

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 Articles 24 and 70 of the Environmental Conservation
Law and Parts 663 and 624 of Title 6 of the Official Compilation
of Codes, Rules and Regulations of the State of New York

- by -

JOSEPH BORG
for Jescar Associates, Inc.,

Applicant.

DEC No. 2-6404-00781/00001

DECISION OF THE COMMISSIONER

July 21, 2004

DECISION OF THE COMMISSIONER

Administrative Law Judges ("ALJs") Kevin J. Casutto and P. Nicholas Garlick on September 3, 2003 issued a ruling on issues and party status ("Ruling") in the matter of the application of Joseph Borg for Jescar Associates, Inc. ("applicant") for a freshwater wetlands permit pursuant to articles 24 and 70 of the Environmental Conservation Law ("ECL") and parts 663 and 624 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

Applicant proposed to construct eight semi-attached residential units with attendant sanitary connections, utilities, paving and landscaping on property located on Staten Island and designated as Richmond County Block 3550, Lots 1, 11 and 54 ("Borg property"). The Borg property is located in the Dongan Hills area of Staten Island and contains acreage which is part of State-regulated freshwater wetland NA-8. Because a portion of the proposed construction would be within the adjacent area of wetland NA-8, applicant was required to apply for a New York State freshwater wetlands permit.

The ALJs recommended that the Commissioner of the Department of Environmental Conservation ("Department" or "DEC")

deny the permit application pursuant to 6 NYCRR 663.5(h) ("ALJs' recommended decision"). Section 663.5(h) of 6 NYCRR authorizes, but does not require, denial of an application for a freshwater wetlands permit where there is a duly filed notice in writing that the State or any agency or political subdivision thereof is in the process of acquiring the freshwater wetland by negotiation or condemnation, and where both the affected landowner of the wetland and the local government have been notified. See Ruling at 1, 6-10.¹

The ALJs ruled that, if the DEC Commissioner did not adopt the ALJs' recommended decision, Department staff's determination pursuant to the New York State Environmental Quality Review Act ("SEQRA") to issue a negative declaration and not to require an environmental impact statement for the project was irrational and an error of law and should be remanded to Department staff for redetermination. See id. at 1, 10-12. The ALJs further ruled that, if the DEC Commissioner did not adopt the ALJs' recommended decision and did not accept the ALJs' decision to remand the negative declaration, an adjudicatory hearing should

¹ In addition to the regulatory provision cited in the Ruling, section 24-0705(2) of the Environmental Conservation Law ("ECL") provides that a "[d]uly filed notice in writing that the state or any agency or subdivision thereof is in the process of acquiring any freshwater wetlands by negotiation or condemnation shall be sufficient basis for denial of any permit." Cf. ECL 25-0403(2) & 6 NYCRR 661.9(d).

be held on three issues that the City of New York ("City") had raised. See id. at 1-2, 12-17.

The ALJs established a schedule for appeals from the Ruling, for comments on the ALJs' recommended decision and for responses to any appeals.

Applicant took an appeal from those portions of the Ruling that recommended adjudication as well as those portions recommending remand of the matter to Department staff for further SEQRA review. Department staff submitted comments which concurred with the ALJs' recommended decision. However, Department staff objected to the ALJs' determination that the decision not to require an environmental impact statement for this action was irrational and an error of law, and Department staff requested that changes be made to the Ruling on that point. The City submitted a response in support of the Ruling, while applicant submitted a response that addressed the comments of Department staff.

As part of the City's efforts on Staten Island to control stormwater runoff and flooding, the City has initiated a program that seeks to preserve and enhance streams, ponds and wetlands on Staten Island for purposes of storm water management

("bluebelt program"). Several bluebelts have been proposed. The City has considered its acquisition of the Borg property to be important to the development of the New Creek Bluebelt.² Subsequent to the issuance of the Ruling, the City proceeded to acquire the Borg property by condemnation.

By letter dated May 27, 2004, Susan D. Adams, Esq., Assistant Corporation Counsel of the City's Law Department, forwarded to the Department an order signed on May 21, 2004 by Justice Abraham G. Gerges in Matter of New Creek Bluebelt Phase 2 (Supreme Court, Kings County (for Richmond County), Index No. CY 4008/04) ("Order"). The Order authorized the City to file an acquisition map encompassing the Borg property and further provided that, upon the City's filing of the acquisition map with the Clerk of the County of Richmond or in the Office of the City Register, title would vest in the City. Attorney Adams requested that the hearing record in the proceeding before the Department on applicant's freshwater wetlands permit application be reopened to receive the Order.

² On June 25, 2003, Governor Pataki signed Chapter 84 of the Laws of 2003 which directed the DEC Commissioner to institute a one-year moratorium on issuance of permits for activities regulated under ECL article 24 with respect to certain freshwater wetlands on Staten Island, including wetland NA-8. The purpose of the moratorium was to provide the City's Department of Environmental Protection time to complete its proposal for design of the New Creek Bluebelt. See Ruling at 3. The moratorium was extended to December 31, 2004 by Chapter 64 of the Laws of 2004.

