

In the Matter of the Application of

LEGACY DEVELOPMENT CO., INC.

RULING ON ISSUES AND
PARTY STATUS

for a Freshwater Wetlands Permit
pursuant to Article 24 of the
Environmental Conservation Law (ECL),
a Coastal Erosion Management Permit
pursuant to Article 34 of the ECL for
seasonal docks and associated
improvements on Irondequoit Bay in
the Town of Webster, Monroe County

February 13, 2006

SUMMARY

This matter involves the application by Legacy Development, Co., Inc. (applicant) for authorization to construct seasonal floating docks and other improvements on Irondequoit Bay on Lake Ontario, in the Town of Webster. This ruling concludes that the single issue proposed by the Glen Edythe Group (Group) is an adjudicable issue. The Group's issue relates to potential damage to a sand bluff, which has been designated a natural protective feature and is located directly to the north of the proposed project, from boat wakes. Accordingly, the Group is granted full party status. The application of the Genesee Land Trust (Trust) for amicus status is also granted because of its interest in real property associated with the project.

PROJECT DESCRIPTION

The applicant proposes to construct and operate "Waterview at Willow Point," a waterfront development and 46 boat slip dockage associated with the upland Willow Point on the Bay residential project located west of Bay Road in the Town of Webster, Monroe County. This project includes the following activities: construction/modification of an existing access way to Irondequoit Bay; installation of water, electric, and cable television service to a seasonal use floating dockage having 46 boat slips; construction of a picnic area adjacent to the dockage, construction of an emergency vehicle turnaround and two upland parking areas for golf carts and motor vehicles; and installation of a limited access gate for use by emergency and maintenance vehicles. Residents of Willow Point will have either pedestrian access to the waterfront or by limited golf cart access. Additional work includes upgrading an existing stormwater

management facility serving the upland development, installation of a stormwater management collection system along the access way, installation of a gabion wall retaining system and beam guide railing along the access way, planting of a shrub buffer to isolate a pond which is connected to Irondequoit Bay, and the installation of seasonal use floating docks for 46 residential boat slips. These activities will take place within Freshwater Wetland RE-1, the associated 300 foot adjacent area, and a Coastal Erosion Hazard Area. Maintenance and security of the area will be done in accordance with a plan provided by the applicant and approved by the Department. Vehicular use of the access way will be restricted to golf carts and for the purposes identified in the approved maintenance and security plan. Use of the docks will be restricted to residents of the Willow Point Subdivision.

The applicant will subdivide Lot 2 of Section 2 of the Willow Point Subdivision and transfer title to approximately 20 acres of the waterfront property and upland area to the Genesee Land Trust, Inc. for open space. The applicant will retain title to the remaining portion of Lot 2 for purposes of access to the Bay and construction of the dock facilities. If seasonal dock storage is necessary, the applicant will only store docks in the developed picnic area and the access way. Use of the area to be retained by the applicant will be subject to restrictions which are approved by the Department and which are consistent with the terms and purposes reflected in the draft permit and the Department's review pursuant to the New York State Environmental Quality Review Act (SEQRA).

PERMITS SOUGHT

The project is located within NYS Freshwater Wetland RE-1 (Class I) and the associated 300 foot extended adjacent area. The project is also located within a Natural Protective Feature Area subject to the Department's Article 34 Coastal Erosion Hazard Areas jurisdiction. The Applicant has applied for a Freshwater Wetland Permit and a Coastal Erosion Management Permit to construct and operate the project pursuant to article 24 and article 34 of the Environmental Conservation Law (ECL). Applicable regulations are 6 NYCRR part 663 and 6 NYCRR part 505, respectively.

SEQRA STATUS

Pursuant to 6 NYCRR part 617, the implementing regulations for SEQRA, ECL article 8, the Town of Webster Planning Board (Town) conducted a coordinated review, and as lead agency,

determined the project may have a significant impact on the environment. The Town issued a SEQRA Positive Declaration requiring the preparation of a Draft Environmental Impact Statement. A Final Environmental Impact Statement was accepted by the Town for waterfront development at this site on November 17, 1992.

