMMISSIONER ON MOTION
TO REOPEN THE HEARING RECORD

January 13, 2010

RULING OF THE COMMISSIONER

By letter dated December 9, 2009, August J. LaRuffa, Jr. ("applicant") moves that the record of the hearing on his application to the New York State Department of Environmental Conservation ("Department" or "DEC") for a freshwater wetlands permit be reopened. Previously, following an adjudicatory hearing, I denied the application in my decision dated August 28, 2009 ("decision"). The application was for the construction of a single-family dwelling, garage, septic system and driveway (the "project") on property located at 20 Gloucester Avenue, Montauk, Town of East Hampton, Suffolk County, New York (the "property").

For the reasons discussed in this ruling, applicant's letter motion is denied.

Background

The background and project description with respect to the application are set forth in the hearing report of Administrative Law Judge ("ALJ") Edward Buhrmaster, which was attached to my decision. As proposed, the project would be located within the boundaries of MP-25, a Class I freshwater wetland.

The ALJ, in reviewing the project, addressed its potential adverse impacts on the wetland, as well as applicant's failure to demonstrate a compelling social or economic need to build a house in the wetland (see ALJ Hearing Report, at 13-18). As the hearing report demonstrated, applicant failed to carry his burden of establishing that the proposed project would comply with the applicable laws and regulations administered by the Department. I adopted the ALJ's hearing report as my decision and denied Mr. LaRuffa's application for a freshwater wetlands permit.

Motion to Reopen

Mr. LaRuffa states that the reason for his request to reopen the hearing record "is based on additional important and very pertinent information made available to me after the hearing was closed and [the Commissioner's] decision was rendered" (Motion, at 1). He notes that, although he had requested permission on several occasions from the Town of East Hampton (the "Town") to undertake a soil boring on the project property, he did not receive approval until October 2009 (Motion, at 2). As part of his motion, Mr. LaRuffa attached the results of the soil boring that Environmental Services, Inc. conducted on November 5, 2009. Mr. LaRuffa also attached to his motion a November 14, 2009 letter from him to Philip Gamble, Chairman of the Town's Zoning

Board of Appeals and a letter dated November 10, 2009 from Joseph Parisi, Project Manager of Environmental Services, Inc., to him.

Mr. LaRuffa states that the soil boring showed that

“the depth to ground water is 32 feet below grade. That well graded sand suitable for the designed septic system was found between 28 and 32 feet below grade and that the soil boring profile is consistent with the typical Long Island geology” (Motion, at 2).

Mr. LaRuffa also notes that a Town representative was present and “confirmed on a few occasions during the test day that there was no standing water on the property” (*id.*).

Response to the Motion to Reopen

In response to applicant’s motion, Department staff submitted papers dated December 29, 2009.¹ The papers include:

- an affirmation of Kari E. Wilkinson, Esq., Assistant Regional Attorney for DEC Region 1, in opposition to the motion to reopen the hearing record (“Wilkinson Affirmation”);
- affidavit of Robert F. Marsh, DEC Region 1 manager of the Bureau of Habitat, in opposition to the motion to reopen the hearing record, with an attachment listing tidal bench marks (“Marsh Affidavit”); and
- affidavit of William O’Brien, DEC Region 1 Senior Engineering Geologist (“O’Brien Affidavit”).

Staff attorney Wilkinson contends that no legal basis exists to reopen the hearing record, and, to the extent that applicant is seeking reconsideration, he fails to meet the applicable legal standard (Wilkinson Affirmation, at ¶¶ 3-4). Robert Marsh states that the information that was provided in the motion would not change his recommendation to deny the permit application. Specifically, Mr. Marsh contends that, among other things, the method that applicant used to collect the data does not accurately reflect groundwater levels, certain relevant information is not included on applicant’s soil boring log, and groundwater data from and hydrological information relating to

¹ Because applicant did not copy Department staff on his motion, a copy of the motion was forwarded to Department staff by Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services. Department staff requested, and was granted, permission to file its response to the motion by December 31, 2009.

surrounding properties contradict applicant's submission (Marsh Affidavit, ¶ 4). He also notes the presence of surface waters on the property (see id.). Senior Engineering Geologist William O'Brien notes deficiencies or omissions in the methodology employed in the boring and the descriptions of the subsurface materials, as well as the limited time of observation (see O'Brien Affidavit, at ¶¶ 2-6).