By letter dated June 7, 2004, Michael D. Zarin, Esq., of Zarin & Steinmetz, attorneys for applicant, stated that the City, pursuant to the Order, filed the acquisition map with the Clerk of the County of Richmond on May 26, 2004, and, as a result, title to the Borg property vested in the City on that date. Attorney Zarin expressed applicant's understanding that, with title vesting in the City, applicant's "[p]ermit [a]pplication is moot, and any final determination on the merits has been rendered academic."

In light of the information that was contained in the submissions of the City and applicant, I provided the parties by letter dated June 28, 2004 with an additional opportunity to submit comments.

By letter dated June 30, 2004, Attorney Susan D. Adams, on behalf of the City, indicated that the City sought to reopen the hearing record to include the Order to demonstrate that the City has "proceeded in good faith to acquire the [Borg] property." Accordingly, the City indicated that it would be appropriate for the Department to deny the freshwater wetlands permit application pursuant to 6 NYCRR 663.5(h).

On behalf of applicant, Attorney Michael D. Zarin submitted a letter dated July 1, 2004 that reviewed the

interaction between the City and applicant with respect to the Borg property, and objected to the City's activities with respect to the wetland permitting process. He maintained that applicant never sought to impede the bluebelt program and "at every stage, invited the City to negotiate the acquisition of [applicant's] properties for fair market value." Attorney Zarin stated that, "at a minimum" the Ruling should be overturned to the extent that it would "[require] adjudication of any issue relating to wetland impacts from the Project, and rule that the Application would be granted but for the City's acquisition efforts and the applicable restrictions thereof, including, 6 NYCRR Section 663.5(h) and the State Moratorium."

Department staff, by letter dated July 1, 2004, recommended that the application be denied based on the transfer of the ownership of the Borg property and the City's "documented unwillingness" to allow the proposed project to proceed. Department staff argued that, if the Department may deny a permit on the basis that a condemnation proceeding has commenced (referring to 6 NYCRR 663.5(h)), it would be justified to deny a permit when the condemnation process leads to the transfer of title to the condemnor. Department staff concluded that either applicant could withdraw its application, or the application could be denied "on the basis that the transfer of ownership and the

City's unwillingness to allow the proposed project to go forward warrant such a denial."

Although the valuation of the Borg property was referenced in several submissions, valuation issues are not within the jurisdiction of this proceeding. They may be considered, to the extent relevant, in the appropriate judicial forum.

Pursuant to 6 NYCRR 624.13(e), the hearing record in the Department's proceeding is hereby reopened to receive the letters of Attorney Adams dated May 27, 2004 (with the Order) and June 30, 2004, the letters of Attorney Zarin dated June 7 and July 1, 2004, and the letter of Department staff dated July 1, 2004.³

Based on this record, the status of Joseph Borg for Jescar Associates, Inc. as applicant in this proceeding must be reconsidered. The freshwater wetlands regulations define "applicant" to include "either the owner of the land on which the

³ Previously, by letter dated March 16, 2004, the record had been reopened to receive submissions regarding the status of the City's acquisition efforts with respect to the Borg property. Pursuant thereto, submissions were received from the City (letter dated March 22, 2004 with enclosures, and corrective supplement dated March 23, 2004), Department staff (letter dated March 22, 2004), Community Board Two, Borough of Staten Island (letter dated March 22, 2004), and applicant (submission dated March 30, 2004 with attachments). Those submissions have also been received into the record of this proceeding.

proposed regulated activity would be located, a contract vendee, a lessee of the land, the person who would actually control and direct the proposed activity, or the authorized agent of such person." 6 NYCRR 663.2(d). In this matter, Joseph Borg for Jescar Associates, Inc. is no longer the owner of the Borg property as title has vested in the City, nor does it qualify as the applicant in any of the other capacities specified in the regulatory definition.

Department staff, in their submission of July 1, 2004, note that the Department routinely entertains freshwater wetlands permit applications from persons who do not hold title in the property, such as a contract vendee or a leaseholder. However, as Department staff indicate, Joseph Borg for Jescar Associates, Inc. is not a contract vendee or a leaseholder. Furthermore, as the record demonstrates, the construction of residential units on the Borg property is no longer a viable project because the City is adding it to the bluebelt system and has opposed the construction of the proposed residential units on the subject property.

Joseph Borg for Jescar Associates, Inc. no longer satisfies the regulatory definition of "applicant". Although Joseph Borg for Jescar Associates, Inc. has not formally withdrawn its application, based on this record and as recognized by

applicant, its application for a freshwater wetlands permit with respect to the subject property is now moot. Accordingly, it is not necessary for any further proceeding or consideration with respect to this freshwater wetlands permit application. The appeals from and the requests for changes to the Ruling have been rendered academic, and the proceeding before the Department in this matter is hereby discontinued.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: _____/s/_____
Erin M. Crotty, Commissioner

Dated: July 21, 2004
Albany, New York

In the Matter of the Application of

Joseph Borg
for Jescar Associates, Inc.

