

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

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

DEC Application No. 2-6405-99476/00001

INTERIM DECISION OF THE COMMISSIONER

September 20, 2006

INTERIM DECISION OF THE COMMISSIONER

Linus Realty, LLC ("Linus Realty" or "applicant") applied to the New York State Department of Environmental Conservation ("Department" or "DEC") for a freshwater wetlands permit to construct ten commercial buildings and parking areas in and adjacent to Freshwater Wetland AR-7, a Class I wetland, on Johnson Street (Block 7207, Lot 35), in Staten Island, Richmond County, New York (the "site"). The matter was referred to the Office of Hearings and Mediation Services ("OHMS") and assigned to Administrative Law Judge ("ALJ") Daniel P. O'Connell.

Previously, the New York State Freshwater Wetlands Appeals Board ("FWAB") had directed the Department to issue a freshwater wetlands permit to Opal Investments, a prior owner of the site (Opal Investments v Zagata, Order and Decision, Index No. 92-10, July 23, 1998 ["FWAB Decision"]). In an issues ruling dated November 2, 2005 ("Issues Ruling"), ALJ O'Connell determined that the FWAB Decision did not "run with the land," and, accordingly, did not bind the Department with respect to the pending application of Linus Realty.

Linus Realty appealed the ALJ's Issues Ruling and for the reasons discussed in this Interim Decision, the ALJ's Issues

Ruling is affirmed.

BACKGROUND

In 1981 the Department prepared a tentative freshwater wetlands map for Richmond County (Staten Island). After public hearings were held, a second tentative map was filed in 1986 which approximately doubled the acreage of land designated as wetlands (see FWAB Decision, at 1). On September 1, 1987, a final freshwater wetlands map for Richmond County that incorporated the additional wetland acreage was promulgated and filed.

As a result of this "double mapping," the State Legislature in 1987 enacted section 24-1104 of the Environmental Conservation Law ("ECL") to provide relief to certain landowners in Richmond County whose property had not appeared on the tentative freshwater wetlands map that the Department filed in 1981, but was subsequently identified as wetlands in the later mapping. ECL 24-1104 authorized FWAB to "affirm, reverse, modify, or remand, with recommendations" the DEC Commissioner's designation of a property as wetlands or any related order or decision where a particular property owner had suffered unnecessary hardships arising from the designation of its

property as wetlands in the later mapping (ECL 24-1104[1]).¹

- Opal Investments

Developers Joseph and Frank J. Vigliarolo, the principals of Opal Investments, purchased the site, as well as additional property in the vicinity of the site in the early 1960's (FWAB Decision, at 3). Although the initial mapping of freshwater wetlands in 1981 did not identify any wetlands on the site (see id. at 3, 8), the later mapping designated a portion of the site as freshwater wetland.

In 1988, Opal Investments filed an application for a freshwater wetlands permit relating to the construction of a proposed warehouse and light industrial complex on the site. Opal Investments entered into negotiations with the Department to arrive at an approvable development plan. However, Opal Investments concluded that the plan that Department staff would accept was economically infeasible "in light of the location of [a] ravine crossing diagonally through the entire parcel and the resultant high cost of mitigation" (FWAB Decision, at 5).

¹ ECL 24-1104 expired on June 30, 1992 (see L 1987, ch 408, § 7, as amended L 1988, ch 671, § 2). Any proceeding commenced under ECL 24-1104 prior to its expiration date was to continue until a final determination was rendered (id.).

Subsequently, Opal Investments petitioned FWAB for relief pursuant to the hardship provisions under ECL 24-1104 (FWAB Decision, at 1). Opal Investments also appealed the Department's designation of freshwater wetlands on the site, but subsequently withdrew that portion of its appeal (id.).

A hearing was conducted before the FWAB on July 10, 1996, and a decision was issued on July 23, 1998. At the hearing, the principals of Opal Investments indicated that they had made decisions and taken actions in reliance on the fact that the site was not on the 1981 freshwater wetlands map (see FWAB Decision, at 5, 8). The onsite wetland, which was identified in the later mapping, was described, in part, as a ravine at the bottom of which was a water course that transported water between two more valuable wetland segments (see id. at 5, 6, 9). A downstream section of the wetland consisting of emergent marsh was also identified (see id. at 7). In order to preserve areas of the wetland system, Opal Investments proposed to pipe the water course as it crossed the site (see id. at 9).

