NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application for a Freshwater Wetlands Permit pursuant to Environmental Conservation Law Article 24 and Part 663 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

Ruling on Motion

DEC Case No. 2-6404-00879/00001

- by -

Phillip Farinacci,

September 28, 2009

Applicant.

Summary

This ruling grants a motion made by Phillip Farinacci ("applicant"), pursuant to section 624.5(e)(1)(iv) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), for a ruling directing staff of the New York State Department of Environmental Conservation (DEC staff) to resume its "post-completion review" of applicant's pending freshwater wetland application, which was deemed complete in 2001 and has been dormant since 2003.

Proceedings

The initial application was received by DEC Staff, Region 2, on July 25, 2001. This application requested a freshwater wetland permit to construct a one family, two story frame house, with a cellar on the site, which is in the adjacent area of NYSDEC regulated Class 1 freshwater wetland NA-7(South Beach). The site is a vacant lot located at 144 McLaughlin Street, Staten Island (Block 3413, Lot 29).

By Notice dated September 24, 2001, DEC Staff informed applicant that the application was incomplete.

By papers received October 21, 2001, applicant responded and supplemented its application materials.

On November 26, 2001, DEC Staff issued a Notice of Complete Application. This notice was published in the *Environmental Notice Bulletin* on November 28, 2001 and the *Staten Island Advance* on November 30, 2001.

On January 3, 2002, DEC Staff received revised application materials (the 2002 application) changing the application from a one family to a two family building.

With a cover letter dated January 14, 2002, DEC Staff forwarded copies of letters received from the public regarding the proposed project to applicant. Approximately two weeks later applicant responded. Letters were received from neighbors, local community groups, NYC Council Member James Oddo and then NYS Assemblyman Matthew Mirones.

On May 7, 2002, DEC Staff forwarded the application to the Office of Hearings and Mediation Services (OHMS) because the application raised substantive and significant issues that might lead to permit denial or the imposition of significant conditions.

On April 2, 2003, a Notice of Public Hearing was published in the *Environmental Notice Bulletin,* and in the *Staten Island Advance* on April 16, 2003.

The full adjudicatory hearing was scheduled for May 8, 2003. The legislative hearing began at 10:00 a.m. In his opening remarks, DEC Staff counsel indicated that DEC Staff had tentatively decided to deny the permit application, due to the unmitigated stormwater impacts of the proposed project (t.16). Also at the legislative hearing seven people spoke in opposition to the proposed project and a number of written comments were accepted into the legislative hearing record.

Immediately following the legislative hearing on May 8, 2003, the issues conference began. Two petitions for party status had been timely received by the parties and me. The petitions were from two neighbors of the project, Mr. George Kiel and Mrs. Catherine Greene-Manzi. At the opening of the issues conference, applicant's counsel requested an adjournment to revise the application based on information received at the legislative hearing. Applicant's counsel requested two weeks to submit revised drawings (t. 7). The issues conference was adjourned pending submission of the revised materials and it was agreed that the matter would remain with OHMS (t. 27). Upon receipt of the revised materials, it was agreed that the matter would be renoticed and the hearing process would begin anew (t. 38).

A moratorium on the issuance of freshwater wetlands permits in and around NA-7 (and other wetlands on Staten Island) was signed by the Governor on June 25, 2003 (Chapter 84 of Laws of

2003) and then extended until December 31, 2004 (Chapter 64 of the Laws of 2004).

In late November 2008, applicant's consultants contacted DEC Staff about continuing the processing of the 2002 application. DEC Staff apparently responded that before it would review any modifications or discuss the project, a new application would have to be filed.

With a cover letter dated April 28, 2009, applicant's counsel submitted revised plans to DEC Staff (the 2009 revision). The revisions included elevating the structure on piles, reducing the impervious surfaces associated with the project, and installing a "green" roof. These revisions were proposed to address the issues of stormwater at the site.

DEC Staff and applicant's counsel disagreed as to whether the 2009 revision should be treated as a new application or not and attempts to resolve the dispute were unsuccessful.

On an August 5, 2009, conference call, a schedule was set for applicant to make a motion to resume the "post completion review" of the 2002 application and for DEC Staff to oppose such motion. The parties were directed to send a copy of their motion papers to the two people who had filed for party status at the 2003 administrative hearing.

Applicant's papers were timely received on August 18, 2009.

DEC Staff's papers were timely received on August 28, 2009. Included in DEC Staff's papers was a request to withdraw the 2002 hearing request from OHMS.