RULING ON ISSUES AND
PARTY STATUS

for a Freshwater Wetlands Permit pursuant to Articles 24 and 70 of the Environmental Conservation Law and Parts 663 and 624 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

September 3, 2003

DEC #2-6404-00781/00001

SUMMARY

The Administrative Law Judges¹ ("ALJs") recommend that the Commissioner of the Department of Environmental Conservation ("DEC") deny this permit application pursuant to 663.5(h) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") based upon the efforts of the City of New York ("City") to acquire the site of the proposed project. In the event that the Commissioner does not accept this recommendation, the ALJs rule that pursuant to 6 NYCRR 624.4(c)(6)(i)(a) the decision by the DEC Staff not to require an Environmental Impact Statement ("EIS") was irrational and an error of law because the proposed project would create a material conflict with the City's plans to create the New Creek Bluebelt. Accordingly, the case is remanded to DEC Staff for redetermination. In the event the Commissioner overturns the ruling remanding the matter back to DEC Staff, the ALJs additionally rule that the City has met its burden and shown that significant and substantive issues exists regarding the Applicant's ability to meet permit issuance standards related to: 1) the Applicant's proposed method of controlling future encroachments into the wetland; 2) the proposed projects impacts

¹This case was originally assigned to ALJ Kevin J. Casutto who presided at the legislative hearing and the issues conference. However, due to ALJ Casutto's workload, ALJ P. Nicholas Garlick was assigned, after the record closed, to assist in drafting this ruling.

on stormwater runoff into the wetland; and 3) the impacts of the proposed curb wall and fence on the wetland. Accordingly, the City is granted full party status. Finally, the ALJs rule that Mr. Lou Caravone, Chairman, of Staten Island Community Board Two also is granted full party status in the hearing, should one be held.

DESCRIPTION OF THE PROPOSED PROJECT

The Applicant, Joseph Borg for Jescar Associates, Inc., proposes to construct eight semi-attached residential units with sanitary connections to existing sewers and install paving, utilities and landscaping for these units on a 0.895 parcel. The project site is located in the Dongan Hills section of Staten Island at the northeastern side of Stobe Avenue between Husson and Vera Streets, Staten Island, New York 10306 (also identified as 179, 181, 183, 185, 187, 189, 193 Stobe Avenue; or Richmond County Tax Block 3550, Lots 1, 11 and 54). A second project involving this Applicant on a nearby parcel also was referred for hearing. However, after further analysis DEC Staff determined that this second project was not subject to DEC's wetlands jurisdiction (DEC #2-6404-00551/0000100).

The Applicant needs a state freshwater wetland permit because a portion of the proposed project, approximately 0.25 acres, would be constructed within the regulated adjacent area of Freshwater Wetland NA-8 (Last Chance Pond). The boundaries of NA-8 on the site were delineated in 2002 by DEC Staff. The proposed project would be located on property identified by the City as critical to its plans to establish the New Creek Bluebelt.

THE STATEN ISLAND BLUEBELT PROGRAM

According to Dana Gumb, Director of the State Island Bluebelt Program for the New York City Department of Environmental Protection ("DEP"), the Bluebelt program began fifteen years ago. The program is designed to control stormwater runoff and reduce chronic flooding in areas of Staten Island by using natural wetland systems. A number of different Bluebelts have been completed or are in the planning stages. The Bluebelt in the South Richmond area of Staten Island has been completed and is reportedly successful in controlling flooding from stormwater, protecting wetlands and saving the costs of constructing a conventional piped stormwater collection system.

Again according to Mr. Gumb, DEP has been actively planning a New Creek Bluebelt in the area of the proposed project since October 2000. An engineering feasibility study completed in December 2002 demonstrated the feasibility of the New Creek Bluebelt and identified the site of the proposed project as a site to store stormwater.

Recognizing the importance of this property, DEP has been moving aggressively to acquire this parcel and expects to actually be in a position to buy it in early Fall 2003. DEP and the Applicant have been involved in discussions regarding a possible sale.

EFFECT OF MORATORIUM ON THE ISSUANCE OF ARTICLE 24 PERMITS

On June 25, 2003, Governor Pataki signed Chapter 84 of Laws of 2003, which directed the DEC Commissioner to institute a one-year moratorium on the issuance of permits for activities regulated under Article 24 of the ECL for freshwater wetlands NA-7, NA-8, NA-9 and NA-10. This law, which was requested by the Staten Island Borough President, is intended to give DEP time to complete its proposal for the design of the New Creek Bluebelt.

On July 22, 2003, Governor Pataki signed Chapter 154 of the Laws of 2003 which clarified Chapter 84. This new law directed that DEC shall not refuse to accept, process or review any application for a permit under Article 24 of the ECL during the moratorium. Thus, the earliest date that the Applicant could receive the permit, if the Commissioner decides to issue it, is in the last week of June 2004.

SEQRA STATUS

DEC Staff determined this application complete on December 2, 2002. For the purposes of compliance with the State Environmental Quality Review Act ("SEQRA", Environmental Conservation Law Article 8, 6 NYCRR Part 617) the project has been identified as an Unlisted Action. A negative declaration was issued on December 2, 2002 finding that the proposed project would not cause a significant environmental impact; consequently, DEC Staff did not require preparation of an EIS.

