STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application for a freshwater wetlands permit pursuant to Environmental Conservation Law (ECL) article 24 and Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR) part 663 to construct commercial buildings in and adjacent to Freshwater Wetland AR-7 on a site located on Johnson Street (Block 7207, Lot 35), Staten Island (Richmond County), New York by Linus Realty, LLC, **Applicant**.	Issues Ruling DEC Application No. 2-6405-99476/00001 November 2, 2005

Proceedings

On July 28, 2003, Linus Realty, LLC, (Linus Realty) filed a joint application with the Region 2 Staff of the New York State Department of Environmental Conservation (Department staff) for a freshwater wetlands permit. Linus Realty proposes to construct ten commercial buildings and parking areas in and adjacent to Freshwater Wetland AR-7 on a 7.5 acre site located between Johnson Street and Industrial Loop West (Block 7207, Lot 35) on Staten Island (Richmond County). Freshwater Wetland AR-7 is a Class I wetland. Linus Realty's application was deemed complete pursuant to 6 NYCRR 621.5(f).

In a letter dated June 30, 2004, Department staff denied the permit application filed by Linus Realty. According to Department staff, the project, as described above, would not meet the permit issuance standards outlined in 6 NYCRR 663.5(e).

On July 21, 2004, the permit application was referred to the Office of Hearings and Mediation Services for a hearing. At Linus Realty's request, the matter was held in abeyance pending the resolution of a proceeding commenced pursuant to CPLR article 78 to address the question of whether the Department responded to Linus Realty's "five-day" letter in a timely manner (*see* 6 NYCRR 621.9[b] and [c]). The court issued an Amended Order on November 24, 2004 (Supreme Court, Richmond County, Index No.: 8267/04). An appeal before the Second Department of the Appellate Division is pending.

With a cover letter dated April 19, 2005 and supporting papers, Linus Realty moved for an order without hearing pursuant to 6 NYCRR 622.12. By letter dated April 25, 2005, I stated that the relief sought by Linus Realty was not available pursuant to

6 NYCRR 622.12 because 6 NYCRR part 622 applies to enforcement matters, and the captioned matter is for a permit. The regulations applicable to permit hearings are outlined in 6 NYCRR part 624. I stated further that Linus Realty's motion may be considered within the context of an issues conference as provided by 6 NYCRR 624.4(b)(5)(iii).

After a telephone conference call on April 26, 2005 with representatives from Linus Realty and Department staff, and after a subsequent opportunity to submit written arguments, I issued a ruling on June 3, 2005 concerning the procedures that would be followed to consider the April 19, 2005 motion. The June 3, 2005 ruling required Linus Realty to publish a combined notice of complete application and notice of public hearing that scheduled a legislative hearing session and an issues conference.

As directed by the June 3, 2005 ruling, Linus Realty published a combined notice dated July 12, 2005 in the *Staten Island Advance* on July 27, 2005. The July 12, 2005 combined notice appeared in the Department's *Environmental Notice Bulletin* on July 27, 2005. The combined notice scheduled the legislative hearing for 10:00 a.m. on August 18, 2005 at the Columbus Club of Tottenville on Staten Island. According to the combined notice, the issues conference would immediately follow the legislative hearing on August 18, 2005 at the same location.

The legislative hearing convened as scheduled. Those who attended the legislative hearing were limited to representatives for Linus Realty, and Department staff. The representatives for Linus Realty were Richard A. Rosenzweig, Esq., from the law firm of Menicucci Villa and Associates, PLLC, Staten Island, New York; Joseph Ferdinando, who is a managing member of Linus Realty; and Steven Ferdinando. Udo M. Drescher, Esq., Assistant Regional Attorney, appeared for Department staff. Other members of Department staff present for the legislative hearing and issues conference were Harold Dickey, Deputy Permit Administrator and Joseph Payne, Principal Fish and Wildlife Biologist.

During the legislative hearing, Mr. Drescher made a statement on behalf of Department staff, and Mr. Rosenzweig made a statement on behalf of Linus Realty. No one else appeared at the legislative hearing. I did not receive any written comments about the subject permit application. The Office of Hearings and Mediation Services received the transcript for the legislative hearing on August 24, 2005.