The FWAB determined, among other things, that Opal Investments had suffered an unnecessary hardship because of the "double-mapping" (id., at 7) and directed that the Department issue a freshwater wetlands permit to Opal Investments (see id.

at 9). The FWAB concluded that, "upon balance, [Opal Investments'] hardship outweighs the value of this particular wetland segment" (id.). FWAB concurred with Opal Investments' environmental consultant that "on these facts, piping of the water course as it traverses the appellants' property would preserve other sections of the concededly very valuable AR-7 [wetland] system" (id. [emphasis added]).² The FWAB ordered the DEC to issue a permit to the appellants for the development of Block 7207, lot 35 in Wetland AR-7, "consistent with [the FWAB's] findings herein" (id.).

However, following the issuance of the FWAB Decision, Opal Investments never submitted a detailed description of the proposed project to the Department and, thus, did not finish the application process. Consequently, Department staff did not issue a freshwater wetlands permit to Opal Investments.³

² The FWAB noted that while it had previously found, in certain cases, that the DEC's processing of permit applications had added to an appellant's hardship, it did not find that to be the case here (see FWAB Decision, at 9).

³ According to Linus Realty, Opal Investments "lacked funds to proceed with the permit process and development" (Applicant's Memorandum of Law in Support of Motion for Order without Hearing dated April 19, 2005 ["Applicant's Memorandum"], at 4; see also Affidavit of Joseph Ferdinando in Support of Motion for Order without Hearing dated April 19, 2005 ["Ferdinando Affidavit"], ¶ 5).

- Linus Realty Application

In January 2003, Linus Realty acquired the site from Taz L.P. and Frank Vigliarolo. Linus Realty subsequently filed an application dated July 28, 2003 with the Department for a freshwater wetlands permit as part of its proposed development of the site. In its application, Linus Realty indicated that it planned to fill the site's ravine.

On September 4, 2003, Department staff issued a notice of incomplete application to Linus Realty. A second notice of incomplete application was issued on January 14, 2004. Both notices identified deficiencies in the application and listed the information that had to be provided in order to satisfy the standards for permit issuance.

By letter dated June 30, 2004 ("Denial Letter"), Department staff denied the permit application on the grounds that the proposed project failed to comply with the applicable regulatory standards contained in section 663 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").⁴ In the Denial Letter, Department staff

⁴ Specifically, the Denial Letter noted that the project "involves the construction of commercial buildings within the wetland and within extreme proximity to the wetland and will degrade wetland functions such as flood control and wildlife habitat, reduce the ability of the wetland to provide water

also noted that the FWAB Decision had no binding effect with respect to Linus Realty's application, and that the project proposed by Linus Realty was different from the project previously proposed by Opal Investments.⁵

quality and erosion control benefits, add to the pollutant load of the wetland, and diminish the open space and aesthetic benefits of the wetland" (Denial Letter, at 2).

⁵ The Denial Letter read, in pertinent part:

"An additional matter associated with the project location and this application is a decision by the Department's Freshwater Wetlands Appeals Board (Index No. 92-10) in the appeal of Frank and Joseph Vigliarolo d/b/a Opal Investments. In that decision, the Freshwater Wetlands Appeals Board confirmed that the watercourse traversing the property at issue was properly mapped as part of Freshwater Wetland AR-7, but held that Joseph and Frank Vigliarolo had suffered a personal hardship. The Board ordered the DEC to issue a permit 'to the appellants' in accordance with the Board's findings. Following the Board's decision, the Vigliarolo Brothers did not obtain the permit from the DEC, but instead transferred ownership to Linus Realty LLC, a third party to whom the hardship decision does not apply. Since the Board's decision pertained to the appellants, Frank and Joseph Vigliarolo d/b/a Opal Investments, in that proceeding only, and since Linus Realty was not a party of the hardship appeal, Linus Realty LLC can claim no benefit from the Freshwater Wetlands Appeals Board decision. Therefore the Board's decision has no bearing on the decision making for this application and the decision is based on the permitting standards in 6 NYCRR Part 663 as presented above.

"Even if the Board's decision had binding effect with respect to the applicant as new owner, the pending application would be subject to denial because it proposes the filling of the ravine. As a result, the water flow across the subject site would be severely restricted and regulated areas both upstream and downstream of the applicant's property would be negatively affected" (Denial Letter, at 2-3).