PUBLIC NOTICE

A Notice of Public Hearing was published on May 21, 2003 in DEC's *Environmental Notice Bulletin* and in the *Staten Island Advance* on May 21, 2003.

LEGISLATIVE HEARING

The DEC permit hearing process began on June 26, 2003 with a legislative hearing to receive unsworn statements about the application. The legislative hearing was held in the Auditorium of Public School 52, 450 Buel Avenue, Staten Island, New York. Approximately seventy-five (75) people attended. Twenty (20) individuals spoke at the hearing including representatives of the Applicant, DEC Staff, and the City. Only the Applicant spoke in favor of the project. The other nineteen, including representatives of Staten Island Borough President James Molinaro and State Senator John Marchi, as well as Councilman James Oddo spoke against approving the project. Many spoke in favor of purchasing the land from the Applicant for inclusion in the New Creek Bluebelt. The Applicant stated a willingness to sell the property if the sale can be completed quickly and fairly.

PETITION FOR PARTY STATUS

The deadline for filing for party status was June 17, 2003. Two petitions for full party status were timely received. The first petition was submitted by Hon. Lou Caravone, Chairman of Community Board Two, Borough of Staten Island. This petition stated the general concern of Community Board 2 that the site of the project had been identified for inclusion in the Bluebelt system.

The second petition was received from the City of New York. The City proposed three issues for adjudication: 1) that the permit application should be denied because of the City's efforts to purchase the site of the proposed project; 2) that DEC should require the preparation of an EIS; and 3) that the Applicant cannot meet permit issuance standards found at 6 NYCRR 663.5(e) & (f). A fourth issue related to a coordinated review was withdrawn by the City.

ISSUES CONFERENCE

An issues conference was held on June 17, 2003, at the Labetti Veterans of Foreign War Post, 390 Hylan Boulevard, Staten Island, New York.

Appearing for the Applicant was Michael D. Zarin, Esq. of the law firm Zarin and Steinmetz as well as the Applicant Joseph Borg. Also attending on behalf of the Applicant were: Peter Calvanico, P.E. and Alphonse J. Calvanico, P.E. from Calvanico Associates; and James Schmid, the Applicant's wetland specialist.

DEC Staff was represented by Udo M. Drescher, Esq., Assistant Regional Attorney. Joseph Pane, a DEC Staff biologist also attended.

The City of New York was represented by Susan D. Adams, Esq. Assistant Corporation Counsel. Also attending for the City were Steve Wallander, Darryl H. Cabbagestalk, Judah Prero, and Dana Gumb from New York City Department of Environmental Protection.

Hon. Lou Caravone, Chairman, appeared for Community Board Two.

ISSUES CONFERENCE RECORD

The record of the Issues Conference closed on July 21, 2003 with the receipt by the ALJ from the Applicant of an unauthorized response to the City's closing brief. Since the response addressed new issues raised by the City in its closing brief, the response will be considered.

RULINGS ON ISSUES

In this case, DEC Staff prepared a draft permit (#2-6404-00781/00001), which was available to the parties prior to the issues conference. The Applicant does not dispute any terms of the draft permit.

Of the three issues raised by the City, only one is appropriate for adjudication. The City's first issue, whether the permit should be denied pursuant to 6 NYCRR 663.5(h), is a legal question; there are no facts in dispute. Likewise, the City's second issue, whether this matter should be remanded to DEC Staff for reconsideration of the decision not to require an EIS, is also

a question of law without any factual dispute that could be resolved through hearing.

Only the third issue proposed by the City, whether the Applicant's proposed project can meet regulatory standards, is a factual question and, therefore, may be appropriate for adjudication. The standard for determining whether any issue proposed should be adjudicated is found at 6 NYCRR 624.4(c). When DEC Staff has determined that a permit application, conditioned by a draft permit, will meet statutory and regulatory requirements (as is the case here), the potential party proposing an issue has the burden of persuasion to demonstrate that the proposed issue is substantive and significant.

An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria such that a reasonable person would inquire further (6 NYCRR 624.4(c)(2)). An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit (6 NYCRR 624.4(c)(3)).

In order to establish that adjudicable issues exist, "an intervenor must demonstrate to the satisfaction of the Administrative Law Judge that the Applicant's presentation of facts in support of its application do not meet the requirements of the statute or regulations. The offer of proof can take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application. Where the proposed testimony is competent and runs counter to the Applicant's assertions, an issue is raised. Where the intervenor proposes to demonstrate a defect in the application through cross-examination of the Applicant's witnesses, an intervenor must make a credible showing that such a defect is present and likely to affect permit issuance in a substantial way. In all such instances a conclusory statement without a factual foundation is not sufficient to raise issues" (Matter of Halfmoon Water Improvement Area, Decision of the Commissioner, April 2, 1992).

6 NYCRR 663.5(h)

A threshold issue raised by the City is that the Applicant's application for a freshwater wetlands permit should be denied pursuant to 6 NYCRR 663.5(h):

(h) A duly filed notice in writing that the State or any agency or political subdivision of the state is in the process of acquiring any freshwater wetland by negotiation or condemnation authorizes, but does not require, denial of any permit, but only if both the affected landowner and the local government have been so notified.