The issues conference commenced on August 18, 2005 after the legislative hearing. Prior to the issues conference, no one requested full party status or amicus status (*see* 6 NYCRR 624.5[b]). No one requested full party status or amicus status at the issues conference. Therefore, the only parties to the proceeding are Linus Realty as the applicant, and Department staff (*see* 6NYCRR 624.5[a]). The Office of Hearings and Mediation Services received the transcript for the issues conference on August 24, 2005.

During the legislative hearing, Department staff offered an aerial photograph of the site (Lot 35) and the surrounding area. The approximate locations of some of the boundaries associated with Freshwater Wetland AR-7 are depicted on the photograph. Subsequently, I marked the photograph for identification as Exhibit 2. Mr. Drescher explained, on behalf of Department staff, that prior owners of the site included Opal Investments, who filed an application with the Department for a freshwater wetlands permit. Mr. Drescher explained further that Opal Investments filed a petition with the Freshwater Wetlands Appeals Board (FWAB), and the FWAB issued an Order and Decision dated July 23, 1998 (the July 1998 Order). For the first time during the review of the captioned permit application, Department staff stated at the issues conference that a permit pursuant to ECL article 15 would also be required.

At the issues conference, Mr. Drescher sought clarification of the issues identified in Linus Realty's April 19, 2005 motion. In addition, Department staff provided a memorandum prepared by John F. Cryan dated August 17, 2005 concerning Staff's determination of significance pursuant to the State Environmental Quality Review Act (SEQRA, ECL article 8). Department staff's SEQRA memorandum is identified as Exhibit 3A. Staff attached the "Final Freshwater Wetland Classification" for AR-7 to the SEQRA memorandum, which is identified as Exhibit 3B.

Mr. Rosenzweig responded to Mr. Drescher's requests for clarification during the issues conference, and stated that Linus Realty wanted the scope of the issues conference limited to the legal issues raised in its April 19, 2005 motion. Mr. Rosenzweig acknowledged that it may be necessary to reconvene the issues conference depending on the ruling on the April 19, 2005 motion.

At the issues conference, a schedule was developed for Department staff to reply to Linus Realty's motion and to make counterclaims, and to provide Linus Realty with an opportunity to respond to Staff's counterclaims. With a cover letter dated

September 16, 2005, Department staff timely filed a memorandum of law dated September 15, 2005 responding to Linus Realty's motion. With the September 15, 2005 memorandum, Staff included transcript pages 91 and 92 from the hardship hearing before the FWAB on July 10, 1996.

With a cover letter dated September 26, 2005, Mr. Rosenzweig timely filed a reply memorandum of law on behalf of Linus Realty. To the September 26, 2005 memorandum, Linus Realty attached Exhibits A and B, which are identified below.

For the limited purpose of considering Linus Realty's April 19, 2005 motion, the record of the issues conference closed on September 27, 2005 upon receipt of Linus Realty's reply memorandum of law dated September 26, 2005.

Background

In the early 1960's, Frank Vigliarolo and Joseph Vigliarolo, doing business as Opal Investments, purchased the site (Block 7207, Lot 35), as well as additional property in the vicinity of the site. In 1988, Opal Investments filed an application for a freshwater wetlands permit with the Department to develop the site. On July 24, 1990, Department staff issued a notice of complete application (the July 1990 notice) to construct a warehouse and light industrial complex consisting of 11 two-story buildings. As mitigation, the proposal included a 40-foot-wide woodland buffer between the developed areas of the site and the wetland. Approximately 500 square feet of the wetland would have been filled, but Opal Investments had proposed to excavate a pond at the northern end of the wetlands on the site.

According to the July 1990 notice, Department staff conducted a coordinated review, and determined that Opal Investments' proposal was an unlisted action that would not have a significant impact on the environment pursuant to 6 NYCRR part 617. Based on this determination, Department staff issued a negative declaration. The July 1990 notice stated further that Opal Investments' proposed activity would not have any impact on registered, eligible or inventoried archeological sites or historic structures.

Subsequently, Opal Investments petitioned the FWAB for relief pursuant to ECL 24-1104. The FWAB issued an Order and Decision dated July 23, 1998 (Index No. 92-10), and determined, among other things, that Opal Investments had suffered an unnecessary hardship. The July 1998 Order directed the

Department to issue a permit. The Department did not seek judicial review of the FWAB's July 1998 Order. The Department, however, did not issue a permit because Opal Investments did not finalize the permit application process. Linus Realty purchased the property in 2003, and filed the subject permit application for the proposal described above.

