

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Applications for Permits to Construct and Operate a Proposed Development to be Known as the Belleayre Resort at Catskill Park, Located in the Town of Shandaken in Ulster County, New York, and the Town of Middletown in Delaware County, New York, Pursuant to Environmental Conservation Law Article 15, Titles 5 and 15, and Article 17, Titles 7 and 8, and Parts 601, 608 and 750 through 758 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and for a Water Quality Certification Pursuant to Section 401 of the Federal Water Pollution Control Act and 6 NYCRR Part 608

- by -

CROSSROADS VENTURES, LLC

Applicant.

DEC Project Numbers:
0-9999-00096/00001
0-9999-00096/00003
0-9999-00096/00005
0-9999-00096/00007
0-9999-00096/00009
0-9999-00096/00010

RULING OF THE COMMISSIONER ON MOTION TO RECUSE THE COMMISSIONER

April 29, 2009

RULING OF THE COMMISSIONER ON MOTION TO RECUSE THE COMMISSIONER

By motion dated March 28, 2008, Friends of Catskill Park, Catskill Heritage Alliance and the Pine Hill Water Coalition (collectively, "FOCP") seek an order (1) disqualifying the Commissioner from taking any part in this or any further proceeding regarding a September 2007 agreement in principle executed by some of the parties to this proceeding, and (2) directing that any ex parte communications, whether written or oral, between the Commissioner or his office and any party to this proceeding, including but not limited to the Governor's office, be fully disclosed together with the circumstances of the communication, and if no such communications have occurred, a certification by the Commissioner to that effect.

For the reasons that follow, FOCP's motion is denied.

Proceedings

Applicant Crossroads Ventures, LLC, filed an application with the New York State Department of Environmental Conservation ("Department") for permits in connection with a proposed development known as the Belleayre Resort at Catskill Park. The Department, serving as lead agency under the State Environmental Quality Review Act (Environmental Conservation Law ["ECL"] article 8 ["SEQRA"]), required the preparation of a draft environmental impact statement ("DEIS") and referred the matter to the Department's Office of Hearings and Mediation Services ("OHMS") for permit hearing proceedings pursuant to part 624 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") ("Part 624").

A legislative hearing and issues conference were conducted by presiding Administrative Law Judge ("ALJ") Richard R. Wissler. Among the participants at the issues conference were Department staff, the applicant, and an association comprised of the Catskill Preservation Coalition and the Sierra Club (collectively, "CPC"). The Catskill Preservation Coalition was itself an association of various groups, including the FOCP movants.

Proceedings continued through the ALJ issues ruling and interim administrative appeals stage, culminating in an interim decision by Deputy Commissioner Carl Johnson (see Interim Decision of the Deputy Commissioner, Dec. 29, 2006). The interim decision identified various issues for adjudication, including supplementation of the alternatives analysis in the DEIS to

address smaller and lower impact alternatives to the original proposal (see id. at 87-94). The interim decision also affirmed the ALJ's grant of party status to CPC (see id. at 95).

In late 2006, the parties to the hearing had begun negotiations to settle contested matters. The negotiations were aided by former Governor Eliot Spitzer's office.¹ In September 2007, applicant informed the ALJ that on September 5, 2007, it and several of the parties in this proceeding entered into an agreement in principle ("AIP") that proposes a modified project having, they claim, a less significant environmental impact. Among the parties to the AIP is the State of New York, represented by the Governor's Deputy Secretary for the Environment. The FOCIP movants were not signatories to the AIP.

The AIP provides that review of the modified project would require the preparation of a supplemental DEIS and the filing of new or modified Departmental permit applications, all subject to full public review. Accordingly, applicant requested, and the ALJ granted, suspension of further adjudicatory proceedings on the original project pending supplementation of the administrative record (see ALJ Ruling on Motion to Suspend Adjudicatory Hearing, Oct. 19, 2007). Further, upon motion by applicant, the Commissioner suspended proceedings on a motion for reconsideration pending before the Commissioner's office (see Ruling of the Commissioner on Motion to Suspend Proceedings on the Motion for Reconsideration, Nov. 9, 2007). FOCIP did not appear or otherwise file an objection on either of these suspension requests by applicant.

In December 2007, FOCIP moved before the ALJ for a determination that the ALJ and OHMS have the exclusive authority to make SEQRA determinations on behalf of the Department as lead agency, subject to appeal to the Commissioner. Subsequently, FOCIP separately moved for a determination that the modified project described in the AIP must be reviewed as a new project and not as a modification of the original project. The ALJ denied both motions (see ALJ Ruling on Motions Addressing Post-Referral SEQRA Determinations and SEQRA Status of Agreement in Principle, March 3, 2008 ["March 2008 ALJ Ruling"]).

FOCIP timely moved before the Commissioner for leave to

¹ In March 2007, the ALJ established a discovery and adjudicatory hearing schedule. The schedule was periodically adjourned at the request of the parties.

appeal from the March 2008 ALJ Ruling. FOCP subsequently requested that the Commissioner suspend decision on the motion for leave to appeal pending submission of the present motion for recusal of the Commissioner. In a letter dated March 21, 2008, Assistant Commissioner Louis A. Alexander informed the parties that the request to suspend decision on the motion for leave to appeal was granted.

