

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Applications of

CROSSROADS VENTURES, LLC

RULING ON MOTIONS
ADDRESSING POST-
REFERRAL SEQRA
DETERMINATIONS AND
SEQRA STATUS OF
AGREEMENT IN PRINCIPLE

for permits to construct and operate a
proposed development to be known as The
Belleayre Resort at Catskill Park.

DEC Application Number
0-9999-00096/00001, 3,
5, 7, 9 & 10

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Summary and Procedural Background

By notice of motion dated December 7, 2007, Friends of Catskill Park, Catskill Heritage Alliance and the Pine Hill Water Coalition (FCP, CHA and the PHWC) move for "a determination that the Administrative Law Judge (ALJ) and the Office of Hearings and Mediation Services (OHMS), exclusively have the authority to make [SEQRA] determinations on behalf of the lead agency in the captioned proceeding, subject to appeal to the Office of the Commissioner." Timely responses to the motion were received from Crossroads Ventures, LLC (Applicant) and Department staff. Subsequently, all parties sought leave to file additional responses and replies.

By notice of motion dated December 21, 2007, FCP, CHA and the PHWC move for "a determination that the project described in the September 5, 2007, Agreement in Principle (AIP) must be reviewed as a new project and not a mere modification of the project that was noticed for review in the captioned proceeding." Timely responses to the motion were received from the Applicant and Department staff. Subsequently, all parties sought leave to file additional responses and replies.

The requests from the parties to file further responses or replies to either motion are denied. For the reasons set forth herein, the motion of December 7, 2007, is denied and the motion of December 21, 2007, is denied on the ground that it does not lie.

Discussion

The Motion of December 7, 2007

As noted, this motion seeks "a determination that the Administrative Law Judge (ALJ) and the Office of Hearings and Mediation Services (OHMS), exclusively have the authority to make [SEQRA] determinations on behalf of the lead agency in the captioned proceeding, subject to appeal to the Office of the Commissioner." The Department's SEQRA and permit hearing procedures at 6 NYCRR parts 617 and 624, respectively, and established Department precedent, do not support such a determination.

The circumstances giving rise to the motion are set forth in the affidavit filed in support thereof. In particular, the motion makes reference to the AIP entered into on September 5, 2007, by certain of the parties appearing in the above-captioned matter. The AIP, the motion notes, provides for the preparation of a supplemental draft environmental impact statement (SDEIS), addressing certain environmental concerns associated with a modified project proposal. Included in the AIP is a draft scope which delineates with particularity the environmental impact issues to be reviewed in preparation of the SDEIS. The motion expresses concern that the draft scope is limited because it fails to examine certain alternatives to or among the elements of the modified project proposed in the AIP. The AIP was entered into, the motion argues, while the above-captioned matter is still under review. But since that review is now in OHMS and before an ALJ, the motion essentially asserts, any decisions as to the breadth and adequacy of the draft scope are to be made by OHMS and the ALJ on the Department's behalf, as lead agency, and not by Department staff who may have been responsible for SEQRA decisions prior to referral of the matter to OHMS.

An examination of past OHMS precedent is instructive. In Matter of Hinkley, Decision of the Commissioner, December 8, 1987, a public hearing was held before an ALJ regarding a proposed residential development. (Id. at 3.) Inasmuch as the appropriate water supply permit application had not been duly filed at the time of the hearing, the application was deemed incomplete. (Id.) The matter was remanded to Department staff for the preparation of an SDEIS addressing those environmental impact issues associated with the water permit application. (Id.) Pending the preparation of that SDEIS, the ALJ directed the parties to meet and discuss the possible resolution of any outstanding environmental issues. (Id. at 4.) To facilitate such resolution, the ALJ, with the requested assistance of the

New York State Office of Court Administration, arranged for the services of a mediator. (Id.) Upon submission of the SDEIS, the application was noticed as complete. A public hearing and issues conference were scheduled. (Id.) At the issues conference and as a result of the mediation process directed by the ALJ, the parties presented the ALJ with a stipulation resolving all issues. (Id. at 5.) No new parties sought to intervene and the ALJ subsequently determined that further hearings were unnecessary. (Id.) The SDEIS prepared was included among the documents constituting the Final Environmental Impact Statement (FEIS) which was accepted by the Commissioner, who directed issuance of the requested permits. (Id. at 1-2.)