Linus Realty's April 19, 2005 Motion

Linus Realty's motion papers consist of a memorandum of law from Mr. Rosenzweig dated April 19, 2005; an affirmation by Philip Weinberg, Esq., dated July 20, 2004; and an affidavit by Joseph Ferdinando sworn to April 19, 2005 with attached Exhibits A through N, inclusive. Exhibit A is a copy of the deed for the site. Exhibit B is a copy of the FWAB's July 1998 Order. Exhibit C is a copy of Linus Realty's joint application for permit dated July 28, 2003. Exhibit D is a copy of a Department staff's notice of incomplete application dated September 4, 2003 concerning the captioned application. Exhibit E is a copy of a letter dated December 14, 2003 from Todd W. Ettlinger, P.E., L.S., C.S., from Rajakaruna & Ettlinger, Consulting Engineers and Land Surveyors, PC., to Department staff member, Harold J. Dickey.

Exhibit F is a copy of a Department staff's notice of incomplete application dated January 14, 2003 concerning the captioned application. Exhibit G is a copy of a letter dated February 23, 2004 from Mr. Rosenzweig to Mr. Dickey. Exhibit H is a copy of a letter dated April 29, 2004 from Mr. Rosenzweig to the Chief Permit Administrator. Exhibit I is a copy of a letter dated May 7, 2004 from William R. Adriance, Chief Permit Administrator to Mr. Rosenzweig.

Exhibit J is a copy of a letter dated June 18, 2004 from Mr. Rosenzweig to the Chief Permit Administrator. Exhibit K is a copy of a letter dated June 24, 2004 from Mr. Rosenzweig to James Tuffy, Deputy Commissioner. Exhibit L is a copy of a letter dated July 1, 2004 from Mr. Rosenzweig to Louis P. Oliva, Esq., Regional Attorney. Exhibit M is a copy of a letter dated June 30, 2004 from Mr. Adriance to Mr. Rosenzweig. Exhibit N is a copy of a letter dated July 6, 2004 from Mr. Rosenzweig to Mr. Adriance.

Linus Realty asserts three points in its memorandum of law. The first is that the FWAB's July 1998 Order runs with the land. The second point is that the Department is estopped from denying

the captioned permit application. Third, Linus Realty asserts that the Department's denial was unwarranted as a matter of law.

1. The FWAB's July 23, 1998 Order and Decision

Linus Realty contends that the FWAB's July 1998 Order "runs with the land." According to Linus Realty, the July 1998 Order concludes, among other things, that Opal Investments suffered a financial hardship. Given Opal Investments' hardship, Linus Realty argues further that Opal Investments lacked the finances to complete the Department's permit process or to develop the site. Consequently, Opal Investments decided to sell the site, and Linus Realty contends that Linus Realty relied upon the applicability and enforceability of the FWAB's July 1998 Order when it negotiated with Opal Investments over the price for the site, purchased it, and proceeded with the captioned permit application. (*See* ¶ 5 of Mr. Ferdinando's April 19, 2005 affidavit.)

To support its argument that the July 1998 Order runs with the land, Linus Realty cites the following cases *Matter of Holthaus v Zoning Board of Appeals*, 209 AD2d 698; *Neponsit Property Owners Association v. Emigrant Industrial Savings Bank*, 278 NY 248; *Statsyszyn v Sutton East Associates*, 161 AD2d 269, 271; *Matter of Dexter v Town Bd. of Town of Gates*, 36 NY2d 102, 105; *Webster v Ragona*, 7 AD3d 850; *Harrison Rye Realty Corp. v New Rochelle Trust Co.*, 177 Misc 776, 777; *Matter of St Onge v. Donovan*, 71 NY2d 507, 517. Linus Realty also refers to Professor Weinberg's July 20, 2004 affirmation, in which he states that the FWAB's decision "runs with the land and is binding on DEC."

2. The Department is estopped from denying the permit

Linus Realty relates the events associated with how Department staff processed its freshwater wetlands permit application. Linus Realty states that its application was deemed complete by operation of regulation. According to Linus Realty, Department staff did not timely respond to its five-day letter demands. In response to the first demand, Department staff characterized Linus Realty's proposal as a "major project," which provided Department staff with additional time to review the captioned application. After Linus Realty filed a second five-day letter, Department staff denied the requested permit application.