Subsequent to the denial of its permit application, Linus Realty requested a hearing and the matter was referred to OHMS and assigned to ALJ O'Connell. Linus Realty moved, pursuant to papers submitted under cover of a letter dated April 19, 2005, for an order without hearing pursuant to 6 NYCRR part 622. In its motion, Linus Realty contended that the FWAB Decision runs with the land, the Department was estopped from denying Linus Realty's permit application, and the Department's denial of its permit application was unwarranted as a matter of law.

Part 622 of 6 NYCRR, upon which Linus Realty based its motion, governs enforcement hearings and is inapplicable to permit application hearings which are governed by 6 NYCRR part 624. However, the ALJ determined that Linus Realty's motion could be considered, pursuant to 6 NYCRR 624.4(b)(5)(iii), in the issues conference on the permit application (see Issues Ruling, at 1-2). At the issues conference, the ALJ authorized Department staff to file a response to the motion, which Department staff filed under cover of a letter dated September 16, 2005 ("Staff's Memorandum of Law"). A reply memorandum of law dated September 26, 2005 was submitted by Linus Realty.

On November 2, 2005, the ALJ ruled that the FWAB

Decision did not "run with the land" and that Department staff were not required, pursuant to that decision, to issue a freshwater wetlands permit to Linus Realty (see Issues Ruling, at 11-12). The ALJ also rejected Linus Realty's other arguments including, but not limited to, estoppel (see Issues Ruling, at 12-14).

- Appeal

By letter dated November 3, 2005 ("Appeal Letter"), attached to which were various exhibits and supporting documents, Linus Realty appealed the Issues Ruling. Applicant argued that the ALJ erred in determining that the FWAB Decision did not "run with the land" and that Linus Realty could not benefit from that decision (Appeal Letter, at 1). Linus Realty contended that the ALJ also erred "by basing his decision" on ECL 24-1104, which Linus Realty argued was not relevant to whether the FWAB Decision "ran with the land" (id. at 2).

Linus Realty asserted that the ALJ "also erred in requiring DEC to issue the permit based upon DEC's failure to timely deny the application" (id.).⁶

⁶ This argument is incorrect because the ALJ did not require the DEC to issue the permit based upon DEC's failure to timely deny the application. However, based on the papers submitted by Linus Realty in this proceeding, it appears that Linus Realty may have intended to argue that the ALJ erred in "not" requiring that

Department staff did not reply to the Appeal Letter, although staff previously addressed applicant's arguments in Staff's Memorandum of Law (see also Issues Ruling, at 7-9 [summarizing Department staff's arguments]).

DISCUSSION

Linus Realty argues that the FWAB Decision, which directed that a freshwater wetlands permit be issued to Opal Investments, "runs with the land" and applies to successive owners. In support of its argument that the FWAB Decision "runs with the land," Linus Realty refers to judicial decisions on various types of real property interests, which it contends are relevant to the present proceeding. These include decisions on variances (Matter of St. Onge v Donovan, 71 NY2d 507 [1988]; Matter of Holthaus v Zoning Bd. of Appeals, 209 AD2d 698 [2d Dept 1994]); easements (Webster v Ragona, 7 AD3d 850 [3d Dept 2004]); and covenants (Neponsit Prop. Owners' Assn. v Emigrant Indus. Sav. Bank, 278 NY 248 [1938], Harrison-Rye Realty Corp. v New Rochelle Trust Co., 177 Misc 776 [Sup Ct 1941]), Stasyszyn v Sutton East Assoc., 161 AD2d 269 [1990], lv denied 86 NY2d 869 [1995]); in addition to zoning cases (e.g., Matter of Dexter v Town Bd. of Town of Gates, 36 NY2d 102 [1975]).

Department staff issue the permit.

Based on my review of the record including but not limited to the papers submitted on Linus Realty's motion, I affirm the ALJ's determination that the FWAB Decision does not "run with the land."

Summary of Conclusions

Linus Realty's argument is based on several incorrect assumptions. First, the Department's permit system to preserve and protect freshwater wetlands is based on the police powers of the State and is not simply a construct equivalent to variances, easements, or covenants as Linus Realty contends.

Second, following the issuance of the FWAB Decision, Opal Investments did not finish the permit application process and the specific details of its project are unknown. No freshwater wetlands permit was issued to Opal Investments. Accordingly, there is no permit with project specific conditions and mitigation that could be transferred to Linus Realty and upon which Linus Realty can rely for its project proposal.

