

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Applications of

CROSSROADS VENTURES, LLC

for permits to construct and operate a proposed development
to be known as The Belleayre Resort at Catskill Park.
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RULING ON MOTION
FOR DISCOVERY

DEC Application Number
0-9999-00096/00005

This Ruling addresses the motion made by the Catskill Preservation Coalition (CPC), pursuant to 6 NYCRR 624.7, for discovery of records relating to any proposed expansion of the Belleayre Mountain Ski Center (BMSC), including any current draft Unit Management Plan (UMP) for that site, in the possession of the Department of Environmental Conservation (Department or DEC). For the reasons set forth herein, the motion is denied.

Positions of the Parties

CPC argues that the discovery of these records at the issues conference stage is essential to a full discussion of the potential cumulative impacts associated with the Applicant, Crossroads Ventures, LLC's, proposed project. Citing 6 NYCRR 617.7(c)(2) and ECL 3-0301(1)(b), CPC argues that it is incumbent upon DEC, as lead agency in this matter, to consider the cumulative impacts of the proposed project and any proposed expansion of the BMSC. Moreover, asserts CPC, while the Draft Environmental Impact Statement (DEIS) provides some references to the proposed expansion and improvements to the BMSC, the matter of cumulative impacts is not adequately addressed therein, as required by 6 NYCRR 617.9(b)(5)(iii)(a). In further support of their position, CPC points out that development of the Applicant's project is proposed for essentially two parcels of land, one lying immediately to the east of the BMSC, being the proposed Big Indian site, and the other immediately to the west, being the proposed Wildacres site. CPC argues that given the proximity of the Applicant's proposed project and the BMSC there will be resulting cumulative impacts on the availability and adequacy of potable water supplies, surface water flow and aquatic habitat, traffic, use of Catskill Forest Preserve lands, and secondary growth.

CPC acknowledges that discovery prior to the issues conference may be permitted upon a showing of extraordinary circumstances, in accordance with 6 NYCRR 624.7(a), and asserts that such circumstances are presented here "due to the Commissioner's unique role in evaluating the significant adverse environmental impacts of two interdependent related actions, one of which is a DEC initiated project." (Gerstman Affirmation in Support of Motion for Discovery, dated June 2, 2004, paragraph 4.)

Department Staff and the Applicant oppose the motion arguing that any proposed expansion of BMSC is speculative and not final at this point in time and thus not relevant to this proceeding. Moreover, they assert that CPC has failed to demonstrate those extraordinary circumstances upon which discovery could be compelled pursuant to 6 NYCRR 624.7(a).

Discussion

Although Article 31 of the Civil Practice Law and Rules (CPLR) provides the general parameters for discovery in New York, as well as an enumeration for the various discovery devices available to parties, its applicability in the Department's permit hearing process is governed by Part 624 of the Department's regulations. As 6 NYCRR 624.7(a) makes clear, except upon a showing of extraordinary circumstances, discovery prior to the issues conference is limited to what is afforded under 6 NYCRR Part 616, being essentially only those records available pursuant to the Freedom of Information Law (FOIL). Where, however, such extraordinary circumstances exist, a party may move, pursuant 6 NYCRR 624.7(c), and with the ALJ's permission obtain, broader discovery than otherwise afforded by Section 624.7(a). The critical question then is: What constitutes "extraordinary circumstances" within the meaning of 6 NYCRR 624.7(a)?

Discovery available under Section 624.7 is in part a function of the procedural status of the matter under consideration. While the section speaks of discovery "prior to the issues conference," it is apparent that the crucial procedural moment at which the broader range of discovery available to a party than that afforded by Part 616 occurs upon "service of the final designation of the issues." 6 NYCRR 624.7(b). Thus, until this final designation of the issues occurs, either through a ruling on issues by the ALJ which is not appealed or a Commissioner's Interim Decision after an appeal of the ALJ's ruling on issues, the provisions of Section 624.7(a) apply. As this matter is at the issues conference stage, the provisions of Section 624.7(a) regulate discovery.