In Matter of Peckham Materials Corp., Ruling of the ALJ, July 9, 1991, the applicant sought a permit from the Department to operate a sand and gravel mine. An issues conference was convened before an ALJ to determine possible issues for adjudication and to hear requests for party status. (Id. at 1.) With the consent of the ALJ, all parties agreed to adjourn the issues conference to allow the parties to informally discuss resolution of some or all of the outstanding issues. (Id.) The ALJ was not involved in these discussions. (Id.) When the issues conference subsequently resumed before the ALJ, Department staff and the prospective intervenors orally moved that a SDEIS be prepared in the matter. The applicant did not join in the motion. (Id.) After hearing argument from all parties, the ALJ ruled that a SDEIS would be required with respect to certain environmental issues. (Id. at 13.) On appeal, the ALJ's ruling requiring the preparation of the SDEIS was upheld by the Commissioner. (Matter of Peckham Materials Corp., Interim Decision of the Commissioner, January 27, 1992, at 5.) When the issues conference was reconvened after the acceptance of, and public comment on, the SDEIS, no additional parties sought to intervene. (Matter of Peckham Materials Inc., Ruling of the ALJ, February 12, 1993, at 2-3.) Following the resolution of certain issues through adjudication, the requested permit was granted. (Matter of Peckham Materials Corp., Decision of the Commissioner, January 28, 1994.)

In Matter of Preble Aggregate Inc., Ruling of the ALJ, August 4, 1993, the ALJ directed the preparation of a SDEIS to address certain environmental impacts of a proposed mine reclamation plan which had not been considered in the Draft Environmental Impact Statement (DEIS). (Id. at 13.) The ruling of the ALJ directing the preparation of the SDEIS was not subsequently appealed by any of the parties. The resultant SDEIS was accepted by the Department and public review completed. The mining permit was ultimately granted. (Matter of Preble

Aggregate Inc., Interim Decision of the Commissioner, September 7, 1995; Matter of Preble Aggregate Inc., Decision of the Commissioner, July 19, 1996.) The same parties appeared throughout the proceeding, no new parties seeking to intervene subsequent to the acceptance of the SDEIS.

There are certain elements common to each of these prior OHMS proceedings. First, the subject of a SDEIS was initially broached before the ALJ on the record during a public hearing or issues conference proceeding. Second, the request for the SDEIS was made prior to any ruling on issues was rendered by the ALJ or any interim decision by the Commissioner. Third, the request for the SDEIS arose in the context of a proposed project whose defining elements were already fully articulated. Fourth, in each case, the ALJ ruled that the SDEIS be prepared, often providing guidance as to the environmental impacts issues to be considered therein. Fifth, in each case, the parties remained the same throughout the proceeding. When the SDEIS was publically noticed and the issues conference reconvened, no other parties sought to intervene.

None of these elements, common to prior OHMS proceedings, are present in this matter. Indeed, as the foregoing analysis of OHMS precedent makes clear, an ALJ will only consider the nature and scope of an SDEIS when the question of its requirement arises during the course of an open proceeding before that ALJ.

At no time during the above-captioned proceeding did any party seek a ruling of the ALJ or the Commissioner directing the preparation of a SDEIS. The issues conference record in this proceeding is closed and an issues ruling as well as an interim decision rendered. The Interim Decision of December 29, 2006, directs that certain defined issues are to be advanced to adjudication and affects and involves only those groups granted party status. A consideration of the AIP is not among those issues to be considered, since it arose some months after the Interim Decision. Moreover, the AIP is supported by certain parties including the State of New York which itself was not a party to nor ever granted party status in the above-captioned proceeding. In addition, the AIP introduces elements to the modified project which were not included in the original proposal advanced in the above-captioned matter.

My ruling of October 19, 2007, holds in abeyance, without date, any further proceedings in the above-captioned matter. It is not, at this time, a matter under review before OHMS. At this point, the final status of the above-captioned proceeding is, effectively, unknown. Indeed, it could be withdrawn by the

applicant in favor of a modified proposal such as that contemplated by the AIP.

The AIP and the preparation of any SDEIS relative thereto are not before me. They did not arise at my or at the Deputy Commissioner's direction. The meetings of certain of the parties in the above-captioned proceeding which culminated in the AIP occurred outside the context of that proceeding. At this juncture, it is not appropriate for me, as ALJ in the above-captioned matter, or for OHMS to intervene and displace Department staff's function as SEQRA decision maker for the Department, as lead agency, in the preparation of an SDEIS under the AIP. Accordingly, the motion is denied.

The Motion of December 21, 2007

This motion raises issues as to the propriety of the SEQRA process followed as a result of the AIP. In the previous discussion regarding the motion of December 7, 2007, I determined that the AIP was not before me nor the SEQRA process there invoked involving the development of a SDEIS. Accordingly, no jurisdiction exists for entertaining this motion, and it is denied on the ground that it does not lie.

Dated: Albany, New York
March 3, 2008

Richard R. Wissler
Administrative Law Judge

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