

In the Matter of the Application of

JARAL PROPERTIES, INC.,

ISSUES RULING

for a Permit and a Variance to Construct a Parking Lot in a Wild, Scenic and Recreational Rivers System, Pursuant to Environmental Conservation Law Article 15, Title 27 (Wild, Scenic and Recreational Rivers System), and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York Part 666 (Regulation or Administration and Management of the Wild, Scenic and Recreational Rivers system in New York State Excepting Private Land In the Adirondack Park).

DEC Case No.
1-4730-01220/00001

(April 3, 2007)

Introduction

Jaral Properties, Inc., (the "Applicant") has applied to the New York State Department of Environmental Conservation (the "Department") for a Wild, Scenic and Recreational Rivers ("WSRR") System permit and a use variance pursuant to Environmental Conservation Law ("ECL") article 15, title 27 and part 666 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), to construct a paved parking lot, approximately 26,200 square feet ("sq. ft.") consisting of approximately 64 parking spaces and associated landscaped commercial area, within the Peconic River Corridor.

The Peconic River is classified as a recreational river. ECL 15-2714(3)(gg). Boundaries of the Peconic River Corridor are identified by narrative description maintained in the Department's Bureau of Habitat database.

Pursuant to 6 NYCRR 666.4(c), "[r]ecreational rivers are generally readily accessible, and may have a significant amount of development in their river areas and may have been impounded or diverted in the past. Management of recreational river areas will be directed to preserving and restoring their natural, cultural,

scenic and recreational qualities, except in areas delineated by the Department as communities, which will be managed to avoid adverse environmental impacts and loss of existing river corridor values."

On December 12, 2006 at 7:00 p.m., a legislative hearing was held before Administrative Law Judge ("ALJ") Kevin J. Casutto, at the Best Western Hotel, 1830 Route 25, Riverhead, New York. At the legislative hearing, no members of the public appeared to offer comments on the permit application. An issues conference was held on December 13, 2006 at 10:00 a.m., at the same location. The deadline for receipt of filings for party status was December 5, 2006. No applications for party status were received, and therefore, the Applicant and Department Staff ("DEC Staff") are the only parties to this proceeding.

Due to irregularities in transcript preparation, a corrected stenographic record of the proceedings was not received by the ALJ until February 20, 2007.¹ The parties made no post-issues conference filings.

At the issues conference, the Applicant appeared by Anthony Palumbo, Esq., Goggins & Palumbo, 13105 Main Road, Mattituck, New York 11952. Appearing with counsel at the issues conference were Albert Salvatico, President, Jaral Properties, Inc., Charles Bowman, Principal, Land Use Ecological Services, Inc., and architect Charles Lobell, AIA.

DEC Staff appeared by Kari E. Wilkinson, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation ("NYSDEC") Region 1. Appearing with counsel was technical staff, Robert Marsh, NYSDEC Regional Manager, Bureau of Habitat, Division of Fish, Wildlife and Marine Resources.

Background

The Applicant proposes to modify and expand its existing commercial Best Western Hotel property located at 1830 Route 25, Town of Riverhead, County of Suffolk, State of New York. The proposed site expansion includes the construction of a new hotel, new office building, an addition on the existing restaurant and paved parking areas. However, the proposed hotel, office building, restaurant addition and most of the parking areas would

¹ Even then, the legislative hearing caption remains uncorrected.

be located outside the WSRR Corridor and therefore are not subject to regulation under the Department's WSRR regulatory program.

The Town of Riverhead requires 464 parking spaces to serve the total proposed project. The Applicant proposes to locate approximately 64 of the 464 parking spaces and related landscaping (approximately 26,200 sq. ft.) within the boundaries of the regulated WSRR Corridor. It is only this portion of the Applicant's development proposal that is the subject of the Applicant's permit and use variance application (the "regulated project").

For purposes of State Environmental Quality Review ("SEQR"; ECL Article 8, 6 NYCRR Part 617), the regulated project is an Unlisted Action and DEC Staff has issued a Negative Declaration.

Regional DEC Staff, after review of the use variance and permit application, made a determination to deny the project, and Applicant has requested this hearing on the variance and permit denial. Following the conclusion of the issues conference, at the Applicant's request, the adjudicatory hearing was adjourned without date to allow the Applicant to engage in discovery.

Applicant bears the burden of proof to demonstrate that the regulated project complies with the permitting standards and requirements (absent any variance) or, in the alternative, to demonstrate that the Applicant is entitled to the use variance (and permit) it has requested. See, 6 NYCRR 624.9(b)(1) and 6 NYCRR 666.9(a).

Applicant's Position

The Applicant concedes that the regulated project does not comply with permitting standards of 6 NYCRR 666.8. Instead, the Applicant has requested a use variance pursuant to 6 NYCRR 666.9 (and permit) to allow construction of the proposed regulated project within the WSRR boundary.

The Applicant has owned the Best Western Hotel property since approximately February 2004. This property is outside the Peconic River Corridor, and therefore is not subject to regulation under the Wild, Scenic and Recreational Rivers System permitting program. In pursuit of its larger project development goals, in or about February 2005, the Applicant acquired an adjoining property to the south of the Best Western Hotel property for site development (the "southern parcel"), a portion of which is within the boundaries of the regulated WSRR Peconic River Corridor. Together, the hotel property and the southern parcel comprise the

project site under review in this permit proceeding. The regulated project is proposed to be located on the southern parcel within the regulated WSRR Peconic River Corridor.