(1) The written notice must include an indication that the acquisition process has commenced, such as that an appraisal of the property has been prepared or is in the process of being prepared.

(2) If the landowner receives no offer for the property within one year of the permit denial this ban to the permit lapses. If its negotiations with the applicant are broken off, the state or any agency of political subdivision must, within six months of the end of negotiations, either issue its findings and determination to acquire the property pursuant to section 204 of the Eminent Domain Procedure Law or issue a determination to acquire the property without public hearing pursuant to section 206 of the General Domain Procedure Law, or this ban to the permit lapses.

The City asserts that the following timeline details its efforts to purchase the site of the proposed project and warrant the denial of the permit application. The following timeline is based upon the affidavit of Dana Gumb and its accuracy has not been challenged.

In December 2002, the City learned of the proposed project when DEC Staff published a notice of complete application. This led to the City's decision to purchase this property before other properties needed to complete the New Creek Bluebelt.

On March 13, 2003, DEP filed a Land Use Review Application with the Department of City Planning which commenced the lengthy and complicated process by which the City purchases property pursuant to Uniform Land Use Review Procedure ("ULURP").

On March 18, 2003, DEP wrote the Applicant informing it that the City had commenced the ULURP process so that the City could acquire the property for use as part of the Staten Island Bluebelt.

On March 24, 2003, DEP wrote to the Department of Citywide Administrative Services requesting that it commence an appraisal of the property.

On April 21, 2003, the Department of City Planning certified that the Land Use Application was complete and ready to proceed.

On April 30, 2003, the DEP informed the Applicant in writing regarding an upcoming public hearing before Staten Island Community Board Two.

On May 6, 2003, Staten Island Community Board Two, the community board with jurisdiction over this property, held a public hearing. On May 20, 2003, it adopted a recommendation in support of the City's acquisition of this property.

On May 14, 2003, the Staten Island Borough President and a City Councilmember met with the Applicant regarding the acquisition of this property.

On June 18, 2003, the Staten Island Borough President recommended this acquisition to the City Planning Commission.

On June 23, 2003, the City's Office of Management and Budget approved funding for purchases within the proposed Bluebelt.

The issues conference record closed on July 16, 2003. The following schedule was projected at that time, although some of these events may have already transpired.

The appraisal was expected to be completed by late June 2003.

A public hearing was scheduled by the City Planning Commission on this proposed acquisition for July 23, 2003. It was expected that the City Planning Commission would vote to approve this acquisition on August 13, 2003.

The City Council then would have twenty days to decide whether to review the decision to purchase. According to Mr. Gumb, this seems unlikely because the Council has not reviewed a Bluebelt purchase in the past 15 years.

Then, in early September 2003, the ULURP process would be complete and the City would be in a position to purchase the property from the Applicant.

The City argues that its notification of the Applicant and the actions of its various agencies relating to the completion of the ULURP process demonstrate that it is entitled to a decision to deny this permit application.

DEC Staff takes the position that this issue should be adjudicated. However, DEC Staff does not identify any factual disputes that exist or how a hearing could more fully develop the record on this issue.

The Applicant argues, correctly, that the fact that the City is in the process of acquiring the property does not require permit denial, rather it only authorizes it. The Applicant argues that the discretion to deny the permit on these grounds rests solely with DEC Staff and that an ALJ cannot decide this issue. However, the Applicant provides no support for this claim. The Applicant claims that there are no factual disputes regarding this issue and it should not be adjudicated.

The Applicant also argues that the City failed to comply with the strict requirements of section 663.5(h). Specifically, the Applicant contends that the City's letters to the Applicant of March 18 and April 30 were legally insufficient because: 1) the letters only notified the Applicant of the commencement of the acquisition process; 2) that the letters referred to the acquisition of the entire parcels, not just the freshwater wetlands; 3) the letters do not specifically reference 6 NYCRR 663.5(h); 4) the letters do not specify a timetable for acquisition; and 5) the letters do not state that an appraisal was underway.

Ruling and Recommendation to the Commissioner:

The ALJs agree with the Applicant there are no factual disputes related to the issue of whether this permit application should be denied pursuant to 6 NYCRR 663.5(h). The ALJs also agree that an ALJ does not have the authority to deny the permit application. However, they disagree that only DEC Staff can exercise this authority. DEC Staff's authority to deny is delegated from the DEC Commissioner and she can also decide to deny this permit application. For reasons discussed below, ALJs recommend that the Commissioner deny this application, without prejudice.

The ALJs reject the Applicant's arguments regarding the alleged failure to notify. All of the information the Applicant claims is missing from the letters of March 18 and April 30 has been provided to him by the City throughout the issues conference process. Indeed, the City's filings in late June were sent to the Applicant and contain all the information claimed lacking.

