

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application for a Tidal Wetlands permit pursuant to Environmental Conservation Law (ECL) articles 15 and 25, and Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR) parts 608 and 661 to construct a catwalk into Shinnecock Bay with a seasonal floating dock off property located at 99 Lynn Avenue, Hampton Bays (Town of Southampton), Suffolk County, New York by:

Memorandum and Ruling concerning Applicant's Discovery Demands.

DEC Application No. 1-4736-06478/00003

99 Lynn Avenue, LLC,

Applicant.

Proceedings

The adjudicatory hearing concerning the captioned permit application convened, as scheduled, on May 15 and 16, 2007 and was completed on June 8, 2007. During the proceedings on June 8, 2007, Applicant's counsel requested discovery about two items. The first concerns the *Matter of John Perretti*, Commissioner's Decision and Order dated January 17, 2001. During his direct examination, DEC Staff witness Matthew Richards stated that he relied, in part, on *Perretti* in making his recommendation to deny the captioned permit application. Applicant's counsel requested the hearing file concerning *Perretti* including the hearing transcript and exhibits.

Applicant's second discovery request relates to Exhibit 25. Exhibit 25 is a letter dated June 7, 2007 to Kelly Cantara¹ at Land Use Ecological Services, Inc. from Steven C. Resler, Deputy Bureau Chief, New York Coastal Management Program, New York State Department of State. In his June 7, 2007 letter, Mr. Resler stated that the Division of Coastal Resources was undertaking a supplemental consistency coordination pursuant to 15 CFR 930.66(a)(2) and 930.66(b) based on new information recently obtained concerning the conditions of the tidal wetlands where Applicant proposes to construct the catwalk and dock. At the June 8, 2007 hearing, Applicant's counsel asserted that sometime between May 16, 2007 and June 8, 2007, Department staff provided the information referenced in Mr. Resler's June 7, 2007 letter. Applicant's counsel asked me to order Staff to disclose the correspondence and related information that it sent to the Division of Coastal Resources.

Applicant's discovery requests are addressed below.

Matter of John Perretti

In the *Perretti* matter, the Commissioner considered Department staff's request to revoke a tidal wetlands permit issued to John Perretti to construct a catwalk and floating dock in Shinnecock Bay. Department staff had previously issued a permit to Mr. Perretti in October

¹ Kelly Cantara's name is now Kelly Rissotto.

1997, and subsequently modified the initial permit in April 1998. Staff's action to revoke the permit is considered enforcement in nature (*see* 6 NYCRR 622.1[a][6]). During his testimony on June 8, 2007, Mr. Richards stated that he relied, in part, on *Perretti* in making his recommendation to deny the captioned permit application.

Given Staff's reliance on the *Perretti* matter, Applicant requested an opportunity to review the hearing record concerning *Perretti* prior to filing the closing brief in the captioned matter. During the June 8, 2007 hearing, I said that I would attempt to locate the hearing file concerning the *Perretti* matter. I explained that the current practice of my office is to retain the hearing file after the Commissioner issues the final decision, and that the prior practice was to forward hearing files related to enforcement actions to the Division of Environmental Enforcement. After returning to my office, I determined that the current practice took effect in 2003, and that the *Perretti* file had been sent to the Division of Environmental Enforcement.

I contacted Elissa Armater in the Division of Environmental Enforcement. Ms. Armater is responsible for maintaining these enforcement files subsequent to the issuance of the Commissioner's final determinations. On Friday, June 15, 2007, Ms. Armater informed me that the hearing file concerning the *Perretti* matter had been sent to the Department's storage facility. Ms. Armater advised me that she has requested the file from the storage facility, and that she will forward the file to me upon her receipt of it. The estimated time to retrieve a file from storage is seven to ten business days after the request is received by the storage facility. Accordingly, when I receive the *Perretti* file, I will advise the parties.

Exhibit 25

In addition to the pending permits from the Department, Applicant is required to obtain other regulatory approvals before constructing the proposed catwalk and floating dock. These additional approvals include permits from the Town of Southampton Board of Trustees and the US Army Corps of Engineers. To obtain the required permit from the US Army Corps of Engineers, the New York State Department of State, Division of Coastal Resources must first issue a general consistency concurrence.

At the hearing, Applicant offered Exhibits 2, 3 and 4 to demonstrate that it had obtained all other necessary approvals, except for the permits pending before the Department. Exhibit 4 is a copy of the permit (No. 9202, dated October 2, 2006) issued by the Board of Trustees for the Town of Southampton to construct Applicant's proposed catwalk and floating dock.