PROCEDURAL HISTORY

On June 27, 2001, DEC Staff declared the application complete. Notice of the complete application was published in the *Environmental Notice Bulletin* and in the *Webster Herald* on July 4, 2001. Based on public comments received and the review conducted by DEC Staff the applicant substantially modified the project described in the notice of complete application to reduce the number of docks from 99 to 46, to eliminate docks from the northerly section of the bay frontage at this location, to restrict vehicular traffic, to eliminate the parking area for 17 vehicles and to provide for the conveyance of 20± acres of land to the Trust.

On April 25, 2005, a request for hearing was received in DEC's Office of Hearings and Mediation Services (OHMS) and administrative law judge (ALJ) P. Nicholas Garlick was assigned.

On July 20, 2005, the United States Army Corps of Engineers (ACOE) sent a letter to DEC Staff indicating that if three conditions were met, no Water Quality Certificate would be required for the project. By letter dated August 10, 2005, the applicant stated that its application met the three conditions set forth by the ACOE in its July 10, 2005 letter and that no Water Quality Certificate was being sought.

On August 17, 2005, a Notice of Legislative Public Hearing and Notice of Issues Conference was published in both the Department's electronic *Environmental Notice Bulletin* and the *Webster Herald*. In addition, DEC Staff mailed copies of the hearing notice to approximately 90 members of the public who had previously expressed interest in the project.

The Notice set the date of September 6, 2005 for the filing of Petitions for Party Status. Two petitions were received. One petition was received from the Genesee Land Trust and the second from the Glen Edythe Group.

On September 12, 2005, a legislative hearing was held in the Plank Road North Elementary School in Webster, New York.

Following statements by the applicant and DEC Staff, fifteen members of the public spoke, including Thomas Wolf on behalf of the Glen Edythe Group (which seeks party status). Four members of the public spoke in favor of the project and eleven spoke against it. Approximately 50 people attended the hearing. In addition to the oral comments, approximately a dozen written comments were received and included in the legislative hearing record.

On the morning of September 13, 2005, a site visit occurred. The ALJ was accompanied by representatives of the applicant and DEC Staff, as well as both petitioners. The visit began at the site of the proposed project and ended at Mr. Wolf's property.

On September 13, 2005, an issues conference occurred at the Webster Community Center, 985 Ebner Drive, Webster, New York. At the issues conference, DEC Staff appeared through Leo Bracci, Assistant Regional Attorney for DEC Region 8. Also in attendance were four members of DEC Staff who participated in the review of the project: Bob Shearer, Scott Jones, Gene Melnyk and Matt Gillette. The applicant appeared through Neal Madden of Harter, Secrest & Emery, L.L.P. Also in attendance for the Applicant were its President and Vice-President, Christopher DiMarzo and Don Riley. One of the petitioners, the Glen Edythe Group, appeared through Mr. Thomas Wolf. The second petitioner, the Genesee Land Trust appeared through Evelyn Gay Mills, its Executive Director. Also in attendance was Mr. Thomas Frey, a board member of the Trust.

On or about September 21, 2005, the applicant submitted revised plans to DEC Staff.

On October 18, 2005, DEC Staff and the applicant met regarding the revised plans. As a result of this meeting, further changes to the plans were agreed upon.

By e-mail dated December 22, 2005, DEC Staff transmitted a revised draft permit and a December 20, 2005 letter from the Genesee Land Trust stating the Trust's agreement to substitute the revised draft permit as an attachment to the Letter of Intent.