FOCP filed the present motion for recusal of the Commissioner dated March 31, 2008. Applicant filed an affirmation dated April 11, 2008 in opposition to FOCP's motion, and Department staff filed an affirmation in opposition dated April 12, 2008. FOCP filed a response to the opposing affirmations dated May 2, 2008. Department staff and applicant filed replies, both dated May 9, 2008.

Discussion

Request for Recusal

In its present motion for recusal, FOCP requests that an order be granted disqualifying the Commissioner from taking any part in this or any further proceeding regarding the AIP. FOCP argues that former Governor Spitzer had, on many occasions, issued public statements in support of the modified project described in the AIP as the only acceptable alternative. FOCP contends that statements in support of the modified project were also issued by the Governor's Deputy Secretary for the Environment. FOCP points out that the Commissioner is appointed by the Governor, holds office at the Governor's pleasure, implements the Governor's environmental policy, and reports to the Governor. FOCP asserts that the Governor's prejudgment and bias in support of the modified project described in the AIP has effectively precluded the Commissioner from rendering an unbiased decision regarding the Department's environmental review of the project.

Department staff opposes the motion on the ground that it is unsupported by proof of any action, statement, or personal bias of the Commissioner. Moreover, Department staff asserts that the AIP does not bind or direct specific decisions by the Department. Rather, staff contends that consideration of the modified project will be subject to full public review under SEQRA, and might result in changes to the project not contemplated by the AIP.

Applicant also opposes the motion, arguing that FOCP has provided no proof of personal bias or disqualification of the

Commissioner in this matter. Applicant points out that the Department was not a party to the AIP, and no representative of the Department signed the AIP. Applicant contends that FOCP's assertions of bias are based upon the public statements of the former Governor, and not the Commissioner. Moreover, applicant asserts that the supplementation of the SEQRA record contemplated by the AIP is not only consistent with the Deputy Commissioner's Interim Decision, it provides more public review and comment than would have occurred under the Interim Decision.

The State Administrative Procedure Act ("SAPA") requires that administrative adjudicatory proceedings be conducted in an impartial manner (see SAPA § 303). SAPA further provides for recusal of the presiding hearing officers, including the Commissioner and the ALJ:

"Upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as part of the record in the case, and its determination shall be a matter subject to judicial review at the conclusion of the adjudicatory proceeding" (id.).

The courts have provided further guidance concerning the grounds for disqualification of a commissioner. A commissioner is disqualified from presiding in an adjudicatory proceeding where the commissioner suffers a personal bias, prejudice, or other disqualifying factor. These factors include a commissioner's prejudgment of the facts of a particular case (see Matter of 1616 Second Ave. Rest., Inc. v New York State Liq. Auth., 75 NY2d 158, 162 [1990]), or a financial or personal interest in or relationship to one of the parties in the matter (see Matter of Beer Garden, Inc. v New York State Liq. Auth., 79 NY2d 266, 278 [1992] [applying Judiciary Law § 14 to a commissioner exercising a quasi-judicial function in an administrative adjudicatory proceeding]). A commissioner is also disqualified where the commissioner previously served as the agency prosecutor in the case, whether actively or merely functionally (see id. at 278-279; see also Matter of General Motors Corp. - Delco Prods. Div. v Rosa, 82 NY2d 183, 188-189 [1993]). Absent one of the above grounds for disqualification, whether recusal is warranted falls within the discretion of the decision maker (see Matter of Murphy, 82 NY2d 491, 495 [1993]; People v Moreno, 70 NY2d 403, 405-406 [1987]).

Although prejudgment of the specific facts of a pending

case may require disqualification, mere familiarity with the facts without prejudgment does not require disqualification (see Matter of 1616 Second Ave. Rest., 75 NY2d, at 162). Nor does a predisposition on questions of law or policy, or advance knowledge of general conditions in the regulated field (see id.). Commissioners are expected to be familiar with the subjects of the regulations they administer, and to be committed to the goals of the agency in which they are employed (see id.). Moreover, the mere circumstance that an agency official is employed by the agency, without more, is not a ground for disqualification (see Matter of Whalen v Slocum, 84 AD2d 956 [1981]).

In its motion, FOCP fails to identify any ground for my disqualification in this case, nor does any such ground exist.

FOCP's assertion that former Governor Spitzer's public support of the AIP requires my recusal or otherwise binds my decision in this matter (citing State ex rel. Ellis v Kelly, 145 W Va 70[1960]) is meritless. No basis exists in New York law for attributing the public statements of the Governor to a commissioner, or for disqualifying a commissioner otherwise free of bias and prejudice on the basis of a Governor's public statements in support of a project.