Linus Realty argues that the Department staff is estopped from declaring the proposal to be a major project after the time

to decide whether to issue the permit has expired. Linus Realty argues further that the Department staff erred when Staff declared Linus Realty's first five-day letter ineffective. Finally, Linus Realty asserts that Department staff is estopped from denying the captioned permit application on the basis that the July 1998 Order does not run with the land. According to Linus Realty, it repeatedly requested a determination from Department staff about whether the July 1998 Order runs with the land, and that Department staff was not responsive to its requests. To support its arguments concerning this point, Linus Realty cited *Progressive Cas. Ins. v Conklin* (123 AD2d 6).

3. Staff's denial was unwarranted as a matter of law

Linus Realty notes that the FWAB convened a full hearing to consider Opal Investments' hardship claim. Opal Investments and Department staff each presented witnesses, who offered sworn testimony. The FWAB provided the parties with the opportunity to cross examine the other party's respective witnesses. As a result of this full hearing, Linus Realty argues that all issues have been resolved, and that the doctrine of collateral estoppel precludes the Department from rendering a determination about the captioned permit application. To support this claim, Linus Realty relies on *Langdon v WEN Mgt. Co.* (147 AD2d 450).

Department staff's response

Department staff opposes Linus Realty's motion, and contends that the motion should be denied. Staff argues that the FWAB's July 1998 Order concluded that Opal Investments suffered a hardship, and directed the Department to issue a permit to the appellant, who was Opal Investments, not Linus Realty. Department staff notes, in general, that the enabling statute for the FWAB contains no specific language to support Linus Realty's claim that any relief granted by the FWAB would "run with the land." In particular, Staff notes that the July 1998 Order did not expressly bind the Department with respect to any and all successors in title. As explained further below, Department staff contends that it must consider an applicant's suitability and fitness as part of the permit review process.

1. Covenants, easements and zoning variances

Staff asserts that Linus Realty's reliance on case law related to use and area variances is misplaced. Department staff argues there is a distinction between the approvals associated with obtaining use and area variances from zoning requirements,

and permits for the activities regulated pursuant to ECL article 24 (Freshwater Wetlands Act) and the implementing regulations (6 NYCRR part 663). Staff notes that pursuant to the freshwater wetland regulations, the same activities can be regulated differently depending on the related land use. For example, Staff states that the construction of commercial buildings in the adjacent area of a freshwater wetland is regulated differently from the construction of residential buildings in the adjacent area (*see* 6 NYCRR 663.4, items 41 and 42). According to Staff, the July 1998 Order did not grant Opal Investments a certain land use, but remanded the application to the Department to issue a permit for certain regulated activities. Staff observes that the FWAB could have demapped the wetland segment, but chose not to do so. Staff acknowledges that the FWAB's order to demap a particular wetland segment could run with the land and, under such circumstances, would be analogous to a zoning regulation. Staff argues further that zoning variances are limited in both duration and transferability (*see e.g.*, *Matter of Knight v Amelkin*, 150 AD2d 528; *Matter of Elwood Properties Inc. v Bohrer*, 216 AD2d 562, 564).

2. Compliance History

Department staff contends that it has the authority to evaluate an applicant's suitability and fitness. This evaluation may be based on an applicant's environmental compliance history, according to Department staff. Staff alleges that an individual associated with Linus Realty may have been indicted for bribery. Department staff reserves the right to seek additional information about this individual, and his or her association with Linus Realty.

3. Substantive differences between Opal Investments' and Linus Realty's proposals

Department staff acknowledges that the FWAB's July 1998 Order remanded the application to the Department to issue a permit. Staff observes, however, that Opal Investments was obliged to submit a plan consistent with the FWAB's findings. For example, the FWAB determined that "piping of the water course as it traverses the appellants' property would preserve other sections of the concededly very valuable AR-7 system." According to Department staff, Linus Realty proposes to fill the water course discussed in the July 1998 Order. Staff argues that Linus Realty's proposal would not be consistent with the FWAB's findings, and as a result, Linus Realty is not entitled to a permit. According to Staff, this and other substantive

differences between Opal Investments' and Linus Realty's proposals support the denial of Linus Realty's application for a permit.