Discussion

A Commissioner's decision issued pursuant to 6 NYCRR 624.13 constitutes a final action of the agency. Following its issuance, no express authority exists in 6 NYCRR part 624 or the Environmental Conservation Law for the Department to suspend or reconsider the decision or to entertain other post-order motion practice. Although Part 624 authorizes the reopening of the hearing record to consider significant new evidence, this only relates to the period prior to the issuance of a final decision (see 6 NYCRR 624.13[e]).

Notwithstanding the foregoing, the Department has recognized its inherent authority to reopen a hearing record or otherwise reconsider a final decision (see, e.g., Matter of Charles Pierce, Sr., [Commissioner] Ruling on Motion for Reconsideration, June 9, 1995, at 1 [addressing the basis for that authority]). Such authority is only exercised in very limited circumstances, none of which apply here.

The grounds for vacating a civil judgment set forth in the New York Civil Practice Law and Rules § 5015 have been applied to the Department's permit application hearings (see Matter of Monroe County [Mill Seat Solid Waste Landfill], [Commissioner] Ruling on Motion to Reopen the Hearing, April 14, 1993, at 1-2 [standard for reopening a final decision should be same as standard for reopening a civil judgment under CPLR 5015]). The CPLR 5015 standards for vacating a civil judgment include: excusable default; newly-discovered evidence which, if introduced at trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial; fraud, misrepresentation, or other misconduct of an adverse party; lack of jurisdiction; or reversal, modification or vacatur of a prior judgment or order upon which the judgment or order is based (see CPLR 5015 [a][1]-[5]).

In his motion, applicant offers what he terms as "important and very pertinent information" based on the results of a soil boring that was conducted on the property where he proposes to construct a residence. As noted in the hearing report, applicant

had, following the completion of the hearing, requested that the ALJ reopen the hearing based on a letter received from the Town regarding the property and additional site information (see Hearing Report, at 6). In support of his request, applicant noted that the Town had not granted permission for him to perform a soil boring to determine subsoil conditions and depth to groundwater, and that a soil boring was essential to assess environmental impact (see id.).

The ALJ noted that the Department did not deny Mr. LaRuffa permission for a boring in the wetland on the property. Furthermore, the ALJ indicated that Mr. LaRuffa had not requested, prior to the commencement of the hearing, that the hearing be postponed until he obtained permission to perform a soil boring from the Town (see id., at 7). Based on his review of applicant's request and Department staff's response, the ALJ properly denied applicant's request to reopen the hearing record.

In considering the present motion, I note that Mr. LaRuffa had the opportunity to request that the adjudicatory hearing on his application be postponed until such time as he performed a soil boring on the property. He did not make such a request. The evidence that applicant now proposes to introduce is evidence that, if he had requested a postponement in order to receive the Town's permission to perform a soil boring, he could have obtained and provided during the course of the hearing.

Furthermore, other grounds existed to deny the application and which applicant is not contesting in his motion. In particular, applicant failed to demonstrate a compelling economic or social need for building a house in a Class I wetland and that ground alone is sufficient to deny the application (see, e.g., Hearing Report, at 15). In addition, adverse impacts of the project, such as the creation of impermeable surfaces that would reduce the wetland's ability to handle excess storm water and control flooding, the destruction of wildlife habitat, and other environmental impacts also support the decision to deny the application (see, e.g., Decision, at 2, Hearing Report, at 14, 18).

Thus, the evidence that applicant seeks to present at this time would not produce a different result, and does not support reopening the record of this proceeding or reconsidering my August 28, 2009 decision. Accordingly, applicant's motion is denied. In light of the foregoing, it is not necessary for me to address the soil boring information or its alleged deficiencies on this motion.

Ruling

Based upon my review, the arguments that applicant raises in its motion fail to support reopening the hearing record or otherwise reconsidering my August 28, 2009 decision. Applicant's motion is denied.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

/s/

By:

Alexander B. Grannis
Commissioner

Dated: January 13, 2010
Albany, New York