Discussion

This dispute involves how applicant's 2009 revision should be treated by DEC Staff. Applicant requests that DEC Staff's review continue from the point it was left in 2003, after a notice of complete application was issued, in what applicant terms "post-completion review." DEC Staff argues that applicant should be required to file a new application that includes the 2009 revision.

Before addressing the dispute, a review of the facts not in dispute is helpful. The site of proposed project has not changed and remains 144 McLaughlin Street. The proposed project, a two family house, remains substantially unchanged, although the

design of the house has changed in response to DEC Staff's concerns about stormwater. It is also not disputed that the six year interval between the 2003 issues conference and the 2009 revision is the result of two factors: (1) the moratorium on the issuance of wetland permits in the area of the proposed project while Staten Island's Bluebelt program was being developed (accounting for a delay of approximately 2 years); and (2) applicant's business decisions (accounting for a delay of approximately 4 years).

Applicable Regulations and Precedent

DEC's Permit Hearing Procedures (6 NYCRR 624) state that the party making the motion bears the burden of proof to sustain the motion. So in this case, applicant must show that it is entitled to having its 2009 revision treated as a post-completion submission rather being required to submit a new application.

DEC's Uniform Procedures (6 NYCRR 621) sets forth the permit application procedures relevant to this application. However, Part 621 does not establish a time limit for information to be submitted by applicants after a notice of completion has been issued. DEC Staff notes that had applicant been granted a freshwater wetland permit, the permit would have expired within 2 or 3 years of issuance, requiring renewal if the project had not been built. DEC Staff further notes that 6 NYCRR 621.11(h) allows a permit renewal to be treated as a new application if a renewal is not timely submitted.

Applicant argues that the outcome of this dispute should be decided by referring to a recent Commissioner's interim decision in Matter of William Haley (June 22, 2009 [WL 2141501]). In Haley, DEC Staff denied the applicant's freshwater wetland permit application in 2006; the applicant timely requested a hearing on the denial; and then, in 2007, submitted a revision which included relocating the proposed dwelling, making it smaller and relocating the proposed septic system. DEC Staff argued that the subject of the hearing should be the original proposal it denied and if the applicant wanted the 2007 revision considered, he should file a new application. The Commissioner rejected DEC Staff's argument and stated the "hearing process is an iterative one where applicant may offer changes to a project that are meant to address environmental concerns or provide further mitigation. The practice of offering project modifications in a good faith effort to mitigate environmental impacts or achieve compliance with permitted standards is one that I encourage." The Commissioner continued, "[a] productive collaboration, where

Department staff clearly explains why a permit denial is warranted, and applicant has the opportunity to respond with potential changes to the project design, is an administratively efficient and practical way to both protect the environment and enable project proponents to pursue their goals." The Commissioner also stated "[c]ircumstances may exist where modifications to a proposed project so substantially change an application that a pending proceeding would need to be terminated, and the applicant would be required to file a new application, restarting the application review process from the beginning. Examples of such changes would be substantially increasing the footprint of a proposed residential dwelling or changing the project from residential to commercial."

Applicant argues that Haley should control in this case and DEC Staff should be directed to continue its post-completion review of the 2002 application. Applicant acknowledges that DEC Staff can request additional information, pursuant to 621.14(b), and that the project will need to be renoticed before the administrative hearing can continue.

DEC Staff argues that Haley is not applicable in this case due to the passage of time. There is nothing in the record indicating any contact from applicant to DEC Staff between the May 2003 legislative hearing and issues conference and November 2008, when applicant's consultants contacted DEC Staff. This silence on the part of applicant, DEC Staff argues, does not demonstrate a productive collaboration or good faith on the part of the applicant. DEC staff cites to no statutory or regulatory provision that establishes that the mere passage of time is a basis for the termination of a permit application. Furthermore, Department staff fails to cite any Department policy or precedent that establishes a time period after which a pending application expires. Accordingly, the mere passage of time is insufficient here to support requiring applicant to file a new application.

The facts in Haley also differ from the instant case in other ways. First, Haley involved a permit denial and an applicant's request for a hearing; in this case, DEC Staff requested the hearing in 2003 and now have requested withdrawal its request. Second, in Haley, negotiations between the parties appear to have been ongoing and the ALJ assigned to the case was regularly updated on the progress of the matter. In this case the applicant appeared to have abandoned the application for nearly six years. In addition, as discussed below, while the proposed project itself may not have substantially changed, conditions at the site may have. However, despite the differences between this case and those in Haley, based on the

above discussion, I conclude that the Commissioner's reasoning in Haley is applicable in this case and that the proposed changes do not substantially change the application and, accordingly, should not be a basis for terminating this proceeding.