A conference call was held with all parties on January 5, 2006. The ALJ requested that three documents be provided: a red-line version of the draft permit showing changes between the permit proposed at the issues conference and the final draft permit (received January 5, 2006); written confirmation that the plans reviewed by DEC Staff were the same as those submitted to

the ALJ (received January 10, 2006); and a list of changes to the plans for the proposed project since the issues conference (received February 2, 2006).

Following consultation with the parties, the issues conference record closed on February 13, 2006.

DISCUSSION

As mentioned above, two petitions were received and each is discussed separately, below.

Petition of Glen Edythe Group

By petition dated August 31, 2005, the Group requested full party status in this proceeding. The members of the Group describe themselves as property owners, residents and users of the waters and land immediately north of the proposed development. The petition includes the names of seventeen members of the Group, including Thomas Wolf, who represented the Group at the Issues Conference. A revised list of twenty-four members was submitted by letter dated September 12, 2005.

The Group proposes a single issue for adjudication relating to ECL Article 34 (Coastal Erosion Management) and raises no issue related to Article 24 (Freshwater Wetlands). In its petition, the Group identifies its issue as the "impact of boat wakes on the sand bluff.... This issue should have been addressed in the Applicant's proposal. To the best of our knowledge the issue has not been addressed nor any remedies proposed." The Group is concerned about both erosion of the sand bluff and possible resulting siltation of Glen Edith Cove.

The sand bluff identified by the Group is located immediately north of the proposed project and immediately north of the sand bluff lies Glen Edith Cove. The sand bluff is on land owned in part by the Applicant (approximately the southerly 25%) and by a Mr. and Mrs. McEwan, who are members of the Group. There is no dispute that the sand bluff is a "natural protective feature" as that term is defined in 6 NYCRR 550.1(y).

The Group asserts that the draft permit proposed by DEC Staff and accepted by the applicant fails to adequately protect the sand bluff. The Group seeks either the denial of the permit or further study and a better plan to control the erosion of the sand bluff. At the issues conference, the Group listed a series of elements that the plan might include, such as an erosion prevention structure at the base of the bluff, or a seasonal

protective breakwater that would dampen the waves against the base of the bluff, or managing how boats can enter and exit the proposed docking area, or the establishment of a no wake zone.

Section 505.6 sets forth the standards for issuance of coastal erosion management permits and reads:

"A coastal erosion management permit will be issued only if the commissioner finds that the proposed regulated activity:

- (a) is reasonable and necessary, considering reasonable alternatives to the proposed activity and the extent to which the proposed activity requires a shoreline location;
- (b) will not be likely to cause a measurable increase in erosion at the proposed site or at other locations; and
- (c) prevents, if possible, or minimizes adverse effects on:
 - (1) natural protective features and their functions and protective values as described in section 505.3 of this Part;
 - (2) existing erosion protection structures; and
 - (3) or natural resources, including, but not limited to significant fish and wildlife habitats and shellfish beds."

In its petition, the Group states that since the opening of the Irondequoit Bay Outlet there has been increased boat traffic in the area that has accelerated the erosion of the sand bluff and resulted in the slow filling of Glen Edith Cove, reducing the depth of the water in the Cove. Each year by mid to late August water depth in the Cove is insufficient for boat traffic and docking. Mr. Wolf also stated that on days of high boat traffic, silt is visible in the water from the bluff drifting toward the Cove. While the Group identified no expert witnesses at the issues conference, Mr. Wolf identified two potential fact witnesses, residents of the area for nearly forty years who Mr. Wolf said would testify about the condition of the sand bluff during this time and the increase that boat traffic has had upon the sand bluff.

Based upon this proffered evidence, the Group argues, it would be logical to assume that the placement of additional docks, as proposed in the instant application, would increase boat traffic in the area and increase this erosion. This increased erosion would be exacerbated because the additional boat traffic from the docks will be "off plane" (i.e. the stern of the boat would be deep in the water due to acceleration or

deceleration), which will create larger wakes than other boat traffic and compound the erosion of the sand bluff and the siltation of Glen Edith Cove.