According to Department staff, the FWAB's jurisdiction is limited to the review of the Commissioner's determinations made with respect to freshwater wetlands. Staff asserts that the FWAB has no jurisdiction over other necessary approvals from the Department. In addition to a freshwater wetlands permit pursuant to ECL article 24, Staff contends that Linus Realty also needs two additional approvals. They are a water quality certification (*see* 33 USC 1341), which the Department implements pursuant to 6 NYCRR 608.9, and a stream disturbance permit (*see* ECL article 15, title 5; 6 NYCRR part 608). Staff notes that even if Linus Realty pipes the wetland in the manner considered by the FWAB, a water quality certification and stream disturbance permit would still be required due to the disturbance of the bed and banks of a navigable stream. Staff asserts further that additional approvals from the Department might be necessary depending on the scope of activities at the site.

4. SEQRA

With respect to the need for a determination of significance pursuant to 6 NYCRR 617, Department staff states that the FWAB's July 1998 Order may be exempt from SEQRA pursuant to 6 NYCRR 617.5(c)(37), if the term "court" is broadly interpreted to include the FWAB. Staff maintains, however, that issuing a permit, whether to Opal Investments or to Linus Realty, would not be exempt from SEQRA. Department staff notes that Linus Realty's proposal is a Type I action because the site is contiguous to the Clay Pit Pond Park. Also, Staff notes further that wildlife habitat conditions on the site have improved since 1998.

Linus Realty's Reply Memorandum of Law

As Exhibit A to its reply memorandum of law, Linus Realty attached a second copy of Exhibit E from its April 19, 2005 motion. Exhibit B to Linus Realty's reply memorandum of law is a copy of a letter dated May 9, 2005 from Mr. Rosenzweig to ALJ O'Connell concerning the applicability of ECL article 8, and further proceedings.

According to Linus Realty, the information included with its motion papers substantially supports its claim that the July 1998 Order runs with the land. Linus Realty maintains that the July 1998 Order is analogous to a land use variance because the FWAB

directed the Department to issue a permit that authorizes a land use that is not normally allowed, or which is expressly prohibited, by ECL Article 24. Linus Realty notes further that like a zoning variance, the FWAB found that Opal Investments had suffered a hardship, as a prerequisite to the relief granted in the July 1998 Order. Linus Realty reiterated its argument that Opal Investments' hardship was so great that it could not file a proposal with the Department for the permit, and that the only way Opal Investments could "alleviate" its hardship was to sell the site with the understanding that the future owner would be entitled to the permit.

Linus Realty objects to Staff's assertion that the environmental quality of the site has improved since the FWAB issued the July 1998 Order. According to Linus Realty, Department staff has not offered any evidence to support this assertion. In addition, there is no evidence, according to Linus Realty, that it is an unfit company. Linus Realty asserts that any allegations made against Mr. Ferdinando have not been proven, and Staff's contentions are prejudicial and irrelevant. Linus Realty requests that Department staff's contentions about either Linus Realty's or Mr. Ferdinando's fitness as an applicant should be stricken from the record pursuant to CPLR 3024(b). Linus Realty argues further that the FWAB considered all relevant factors when it issued the July 1998 Order.

Linus Realty states that it intends to "pipe" the ravine, which is what Opal Investments proposed to do (*see* Exhibit E to Mr. Ferdinando's affidavit and Exhibit A to Linus Realty's reply memorandum of law). Linus Realty argues, in the alternative, that its development proposal is irrelevant to the issue of whether the FWAB's July 1998 Order runs with the land. If it is determined that the July 1998 Order does run with the land, then Linus Realty states that it should be provided with the opportunity to amend its current proposal, to the extent necessary, so that it would be consistent with the FWAB's findings.

With respect to other approvals from the Department, Linus Realty argues that the July 1998 Order did not direct Department staff to issue a permit "subject to" any other statutory or regulatory requirements outlined in the ECL or implementing regulations. Linus Realty argues that the principles of res judicata, collateral estoppel, and law of the case bar Department staff from asserting the need for additional approvals at this point in the proceeding. In addition, Linus Realty argues that

the FWAB's review determined that other approvals from the Department are either inapplicable or unnecessary.

Because the notices of incomplete application, other numerous correspondence, and the denial letter from Department staff do not identify the need to conduct an environmental review pursuant to SEQRA, Linus Realty asserts that Department staff concluded long ago that SEQRA requirements are "not applicable" to the captioned permit application. Linus Realty acknowledges that SEQRA requirements cannot be waived, but contends further that an environmental review never applied in the first instance. According to Linus Realty, further delay would result if an environmental review were undertaken now. (*See* Exhibit B to Applicant's reply memorandum of law.)