Site Conditions

Applicant claims that conditions at 144 McLaughlin Street have not substantially changed since 2003, except the site is now overgrown (Farinacci affidavit, ¶6). Contained in applicant's papers is the affidavit of his expert who visited the site on August 14, 2009 and states that the water levels and flow pattern at the site were the same as he observed in 2003 (Huddleston affidavit, ¶ 16-18).

DEC Staff disputes applicant's assertion that site conditions remain unchanged. While no member of DEC Staff has visited the site recently, DEC Staff notes that Mr. Huddleston did not address the groundwater level at the site, which may have changed since 2002. One reason to suspect a change in groundwater at the site is new development along Father Capodanno Boulevard, southeast of the site. DEC Staff supplies a series of recent aerial photographs showing the area of the project and suggests the recent development and installation of impervious surfaces in areas of higher elevation have the potential of raising the water levels at the site and exacerbating the potential for flooding. DEC Staff also notes the potential for a change in wildlife at the site, based on the changed vegetative conditions.

On the basis of this limited information, it is not possible to conclude that conditions at the site remain substantially unchanged today from what they were in 2003. However, these facts can be developed during the processing of the application by DEC Staff and at the administrative hearing in this matter and do not necessitate applicant filing a new application. It may be that the applicant will have to provide DEC Staff additional information during its review or prepare additional studies or submissions as part of the hearing process.

Site Ownership and the Applicant

The original application listed Phillip Farinacci as the applicant. On the eve of the hearing in May 2003, DEC Staff discovered that title to the property was held by Lighthouse Development Corporation ("Lighthouse"). It was explained that

Lighthouse was a closely held corporation with three principals, and Mr. Farinacci was one of the principals. In October 2003, the property was transferred and is now owned by Grasmere Proper Homes, Inc. ("Grasmere"). Grasmere is also a closely held corporation and Mr. Farinacci and the other two principals of Lighthouse are also the principals of Grasmere.

While DEC Staff claims this change in ownership is a substantial change to the application, I do not agree. Mr. Farinacci states in his affidavit that he was and is the authorized representative of these corporations, and accordingly this change is not substantial.

Prejudice to the Applicant

Applicant argues that requiring a new application would cause prejudice to him, waste both his resources and those of DEC Staff, and serve no practical purpose. Applicant asserts that it would take two years from the date the new application is submitted for DEC Staff to issue a completeness determination. The basis for this claim is the alleged backlog of approximately 200 applications awaiting completeness determinations pending before DEC Staff in Region 2. To support this claim, applicant includes in his papers a printout from DEC's Department Applicant Review Tracking ("DART") system, an online database maintained by DEC, which he says demonstrates this backlog.

DEC Staff rejects applicant's claim of prejudice and disputes the claim that denying the motion would result in a two year delay. In the affidavit of DEC Staff member Harold Dickey, Deputy Regional Permit Administrator for Region 2, he acknowledges a shortage of staff. However, he asserts that applicant's reading of the information on the DART system is incorrect. Mr. Dickey states that of the 204 freshwater wetland applications received in the past two years, 134 have been issued and only 24 await action by DEC Staff. DEC Staff also notes that the new application would be subject to deadlines found in the Uniform Procedures Act (Environmental Conservation Law, Article 70) and that Mr. Farinacci would have legal recourse if the deadlines were not met.

It is difficult to evaluate applicant's claim of prejudice at this point. However, it should be noted that it took DEC Staff approximately four months to deem the original application complete and one month of this was due to a delay by applicant in responding to DEC Staff's request for additional information.

Public Involvement

Another concern raised by DEC Staff in its papers involves a negative public perception that would be created by granting applicant's motion. DEC Staff argues that given the significant public interest at the 2003 hearing, continuing DEC Staff's review at the post completion phase now would negatively impact the public's view of the agency.

Applicant has agreed that if his motion were granted that he would consent to restarting the administrative hearing process, including the renoticing of the hearing and a new legislative hearing. In addition, all the members of the public who commented on the initial application would be notified by mail of any new hearing. Accordingly, DEC Staff's argument is rejected.

Ruling

Applicant's motion for a ruling directing DEC Staff to resume the "post-completion review" of the 2002 application is granted. Applicant has met his burden to sustain the motion as required by 6 NYCRR 624.9(b)(4). DEC Staff's request to withdraw its hearing request is denied. DEC Staff is directed to promptly review applicant's 2009 revision as part of its post completion review. The parties are further directed to provide copies of all written communications regarding this proposed project to me in a timely fashion.

Dated: Albany, New York
September 28, 2009

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