In sum, the majority of the Applicant's proposal, including hotel expansion, office building, restaurant addition and most of the other parking areas would be located outside the Peconic River Corridor, and therefore are not subject to the WSRR regulatory program nor are they subject to review in this proceeding. Only the proposed regulated project, approximately 64 parking lot spaces and related landscaping, is within the Peconic River Corridor and is the subject of this permit and use variance application.

Prior to enactment of ECL article 15, title 27 and the Applicant's acquisition of the site, the Town of Riverhead zoned the southern parcel "commercial." The southern parcel, the Applicant states, was purchased for \$950,000.00 and is assessed annual local taxes of \$6,892.18. As noted by the Applicant, the southern parcel is greater than 500 feet from the Peconic River, the Peconic River is not visible from the site.

Pursuant to 6 NYCRR 666.8(f) (Permits):

- (1) The proposed land use or development must be consistent with the purposes and policies of the act (ECL article 15, title 27) and with the provisions of 6 NYCRR part 666.
- (2) The resources specified in 6 NYCRR 666.2(e) must be protected and the proposed activity must not have an undue adverse environmental impact. Subdivision 666.2(e) identifies the following resources: protection and enhancement of the natural, scenic, ecological, recreational, aesthetic, botanical, geological, hydrological, fish and wildlife, historical, cultural, archaeological and scientific features of designated rivers and river areas.
- (3) It must be determined that no reasonable alternative exists for modifying or locating the proposed activity outside of the designated river area.
- (4) (Not applicable to this application; only applicable to applications by NYS agencies.) Actions proposed to be taken by State agencies must be designed to preserve, protect or enhance the resources and values of the designated rivers.

In addition, the regulatory program provides use guidelines. See, 6 NYCRR 666.13. Pursuant to 6 NYCRR 666.13(K)(3), the proposed regulated project is prohibited in a recreational river corridor.

Although the Applicant concedes that the regulated project does not comply with 6 NYCRR 666.8 and 666.13, nonetheless, the Applicant asserts that the project does comply with all the use variance standards of 6 NYCRR 666.9 (Variances). Further, the Applicant asserts that the project will not adversely affect existing recreational river values within the river corridor and will meet the spirit and intent of the WSRR regulations. The Applicant also has stated its willingness to comply with any reasonable mitigation measures necessary to obtain the use variance and permit.

Lastly, the Applicant asserts that denial of the use variance will cause the Applicant severe hardship, in that denial of the use variance will substantially reduce the economic value of the site. The Applicant contends that these hardships were not created as a result of any action on its part.

In conclusion, the Applicant asserts that it is entitled to the use variance (and permit) it has requested and that the Commissioner should grant the use variance and permit in this instance.

DEC Staff's Position

DEC Staff's determination to deny the use variance and permit application is based upon Staff's conclusion, first, that the project does not meet the requirements for permitting, pursuant to 6 NYCRR 666.8. (This remains undisputed by the Applicant, as noted above.) Second, DEC Staff asserts that the Applicant has not met its burden of establishing that the project complies with the variance standards of 6 NYCRR 666.9(a)(1).

Pursuant to 6 NYCRR 666.9(a), an applicant for a use variance must meet the following variance standards:

- (1) A variance may be granted only if it is the minimum variance necessary (6 NYCRR 666.9[a]); and
- (2) The provisions to be varied or modified deprive the applicant of all economic use or benefit from the property in question, which deprivation must be established by competent financial evidence (6 NYCRR 666.9[a][1][i]); and

- (3) The alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the river corridor (6 NYCRR 666.9[a][1][ii]); and
- (4) The requested use variance, if granted, will not alter the essential character of the river corridor (6 NYCRR 666.9[a][1][iii]); and
- (5) The alleged hardship has not been self-created (6 NYCRR 666.9[a][1][iv]).

In short, DEC Staff asserts that the Applicant fails to carry its burden of proof to demonstrate that the project will satisfy use variance and permitting standards. Moreover, DEC Staff concludes that it acted properly in exercising its discretion to deny Applicant's request for a use variance.

Ruling

- 1) The issues for adjudication are whether the project complies with the permitting standards (6 NYCRR 666.8) and use guidelines (6 NYCRR 666.13) and in addition, whether Applicant's project complies with the use variance standards (6 NYCRR 666.9).
- 2) Presumably, because the Applicant acknowledges that the project does not comply with the permitting standards and use guidelines, the adjudicatory hearing will focus upon whether Applicant's project complies with the use variance standards of subdivision 666.9(a).
- 3) At the Applicant's request, this matter is adjourned without date to allow for further discovery. Upon request of the Applicant or DEC Staff, following conclusion of the discovery process, a schedule will be set for the adjudicatory hearing.

Appeals

Pursuant to 6 NYCRR 624.6(e) and 624.8(d)(2)(i), this Ruling on party status and issues may be appealed in writing to the Commissioner within five business days of receipt of the Ruling. Any appeals and replies must be addressed to the office of the Commissioner, NYSDEC, 625 Broadway, Albany, New York 12233-5500 (to the attention of Assistant Commissioner Louis A. Alexander), and must be received by that office by the dates indicated herein. One copy of all such appeals, briefs and related filings must also be sent to the Chief ALJ and one copy to the ALJ at the

Department's Office of Hearings and Mediation Services, and one copy to the DEC Staff attorney at the address indicated below. Transmittal of documents shall be made at the same time and in the same manner to all persons.

Albany, New York
April 3, 2007



Kevin J. Casutto
Administrative Law Judge

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