Rulings and Discussion

1. The Freshwater Wetlands Appeals Board's July 23, 1998 Order

By its express terms, ECL 24-1104 provided temporary procedural remedies to certain private landowners in Richmond County whose properties did not appear on the 1981 tentative freshwater wetlands maps, but were subsequently included on the final freshwater wetlands map filed on September 1, 1987. To take advantage of these remedies, landowners must have owned property as of January 1, 1987, and commenced proceedings before June 30, 1992, when ECL 24-1104 expired.

Linus Realty purchased the property in January 2003 (*see* Exhibit A to Mr. Ferdinando's April 19, 2005 affidavit), some 15 years after the freshwater wetlands maps were filed and 11 years after the expiration of ECL 24-1104. Therefore, Linus Realty did not own the property during the effective period of ECL 24-1104. In *Cohn v Freshwater Wetlands Appeals Board* (150 Misc 2d 807, 811), the court concluded that the Legislature intended ECL 24-1104 to provide an additional remedy only to the adversely affected property owners. The court based its conclusion on the principle that where a law expressly describes a particular person to which it would apply, it must be inferred that the Legislature intended to omit or exclude all others (*see Cohn*, 150 Misc 2d at 811, *citing McKinney's Cons Laws of New York, Book 1, Statutes §240*). Given the limited applicability of ECL 24-1104 to adversely affected property owners, I conclude that the Order and Decision issued by the Freshwater Wetlands Appeals Board on July 23, 1998 to Opal Investments does not run with the land.

The case law cited by Linus Realty to support its argument that the July 1998 Order is analogous to area or use variances, easements, and covenants, which may run with the land, under certain conditions, is distinguishable from the holdings in the July 1998 Order. Furthermore, in the *Matter of Jorling v Freshwater Wetlands Appeals Board* (147 Misc 2d 165, 175), the court determined that references to land-use law and zoning law cases were not appropriate within the context of matters related to ECL 24-1104.

As noted above, Linus Realty asserts that after obtaining the July 1998 Order, Opal Investments lacked the financial resources either to complete the permit process or to develop the site, which necessitated the sale of the property. In the absence of either a permit or site development, Linus Realty argues that the July 1998 Order must run with the land in order for Opal Investments to obtain the benefits of the July 1998 Order through the sale of the property. This argument is not persuasive.

The financial status of Opal Investments after the FWAB issued the July 1998 Order is an issue of fact that cannot be decided based on the record before me. Although Mr. Ferdinando makes a statement about Opal Investments' financial status in his April 19, 2005 affidavit (*see* ¶ 5), he does not explain the basis for his statement or offer any supporting documentary information. Why Opal Investments did not, or could not, complete the permit process and obtain a permit from the Department, however, is irrelevant. What is clear is that Opal Investments did not provide the information that Department staff needed to issue a permit consistent with the findings outlined the FWAB's July 1998 Order. As a result, Opal Investments did not obtain a freshwater wetlands permit, which may have been transferred, pursuant to 6 NYCRR 621.13, to a future property owner. Therefore, I conclude that Department staff is not obliged, pursuant to the July 1998 Order, to issue a freshwater wetlands permit to Linus Realty.

2. Estoppel

Linus Realty objects to the manner in which Department staff processed its permit application, and asserts that Department staff failed to process the permit application in a manner consistent with the procedures outlined in 6 NYCRR part 621. Linus Realty argues further that the doctrine of collateral estoppel precludes the Department from rendering a denial because

the FWAB convened a full hearing to consider Opal Investments' hardship claim.

Collateral estoppel precludes the relitigation of issues (issue preclusion), and applies to questions of law and fact (*see* Seigel, *New York Practice* § 443 at 715-716, § 463 at 744 [3d ed]). In addition, a court must have passed upon the issue in question. Where as here, collateral estoppel is asserted, the burden of showing that the alleged, estopped issue is the same as one disposed of in an earlier action rests with the proponent (*see* id. § 462 at 742-743).

The doctrine of estoppel does not apply here, contrary to Linus Realty's assertion. As noted above, the FWAB's hardship determination in the July 1998 Order does not apply to the captioned permit application by Linus Realty because the July 1998 Order does not run with the land. I note further that Linus Realty was not a party to Opal Investments' hardship hearing before the FWAB pursuant to ECL 24-1104.