Exhibit 3 is a copy of a letter dated March 9, 2006 from Jeff Zappieri, who is the Supervisor of Consistency Review, from the Division of Coastal Resources, New York State Department of State. In his March 9, 2006 letter, Mr. Zappieri stated that based on the information provided, Applicant's proposal would meet the criteria considered by the Division of Coastal Resources for a general consistency concurrence. According to the March 9, 2006 letter, Mr. Zappieri provided the US Army Corps of Engineers with a copy of the Division's

general concurrence. Exhibit 2 is a copy of the authorization from the US Army Corps of Engineers dated April 27, 2007, which allows Applicant to construct the proposed catwalk and floating dock.

At the June 8, 2007 hearing, Department staff offered Exhibit 25. As noted above, Exhibit 25 is a letter dated June 7, 2007 to Kelly Cantara from Steven C. Resler. In his June 7, 2007 letter, Mr. Resler explained that the Division of Coastal Resources recently received additional information about the eel grass beds in the area of the proposed catwalk and floating dock. According to Mr. Resler, eel grass is one of the most valuable species and elements of the State-designated Shinnecock Bay Significant Coastal Fish and Wildlife Habitat, and that Applicant's proposal could adversely impact the designated habitat area. Based on this new information, Mr. Resler stated that a supplemental consistency coordination would be undertaken pursuant to 15 CFR 930.66(a)(2) and 930.66(b).

Counsel for Department staff stated that Exhibit 25 was offered to show that the Division of Coastal Resources is reevaluating the March 9, 2006 general concurrence. A potential outcome of the Division's reevaluation may be a finding that Applicant's proposal would not be consistent with the State's federally approved coastal management program. If Applicant's proposal is not consistent with the coastal management program, then the US Army Corps of Engineers, in turn, may reevaluate its April 27, 2007 approval.

Applicant wants to know who recently provided the Division of Coastal Resources with the information referenced in Mr. Resler's June 7, 2007 letter, and exactly what information was provided to the Division. Applicant's counsel asserted that Department staff provided this information. During the June 8, 2007 hearing, Applicant's counsel asked me to direct Staff to produce the information allegedly provided to Mr. Resler, as described in his June 7, 2007 letter. For purposes of discussion, I will assume that Applicant's assertion is true.

The Department's permit hearing procedures authorize discovery (*see* 6 NYCRR 624.7). The scope of discovery is broad, and requires the disclosure of all matter material and necessary (*see* Civil Practice Law and Rules [CPLR] § 3101[a]). The Court of Appeals has interpreted this standard to require the disclosure of material that "will assist in the preparation for trial by sharpening the issues and reducing delay and prolixity." The Court stated further that "[t]he test is one of usefulness and reason." (*Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406.)

If, after reviewing the record of this proceeding, the Commissioner decides to issue the requested permits, Applicant will be required to obtain all other necessary approvals. Whether Applicant can obtain these other necessary approvals is not material and necessary to the outcome of this proceeding.

As provided in the Combined Notice (Exhibit 1-A), the SEQRA status for Applicant's proposal is Type II (*see* 6 NYCRR 617.5[c][10]). Consequently, the provisions of 19 NYCRR 600 do not apply (*see* 6 NYCRR 617.6[a][5] and 19 NYCRR 600.4[a]). In addition, I note that

the Town of Southampton does not have a State-approved Local Waterfront Revitalization Program (LWRP) (*see* http://nyswaterfronts.com/downloads/pdf.LWRP_Status_Sheet.pdf). Consequently, the Department is not required to determine whether Applicant's proposal would be consistent with the LWRP (*see* 19 NYCRR 600.3[c] and 600.4[c]).

The issues for adjudication in this proceeding are limited to the permit issuance criteria at 6 NYCRR 661.9(b) for the tidal wetlands permit, and at 6 NYCRR 608.8 for the protection of waters permit. As a result, issues related to whether Applicant can obtain any other necessary approvals, such as a general concurrence from the New York State Department of State, are immaterial and unnecessary to determining whether Applicant's proposal meets the referenced permit issuance criteria for the permits issued by the Department. Therefore, I deny Applicant's request for an order directing Department staff to disclose any letter and other information that Staff may have sent to the Division of Coastal Resources between May 16, 2007 and June 8, 2007.

/s/

Daniel P. O'Connell
Administrative Law Judge
Office of Hearings and Mediation Services
NYS Department of Environmental Conservation
625 Broadway, First Floor
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Dated: Albany, New York
June 18, 2007

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