The ALJs also reject the Applicant's narrow reading of 6 NYCRR 663.5(h) that would restrict the use of this section only in cases where the property to be bought is 100% wetland. This is unreasonable because many, if not most, parcels that contain wetlands probably contain adjacent areas and may even contain upland. In this case, approximately 25% of the parcel is actual wetlands. The purpose of this provision is to protect wetlands by giving governmental agencies (which usually have lengthy budgeting processes) additional time to purchase the land on which they sit. To limit this provision as the Applicant suggests to only parcels that are entirely wetlands would make this provision nearly useless and lessen the protection of wetlands.

The reason for this recommendation is that the City is at the last stages of the ULURP process and, in September 2003, will be in a position to enter into a binding contract with the Applicant for the property. The Applicant suffers no real injury from this denial because it could not receive this permit until late June 2004. Further, should negotiations with the City fail, the Applicant can reapply early next year and still receive a permit by the Summer 2004. Thus, it is not unfair to the Applicant. However, it would be inefficient to continue the hearing process on this permit application, given the legislatively imposed moratorium on permit issuance and the City's substantial interest in purchasing the property.

In the event that the Commissioner rejects this recommendation, the administrative hearing process on this application must continue. Therefore, the ALJs will address the City's other two proposed issues below.

Negative Declaration

The City asserts DEC Staff should have required the preparation of an Environmental Impact Statement ("EIS") pursuant to SEQRA. Specifically, the City asserts that when DEC Staff issued a negative declaration regarding the environmental impacts of this project in December 2002 it failed to consider: that there was open water on the Applicant's property; that the water table was not measured during the spring, when it is highest; the visual

impacts of the project; the additional runoff from the project site; the additional contamination in the runoff; and, erosion.

DEC Staff disputes the City's claims that environmental impacts were not considered. DEC Staff states that while a short form Environmental Assessment Form ("EAF") could have been used, DEC Staff required the Applicant to fill out a long form EAF to more completely identify impacts. Regarding the specific claims by the City, DEC Staff asserts that: the open water bodies mentioned by the City are contained within NA-8 and did not need to be specifically identified; that there were no direct impacts to these open water bodies as a result of the project; that there is no legal requirement to measure the water table during the spring for dry wells; that there would be no additional runoff from the project into the wetland because all additional runoff would be captured in dry wells; that no additional pollutants would enter the wetland because of remaining buffer areas; and that erosion would be controlled during construction with hay bales and after construction by the erection of a wall and fence.

In its closing brief, DEC Staff raised the fact that when it issued its negative declaration, it did not realize the importance of this property to the City's proposed New Creek Bluebelt and that this is new information. In light of the City's actions toward purchase, DEC Staff suggests that the approval of this permit application may create a material conflict with the City's plans, as officially approved and adopted, to create this new Bluebelt. Therefore, pursuant to 6 NYCRR 617.7(c)(1)(iv), DEC Staff suggests that this proposed project may have significant adverse environmental impacts and require the preparation of an EIS.

The Applicant agrees with DEC Staff that the impacts of the proposed project were identified by the negative declaration and that the City's opportunity to challenge the negative declaration has expired. Further, the Applicant argues that if there are new impacts, the appropriate method to review them is to amend the negative declaration, not to rescind it and require the preparation of an EIS.

DEC's administrative permit hearing regulations provide that in situations, such as this one, where DEC is lead agency:

the ALJ may review a determination by staff to not require the preparation of an environmental impact statement. Where the ALJ finds that the determination was irrational or otherwise affected by an error of law, the

determination must be remanded to staff with instructions for a redetermination. In all other cases, the ALJ will not disturb the staff's determination. (6 NYCRR 624.4(c)(6)(i)(a)).

In this case, the City's actions toward establishing a New Creek Bluebelt and toward purchasing the Applicant's property described above indicate the City's plans as officially adopted. The construction of residential units on this parcel the City is planning to use for stormwater management would be a material conflict with such plans. Accordingly, DEC Staff's determination not to require an EIS was irrational and an error of law because the issuance of the draft permit in this case would have a significant adverse environmental impact, as that term is used in 6 NYCRR 617.7. It should be noted that DEC Staff's error is excused by the fact that the City's engineering study regarding the New Creek Bluebelt was completed in December 2002, approximately the same time DEC Staff issued its negative declaration; and, the fact that the City only notified DEC Staff of its interest in purchasing the property in late January 2003. Nonetheless, since the permit has not been issued, it is appropriate now to recognize that permit issuance may have a significant adverse environmental impact.

Ruling: In the event that the Commissioner does not adopt the recommendation to deny the permit as recommended above, DEC Staff's determination not to require the preparation of an EIS is remanded and DEC Staff is instructed to reconsider its determination.

6 NYCRR 663.5(e)

In the event that the Commissioner rejects the recommendation to deny the permit application pursuant to 6 NYCRR 663.5(h); assuming an appeal from this ruling, and overturns the ruling remanding the matter back to DEC Staff, the hearing process will continue. In that event, below is a discussion of the City's third issue, whether the Applicant's proposed project, as conditioned by the draft permit, meets regulatory standards.