Linus Realty has already litigated the issue of whether Department Staff processed its permit application properly. Supreme Court (Richmond County, Index No. 8267/04, Amended Order dated November 24, 2004) denied Linus Realty's petition for an order to show cause. After Linus Realty obtains a final determination from the Commissioner, the Amended Order grants Linus Realty leave to renew its petition.

3. SEQRA

During the August 18, 2005 issues conference, Department staff distributed a memorandum that offered an opinion on the SEQRA determination for the captioned permit application. This memorandum is identified in the issues conference record as Exhibit 3A. According to Exhibit 3A, Linus Realty's proposal would be a Type I action based on the criteria at 6 NYCRR 617.4(b)(6)(i) and 617.4(b)(10). Department staff concludes that an environmental impact statement would be required.

The Commissioner, and upon review, the courts, have determined that the procedural mandates of ECL article 70 (Uniform Procedures Act) do not supersede the substantive requirements in ECL article 8 (SEQRA). When a violation of SEQRA has been shown, the proper remedy is to annul any determination that does not fully comply with SEQRA. Furthermore, the Commissioner may revoke a permit if the SEQRA determination is defective. Because literal compliance with SEQRA is required,

the potentially significant environmental impacts of Linus Realty's proposal must be evaluated as required by SEQRA, otherwise the Commissioner may not issue any permit. (*See Matter of 628 Land Associates*, Commissioner's Interim Decision, September 12, 1994; *Matter of Zagata v Freshwater Wetlands Appeals Board*, 244 AD2d 343 [2d Dept. 1997], *appeal withdrawn* 95 NY2d 792.)

4. Other approvals

At the August 18, 2005 issues conference and in more detail with its September 15, 2005 memorandum of law, Department staff identifies two other approvals that Linus Realty must obtain in addition to a freshwater wetlands permit. These are a water quality certification and a stream disturbance permit (*see* 6 NYCRR part 608).

Linus Realty objects based on the premise that the FWAB's July 1998 Order runs with the land and that the FWAB did not issue its order "subject to" other approvals. Consequently, Linus Realty contends that the principles of res judicata, collateral estoppel and law of the case bar Department staff from identifying any other necessary approvals at this point in the proceeding.

Linus Realty's objection is unpersuasive given my determination that the July 1998 Order does not run with the land. Moreover, the principles of res judicata, collateral estoppel and law of the case do not apply here because the Commissioner has not made any final determinations. In addition, the principle of the law of the case does not apply here because I have not issued any ruling that would preclude Department staff from identifying any additional approvals applicable to Linus Realty's proposal.

Further Proceedings

During the August 18, 2005 issues conference, Mr. Rosenzweig, Linus Realty's counsel, stated that a ruling about the April 19, 2005 motion could eliminate or greatly narrow the factual issues for adjudication. Accordingly, the parties did not discuss potential factual issues for adjudication at the issues conference. (*See* p. 6 of transcript from issues conference.)

Before the adjudicatory hearing can commence, it is necessary to reconvene the issues conference to identify

potential factual issues for adjudication. I would like to schedule a telephone conference with the parties to discuss where and when the issues conference can reconvene. I request that the parties advise me by November 10, 2005 whether they would be available for the telephone conference call on November 21 or 22, 2005.

Appeals

During the course of a hearing, a ruling by the administrative law judge 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]). Such appeals are to be filed with the Commissioner in writing within five days of the disputed ruling as required by 6 NYCRR 624.6(e)(1). However, this time frame may be modified by the ALJ, in accordance with 6 NYCRR 624.6(g), to avoid prejudice to any party.

Therefore, any appeals in this matter must be received at the office of Acting Commissioner Denise M. Sheehan (attention: Louis A. Alexander, Assistant Commissioner for Hearings), 625 Broadway, Albany, New York 12233, no later than the close of business on November 30, 2005. Moreover, responses to the initial appeals will be allowed and such responses must be received as above no later than the close of business on December 12, 2005.

The appeals and any responses sent to the Commissioner’s Office must include an original and one copy. In addition, one copy of all appeal and response papers must be sent to me, to Chief ALJ James T. McClymonds at the Office of Hearings and Mediation Services, and to opposing counsel at the same time and in the same manner as to the Acting Commissioner. Service of any appeal or response thereto by facsimile transmission (FAX) is not permitted and any such service will not be accepted.

Appeals and any responses thereto should address the ALJ's rulings directly, rather than merely restate a party's contentions and should include appropriate citations to the record and any exhibits introduced therein.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: November 2, 2005
Albany, New York

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