As 6 NYCRR 624.4(b)(2)(iii) provides, one purpose of the issues conference is "to hear argument on whether disputed issues of fact that are not resolved meet the standards for adjudicable issues set forth in subdivision 624.4(c) of [Part 624]," that is, whether these disputed issues of fact are substantive and significant. Where Department Staff finds that a proposed aspect of an applicant's project conforms to all applicable statutory and regulatory requirements, the burden of persuasion is on the intervening proponent of an issue regarding that project aspect to demonstrate that that issue is both substantive and significant. 6 NYCRR 624.4(c)(4). This burden of persuasion is met where an intervenor can demonstrate that "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" and that such further inquiry could affect permit issuance or result in a major modification to the proposed project. 6 NYCRR 624.4(c)(2) and (3). This demonstration is accomplished through an offer of proof. Thus, the purpose of the issues conference is to identify substantive and significant issues, not to adjudicate them.

In the ordinary circumstance, the application and any related documents, such as the

DEIS and any comments thereon, the draft permit, and any other records discoverable pursuant to Part 616, will be sufficient to allow intervenors to determine and articulate potential substantive and significant issues, and, as is often the case, through their own expert enable them to meet their burden of persuasion with respect to a potential issue. The Public Comment Responsiveness Document to the 1994 Revisions to 6 NYCRR Part 624 supports this position, as illustrated by this comment and response:

COMMENT 624.7 - If the Department is going to continue to impose a high standard of proof for an intervenor to demonstrate that an adjudicable issue exists, then it is crucial that discovery be liberally provided to the intervenor for that purpose.

RESPONSE Discovery can become unwieldy if it is open-ended. We view the application documents as normally being sufficient to alert any intervenors to matters which could potentially lead to an issue. The new regulations have been structured to provide a much more completely articulated and comprehensive discovery process than do the current regulations. They do, however, limit discovery in the pre-issues conference phase. This is to prevent “fishing expeditions” and to focus the process on the substantive and significant issues determined at the issues conference. Additional pre-issues conference discovery is possible however. If an intervenor can demonstrate that it really does need further discovery to raise an issue, the ALJ has the power to authorize that discovery and grant whatever time is necessary to review the additional material.

The last sentence of the Response is particularly important in defining and understanding when “extraordinary circumstances” exist: “If an intervenor can demonstrate that it really does need further discovery to raise an issue” While the existence of “extraordinary circumstances” must be determined on a case by case basis in light of the unique circumstances of the particular matter (see, e.g., *Matter of American Marine Rail, LLC*, Rulings of the ALJ, August 25, 2000), the general rule is clear: Where the intervenor can demonstrate that it cannot reasonably meet its burden of persuasion that an issue is substantive and significant without the requested discovery, a showing of extraordinary circumstances has been made.

From the foregoing, it is apparent in the first instance that the “Commissioner’s unique role in evaluating the significant adverse environmental impacts of two interdependent related actions, one of which is a DEC initiated project” does not constitute the “extraordinary circumstances” contemplated by 6 NYCRR 624.7(a).

A finding of extraordinary circumstances would require a showing that but for the requested discovery, a potential intervenor cannot meet its burden of persuasion that an issue is substantive and significant. Moreover, extraordinary circumstances cannot be alleged merely because the discovery sought would, beyond the threshold burden of persuasion, augment an intervenor’s argument that an issue is substantive and significant. In the present matter, while essentially arguing that its position with respect to the issue of cumulative impacts would be

strengthened through the requested discovery, CPC's counsel stated during colloquy on June 8, 2004: "I'm certainly not going to concede, your Honor, but for this information my offer of proof fails on cumulative impacts, because we believe that we have made a prima facie case for cumulative impact evaluation that has not been addressed in the Draft Environmental Impact Statement." (Transcript of Issues Conference of June 8, 2004, at page 15.)

In view of the foregoing, I find that CPC has not made a showing that extraordinary circumstances exist as required by 6 NYCRR 624.7(a) and, accordingly, its motion for discovery of records relating to any proposed expansion of the Belleayre Mountain Ski Center (BMSC), including any current draft Unit Management Plan (UMP) for that site, in the possession of the Department is denied.

This Ruling does not in any way affect CPC's rights pursuant to FOIL, or the records provided thereto by the Department.

Dated: Albany, New York
June 21, 2004

/s/
Richard R. Wissler
Administrative Law Judge

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