The third issue proposed by the City is a factual question, appropriate for adjudication, namely that the proposed project as conditioned by the draft permit cannot meet permit issuance standards. The appropriate permit issuance standards are found at 6 NYCRR 663.5(e)(i)-(iii).

A permit, with or without conditions, may be issued for a proposed activity on a wetland of any class or in a wetland adjacent area, if it is determined that the activity (i) would be compatible with the preservation, protection and conservation of the wetland and its benefits, and (ii) would result in no more than insubstantial degradation to, or loss of, any part of the wetland, and (iii) would be compatible with public health and welfare.

The City asserts a number of sub-issues.

Protection Against Encroachments

The City asserts that the use of a deed restriction, as a condition of the permit, which would designate areas within the adjacent area as "areas of no land alteration" will not adequately protect the wetland. Specifically, the City asserts that deed restrictions are not effective and enforcing them can take an extended period of time. The Applicant has clarified that a concrete curb wall with a five foot chain link fence above it will be installed to prevent human incursion into areas dedicated for no disturbance. The City contends that the chain link fence may slow human incursions into the area of no alteration, but that it will not stop it. Steven Wallander, an environmental planner for DEP, has observed that on other properties surrounding bluebelts, fences are often moved or removed, allowing for encroachment onto wetlands and wetland buffers. Once encroachment occurs it can be difficult to remove and can take years to restore the affected areas. Mr. Wallander describes a number of specific encroachments in situations similar to the proposed project, such as the construction of decks, sheds, swimming pools and in one case a bocce ball court.

The City argues that the proposed project, as conditioned by the draft permit, does not adequately protect against future encroachments and, therefore, the proposal is not compatible with the preservation, protection and conservation of the wetland and its benefits. Thus, the proposed development cannot meet permit issuance standards (6 NYCRR 663.5(e)(i)). DEC Staff have not commented in the record on the latest site plan with the curb and the fence. The Applicant responds by noting that the City has not proposed a solution to the problem of future encroachments.

The City's offer of proof regarding the failure of fencing to prevent encroachments into other wetlands calls into question the

efficacy of this proposed permit condition to control encroachment. Accordingly, the Applicant's ability to prevent encroachments and protect the wetland is called into question and a different permit condition or permit denial may be necessary to control or prevent this problem. Therefore, the ALJs find this sub-issue to be substantive and significant and advance it to adjudication.

Potential Stormwater Runoff Impacts

The City asserts that the stormwater runoff from the proposed project will adversely impact the wetlands. Specifically, the proposed construction in the wetland's adjacent area, the subsequent human activities there, the loss of buffer areas, and the replacement of the existing vegetation with grass lawns will negatively impact water quality in the wetland. The City offers as proof the statements of Laurie Machung, a wetland expert from DEP.

These impacts on the quality of the water entering the wetland are not compatible with the preservation, protection and conservation of the wetland and its benefits. Thus, the proposed development cannot meet permit issuance standards (6 NYCRR 663.5(e)(i)).

Both the Applicant and DEC Staff oppose advancing this sub-issue to adjudication. DEC Staff believes that the draft permit adequately protects the wetland. The Applicant argues that the creation of the Bluebelt would do more damage to the wetland than the Applicant's proposal and cites his wetland expert. The Applicant argues that the City has only made generalized, abstract and conclusory statements regarding potential adverse impacts and has not presented site specific data adequate to raise an adjudicable issue.

However, it is reasonable to inquire further regarding the potential adverse impacts of this proposed project where the project will be as close as eighteen feet from the wetland boundary and eight units are proposed on a parcel smaller than one acre. The possibility of as many as sixteen families living in this area would cause a reasonable person to inquire further about the Applicant's claim that it can meet regulatory standards. These potential impacts may lead to a major modification of the draft permit or permit denial. Accordingly, the ALJs find this issue substantive and significant and advance it to adjudication, should a hearing occur.

Post-Issues Conference Changes to the Site Plan

The City also claims that recently-made changes to the site plan warrant DEC Staff treating this permit application as a new application. The changes to the site plan include: the construction of the concrete curb and fence along the boundary of the area of no disturbance; the placement of approximately one foot of fill in the backyards of the proposed units; and the cutting of weep holes through the curb for drainage. These changes, the City asserts, raise a series of concerns including: the possibility of erosion during construction and post-construction; the increased velocity of water passing through the weep holes and the possibility of clogging; and other impacts on the wetland and adjacent area. Due to these changes and the concerns they raise the City argues that the permit application must be reconsidered by DEC Staff.

The City first raised this issue in its July 16, 2003 submission, which was to be the day the record closed. The Applicant then made an unauthorized submission responding to this new issue which was received on July 21, 2003. The City requested that this submission not be included in the record. However, given the evolving nature of the proposed project and the parties' arguments, the ALJs believe it is fair to consider the Applicant's last submission.

The Applicant responds that the changes to the site plan are very minor and all in response to suggestions from government regulators. It would be unfair, the Applicant contends, to now require the application to be treated as a new one. DEC Staff did not respond on this dispute.