The applicant opposes adjudication of the Group's proposed issue and argues that the issue is not substantive and significant, but is rather general opposition and a speculative concern. However, the applicant is mistaken. An issue is substantive if there is sufficient doubt about an applicant's ability to meet a regulatory criteria such that a reasonable person would require further inquiry (624.4(c)(2)). In this case the Group has identified two standards that the Applicant may not meet: (1) that the proposed project will not be likely to cause a measurable increase in erosion at the proposed site or at other locations (505.6(b)); and (2) that the proposed project prevents, if possible, or minimizes adverse effects on natural protective features (505.6(c)(1)). The Group's proffered factual testimony regarding visible erosion on days of high boat traffic requires further inquiry regarding whether additional boat traffic from the proposed project will cause a measurable increase in erosion, and an examination of whether steps not proposed could prevent or minimize adverse effects on the sand bluff.

An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit (624.4(c)(3)). In this case, the apparent failure of the application materials to include an analysis regarding the prevention of damage to the sand bluff and steps taken to minimize adverse effects results in the potential for permit denial or the imposition of significant new permit conditions. A review of the application materials provided to the ALJ by DEC Staff includes a discussion regarding the application for the Article 34 permit (March 9, 2001 letter from Sciremammano to Shearer, p. 14-16). However, this correspondence does not include any discussion of the sand bluff, the project's potential impact thereon, or any measures to prevent or minimize any adverse impact.

The applicant also argues that the Group failed to make an adequate offer of proof, specifically, that the Group failed to identify any expert witnesses and that the witnesses it had identified would only testify regarding historical events regarding the Cove and not what would happen if the project were built (t. 39). Again the Applicant is mistaken. The Group proposed to present factual evidence that boat traffic damages the sand bluff; and, therefore, the Group asserts it is logical to conclude that the proposed project will increase this damage,

absent provisions to protect the sand bluff.

DEC Staff supports permit issuance with the conditions in the draft permit and objects to the adjudication of the Group's proposed issue. DEC Staff argues that boat traffic is not regulated under ECL Article 34 and, therefore, the Group's proposed issue is actually an issue raised pursuant to SEQRA. DEC Staff argues that in this case, because DEC is not the lead agency, the issue cannot be raised in this DEC administrative permit hearing. 6 NYCRR 624.4(c)(6). (t. 45). DEC Staff takes the position that it can regulate the placement of the docks and certain upland activities pursuant to Article 34, but cannot look at boat traffic. This argument seems based upon the definition of regulated activity in Article 34:

"(hh) Regulated activity means the construction, modification, restoration or placement of a structure, or major addition to a structure, or any action or use of land which materially alters the condition of the land, including grading, excavating, dumping, mining, dredging, filling, or other disturbance of soils...."

DEC Staff's argument fails upon a plain reading of the definition. The broadly worded phrase "any action or use of land which materially alters the condition of the land" clearly indicates that not only the construction of the docks is a regulated activity, but also the use of these docks by boats and boaters. This reading is consistent with the Legislature's declaration of policy that "any activities, development or other actions in such erosion hazard areas should be undertaken in such a manner as to minimize damage to property, and to prevent the exacerbation of erosion hazards. Such actions may be restricted or prohibited if necessary to protect natural protective features or to prevent or reduce erosion impacts" (ECL 34-0102(2)). These sections authorize DEC Staff not only to examine impacts from the construction of the docks in this case but also the use of these docks.

Both DEC Staff and the applicant argue that efforts have been made to minimize the impact of the proposed project. First, the current proposed project is much smaller than the project originally proposed at the site in 1992 which contemplated 260 docks across entire parcel. (T. 47). Second, the location of the docks is now at the southern end of the parcel, as far away as possible from the sand bluff and Cove. Third, the docks are oriented to the south, and no docks would be facing north. Consequently, boats either approaching or leaving the docks would use a southerly or westerly tack, away from the sand bluff.