Moreover, the contention that through the AIP, the former Governor has bound the Department to a particular course of action and outcome is not correct, and is in fact belied by the way in which the AIP was structured. The Department was not a signatory to the AIP. In addition, the AIP expressly preserves the Department's SEQRA and permit review authority, and contemplates that changes may occur to the project as a result of that public review process (see AIP, Feller Affidavit, Exh A, at 2-3, 16-17, 25; see also Matter of Catskill Heritage Alliance, Inc. v State of New York, Sup Ct, Albany County, Sept. 3, 2008, Connolly, J., Index No. 24-08, at 9). Thus, the circumstance that the Governor's Office facilitated negotiations and signed the AIP does not prevent me from serving as the decision maker in this adjudicatory proceeding.²

² The West Virginia case cited by FOCP in support of the proposition that the Commissioner, as the immediate subordinate of the Governor, is disqualified by the Governor's public support of the AIP, is inapposite. In State ex rel. Ellis v Kelly, the Commissioner testified concerning his independent investigation of a business that was the subject of an adjudicatory proceeding before the Deputy Commissioner, thereby disqualifying the Deputy Commissioner (see 146 W Va, at 71). In this case, the former

In sum, FOCP has not identified any ground for my disqualification. FOCP's motion, insofar as it seeks my recusal, is denied.

Alleged Ex Parte Communications

FOCP argues that the possibility of undisclosed ex parte communications between the Commissioner's office and the Governor's office concerning the AIP may provide an independent basis warranting the Commissioner's recusal. FOCP asserts that by executing the AIP on behalf of the State, the Governor's office has become a party to this adjudicatory proceeding. Accordingly, FOCP asserts, any communication with the Governor's office would constitute an ex parte communication with a party (see SAPA § 307[2]).

FOCP notes that it requested, pursuant to the Freedom of Information Law (see Public Officers Law art 6 ["FOIL"]), disclosure of records pertaining to communications between the Commissioner's and Governor's offices concerning the AIP, and that some records were withheld by both the Department and the Governor's office. With respect to the FOIL request before the Department, an administrative appeal was decided regarding the partial denial of FOCP's request, which the Catskill Heritage Alliance, Inc. has now challenged (see Matter of Catskill Heritage Alliance, Inc. v Office of the Governor, et al., Index No.:1141-09 [Sup Ct, Albany County]).

FOCP contends that whatever the outcome of the FOIL appeal, any withheld records must be disclosed in this administrative proceeding. Accordingly, FOCP demands that any communications between the Commissioner's office and the Governor's office concerning the AIP be fully disclosed or, in the alternative, that the Commissioner certify that no such communications took place.

Department staff opposes FOCP's requests and argues, in part, that FOCP has failed to carry its burden of proof on the motion (see 6 NYCRR 624.9[b][4]) that any ex parte communications occurred between the Governor's and Commissioner's offices. Moreover, staff asserts that the remedy for any ex parte communication is not recusal. Rather, the remedy would be to

Governor has not appeared in this adjudicatory proceeding and, as noted above, the AIP does not bind the Department to any particular outcome. To the contrary, the AIP expressly preserves the Department's independent review of the modified project.

provide notice of the communication and the opportunity for all other parties to participate (see SAPA § 307[2]).

Applicant also opposes the request, arguing that the Governor is not a party to this adjudicatory proceeding and, therefore, even assuming the existence of communications with the Governor's office, those communications would not be ex parte communications with a party. Applicant notes that SAPA § 307(2) does not prohibit communications with nonparties to an adjudicatory proceeding on questions of law and policy. As to FOCP's arguments concerning FOIL, applicant argues that FOCP's motion is not proper under FOIL and constitutes an attempt to conduct discovery in a suspended proceeding. In addition, applicant notes that under FOIL, an agency is not required to certify that records do not exist (citing Matter of New York Assn. of Homes and Servs. for the Aging, Inc. v Novello, 13 AD3d 958, 960 [2004]). Rather, an agency's attestation in response to a FOIL request that it did not possess or maintain records constitutes the requisite certification (see id.).

As an initial matter, the Governor's office has not filed a petition for party status in this proceeding, and no such status has been granted. Accordingly, the Governor's office is not a party to this proceeding and any communications with the Governor's office on questions of law and policy are not barred under SAPA § 307(2). The circumstance that the Governor's office executed the AIP on behalf of the State does not make the Governor's office a party.

No ex parte communications have taken place between my office and the Governor's office, or between my office and any party, in this proceeding. Moreover, as is the usual practice, any written communications to the Commissioner's office concerning any matters presently before OHMS are diverted by the Commissioner's Correspondence Unit ("CCU") to other members of Department staff for appropriate action and response. Oral inquiries concerning matters in OHMS are similarly referred to other members of Department staff. These measures, long a part of this and prior Commissioners' practice, are in place to assure that the Commissioner remains insulated from communications outside the hearing record in adjudicated proceedings and, thus, remains an impartial final decision maker in such proceedings. These usual safeguards against ex parte communications have been followed in this proceeding.

Accordingly, FOCP's request for disclosure of ex parte communications between the Commissioner's office and the Governor's office is denied upon the ground that no such ex parte

communications occurred. No further certification is required.

Ruling

FOCP's motion for the Commissioner's recusal and other relief is denied in its entirety.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Alexander B. Grannis
Commissioner

Dated: April 29, 2009
Albany, New York

TO: Attached Service List