The ALJs agree with the Applicant that these changes do not warrant treating this application as new. However, the City's concerns, as discussed in the affidavits of its expert witnesses, regarding the changes to the site plan are valid. The sub-issues related to the construction of the curb wall and fence and the placement of fill raise sufficient doubt about the Applicant's ability to meet the regulatory criteria and could result in permit modification or denial. Accordingly, these sub-issues are substantive and significant and should be adjudicated. The adjudication will allow the parties an opportunity to develop the record, present expert testimony and cross examine these experts so that the Commissioner will have the facts necessary to determine whether to issue the permit.

The Public Health and Welfare

The City asserts that the proposed New Creek Bluebelt would promote the public health and welfare. Since the site of the proposed project is critical to the development this Bluebelt, the issuance of DEC's permit, the City maintains, would not be compatible with the public health and welfare. This incompatibility, the City argues, demonstrates that the proposed project does not meet permit issuance standards (6 NYCRR 663.5(e)(iii)).

As an offer of proof regarding this sub-issue, the City submitted a document entitled "Engineering Feasibility Analysis for the New Creek Bluebelt, with focus on Last Chance Pond and the Borg Property" dated June 25, 2003. This document was prepared by the City's expert, Sandeep Mehrotra, P.E., who believes that the proposed project will undermine the feasibility of the New Creek Bluebelt.

DEC Staff believes that this sub-issue is substantive and significant and should be adjudicated. The Applicant argues that the sub-issue is not adjudicable based on the definition of "public health and safety" below:

- (f) *Interpretation of some terms used in subdivision (e) of this section.* (1) Public health and welfare. Those concerns include:
- (i) consistency of the proposed activity with physical health, in necessary, as judged by health professionals; and
 - (ii) consistency with related Federal, State and local laws, regulations and policies. If a proposed activity is inconsistent with physical health, or with any related laws, regulations and government policies, this would weigh against issuing a permit under the act until such conditions were met that would make the proposed activity consistent with these provisions.

Based upon this definition and the fact that the City did not assert that the issuance of the permit would affect human health, the Applicant asserts that the City has failed to meet its burden of demonstrating this is an adjudicable issue. The ALJs concur, the City has not offered any proof that the issuance of this permit would affect physical health of anyone near this proposed project. Accordingly, this issue should not be advanced to adjudication.

Ruling: The City has raised three adjudicable sub-issues related to the Applicant's ability to meet regulatory standards.

These issues are: 1) the adequacy of the Applicant's proposed measures to prevent future encroachments; 2) whether stormwater runoff from the proposed project will adversely impact the freshwater wetland; and 3) whether the impacts of the placement and construction of the curb wall and fence will adversely impact the wetlands. The fact that the Applicant has provided additional details during the issues conference process is not a reason to treat this application as a new application. Finally, the City has failed to establish an adjudicable issue related to the proposed project on the public health and welfare.

RULINGS ON PARTY STATUS

The Applicant and DEC Staff are parties to the hearing pursuant to 6 NYCRR 624.5(a). The City has filed an acceptable petition, raised a substantive and significant issue and has demonstrated an adequate environmental interest. Therefore, the City is entitled to full party status pursuant to 6 NYCRR 624.5(d)(1), should this hearing go forward. Mr. Caravone, as a long-time resident and elected leader of the community in which this project is proposed, has special knowledge regarding the issue to be adjudicated and can make a meaningful contribution to the record. Accordingly, Mr. Caravone is also entitled to full party status pursuant to 6 NYCRR 624.5(d)(1).

CONCLUSION

The Commissioner should deny this permit application pursuant to 6 NYCRR 663.5(h) based upon the efforts of the City to acquire the site of the proposed project. If she does not, the decision by the DEC Staff not to require an EIS is remanded to DEC Staff for a redetermination pursuant to 6 NYCRR 624.4(c)(6)(i)(a). If the Commissioner directs the hearing process to go forward now, the issues raised by the City regarding the Applicant's ability to meet permit issuance standards in 6 NYCRR Part 663 should be adjudicated with both the City and Mr. Caravone as full parties.

APPEALS/COMMENTS ON THE RECOMMENDED DECISION

Pursuant to 6 NYCRR 624.8(d), an ALJ's issue ruling may be appealed to the Commissioner and pursuant to 6 NYCRR 624.13(a)(2), parties are entitled to comment on a recommended decision. In this case, the ALJs have taken the unusual step of recommending permit denial at the issues conference stage and combined their

issues ruling with a recommendation for a final agency action, specifically permit denial.

In the interest of efficiency, the schedules for the parties to appeal the issues ruling and comment on the recommended decision are combined. Accordingly, any appeals/comments must be received at the office of the Commissioner no later than September 26, 2003, at the following address: Commissioner Erin M. Crotty, NYS Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1010. Any responses to such appeals are to be received by October 13, 2003, at the same address. The parties are to transmit copies of any appeals/comments and replies to all persons on the service list at the same time and in the same manner as they are sent to the Commissioner.

Any request for an adjustment to the appeal/comment schedule must be made to the Chief ALJ, at the Office of Hearings and Mediation Services address.

_____/s/_____
Kevin J. Casutto
Administrative Law Judge

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

Albany, New York
September 3, 2003

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