However, DEC Staff concedes that these design features were not required to protect the bluffs but rather were primarily motivated by a desire to protect the Cove (t. 57).

Both DEC Staff and the applicant note that section 45-aaa of the Navigation Law imposes both a 25 mile per hour speed limit and a five mile an hour speed limit within 200 feet of the shore of Irondequoit Bay, unless for the purpose of enabling a person engaged in water skiing to take off or land.

DEC Staff also argues that there is no evidence that wave action from the increased boat traffic would result in substantial increased erosion to the sand bluff. According to the applicant's estimates, 10% of boats would be used on weekdays and 25% of boats would be used on weekends (t. 50), which means approximately fifty boats would be used a week. DEC Staff also assert that the Group failed to provide evidence, perhaps in the form of a litoral drift study, to identify the source of sedimentation in the Cove, and argue that this sedimentation could be the result of wind action or sedimentation from the stream that discharges into Glen Edith Cove.

DEC Staff's and the applicant's arguments regarding steps to minimize impacts on the sand bluff miss the point. The regulatory standard (505.6, quoted above) prohibits applicants from causing a measurable increase in erosion and requires applicants prevent, if possible, or minimize adverse impacts on natural protective features. At no point during the issues conference did either the applicant or DEC Staff point to the application materials and claim that an analysis had been done that demonstrates the applicant would meet these permit issuance standards, which the applicant bears the burden of proving. Rather, both point to aspects of the project that could lessen the impacts of the project and state there is no evidence that wave action from boats will cause damage. This is not the standard. The standard is whether the applicant has demonstrated that wave action from the boats using the proposed docks will not cause damage, or that this damage is minimized.

The Group has demonstrated that the potential damage from increased boat traffic resulting from the proposed project is a substantive and significant issue and has made an adequate offer of proof. At the hearing, the applicant will have the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by the Department (624.9(b)).

Petition of Genesee Land Trust

By letter dated September 3, 2005, the Trust petitioned for full party status in this proceeding. The Trust described itself as a not-for-profit corporation dedicated to land conservation for wildlife habitat and open space protection in the greater Rochester area. The Trust stated that its interest was related to any impact on the proposed transfer of land to it as a condition of project approval.

At the issues conference, Evelyn Gay Mills, the Trust's Executive Director, stated that the Trust supported the proposed project. She also stated that the Trust was not proposing any issues for adjudication, would not call any witnesses and was interested only in briefing issues, if necessary, that might arise before the Commissioner. After discussion, the Trust modified its request so that it now seeks amicus status. No other issues conference participant objected to this request. The Trust has met the standards for amicus status (6 NYCRR 624.5(b)(3)) and therefore, will be granted such status in this hearing.

APPEALS

A ruling of the ALJ to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis (see 6 NYCRR 624.8(d)(2)). Expedited appeals must be filed with the Commissioner in writing within five days of the disputed ruling (see 6 NYCRR 624.6(e)(1)).

Allowing additional time to allow the parties a reasonable opportunity to review this ruling, any appeals must be received before 4:00 p.m. on Friday, March 3, 2006. Replies to appeals are authorized, and must be received before 4:00 p.m. on Friday, March 17, 2006.

Send one copy of any appeal and reply to Commissioner Denise M. Sheehan, c/o Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services, New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-1010, and one copy of any appeal and reply to Department Staff the same time and in the same manner as transmittal is made to the Commissioner. The Commissioner will not accept submissions by electronic mail, or via telefacsimile. Send two copies of any appeal and reply to the ALJ, and one copy

of any appeal and reply to James T. McClymonds, Chief
Administrative Law Judge, Office of Hearings and Mediation
Services, 625 Broadway, First Floor, Albany, New York 12233-1550.

Appeals should address the ALJ's rulings directly, rather
than merely restate a party's contentions.

February 13, 2006
Albany, New York

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

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