Moreover, the transfer of permits are subject to the discretion of the Department, and are not automatic. Treating the FWAB Decision as a permit that could be transferred by Opal Investments to Linus Realty deprives the Department of its

exercise of discretion over permit transfers. In addition, the FWAB Decision is directed to Opal Investments, and does not benefit any other party or any successor to Opal Investments.

Finally, based on the application materials including but not limited to site plans, Linus Realty's project is different from the sketchy proposal offered by Opal Investments, and Linus Realty's project would pose greater adverse impacts to the site wetlands. Accordingly, Linus Realty's proposal is not consistent with the findings of the FWAB Decision and cannot benefit from that decision.

Transferability of the FWAB Decision

The State Legislature has enacted legislation authorizing the Department's Commissioner to issue permits and licenses for the protection and management of the environment of the State (see generally ECL 3-0301). With respect to freshwater wetlands, the Legislature has declared it to be the public policy of the state "to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands to secure [their] natural benefits" (ECL 24-0103).

Pursuant to the State's police powers, the Legislature has established a permit system to address activities relating to freshwater wetlands (see ECL 24-0701, 24-0703, & 24-0705; see also J Nolon, "Smart Growth, Wetlands Protection Invites Reflection on Federal Law," NYLJ, August 16, 2000 [New York has used its police powers to establish a wetlands protection permit system]).

The freshwater wetland permits that the Department issues are not a function of zoning, or equivalent to variances, easements or covenants as Linus suggests,⁷ but are an exercise of

⁷ Linus Realty cites various rules applicable to easements, covenants, variance and zoning, but fails to demonstrate any applicability to the FWAB Decision. For example, easements relate to the use of the land of another for some purpose (Nature Conservancy v Congel, 253 AD2d 248, 252 [4th Dept 1999]). The FWAB Decision directing that a permit be issued to Opal Investments does not relate to any right to use in some way the land of another.

Linus Realty refers to at least two decisions that discuss the factors which determine whether a property interest is personal or runs with the land, but neither test is applicable or satisfied here (see Stasyszyn v Sutton East Assoc., 161 AD2d 269, 271-272 [1st Dept 1990][listing as one factor in determining if a covenant restricting real property is personal or runs with the land whether the parties intended its burden to attach to the servient parcel and its benefit to run with the dominant estate, but there is no servient parcel and dominant estate in this matter]; Neponsit Prop. Owners' Assn. v Emigrant Indus. Sav. Bank, 278 NY 248 [1938][test for covenant includes intention of parties as to whether covenant should run with land, but no such intent has been expressed in this matter]).

In an affirmation dated July 20, 2004, submitted in support of Linus Realty, Matter of Weinrib v Weisler, 33 AD2d 923 (2d

the State's powers implemented through article 24 of the Environmental Conservation Law (see, e.g., Matter of Frank Zaccaro, ALJ Hearing Report, at 11 [State regulation of freshwater wetlands is not a zoning matter], adopted by Order of the Commissioner, August 24, 2000). The freshwater wetland permits that the Department issues for these type of development projects are site and project specific and incorporate conditions and mitigation measures to address potential impacts to the freshwater wetland of concern.

As the record indicates, Opal Investments never finished the permit application process. Because development plans were not finalized, appropriate permit conditions and mitigation measures could not be established (see, e.g., Staff's Memorandum of Law, at 2 & Exhibit 1 thereto). Decisions of the FWAB which direct, pursuant to ECL 24-1104, that a permit be issued, contemplate that an applicant's plans will be sufficiently developed to serve as a basis for establishing appropriate permit terms, including mitigation (see, e.g., Smith

Dept), aff'd, 27 NY2d 592 (1970) is cited for the principle that "[t]he purpose of zoning is to regulate the use of land, irrespective of who may be the owner of the land" (id.). In Weinrib, a prohibition against the assignment of building permits, being a function of zoning, was held to be unconstitutional as an attempt to control ownership and transference of property. However, what is at issue in the pending matter is not zoning, but the preservation and protection of freshwater wetlands.

v Jorling, Fresh Wet App Bd, Order and Decision, June 28, 1990 [directing the Department to issue a permit to appellant in a proceeding pursuant to ECL 24-1104, "subject to reasonable and good faith mitigating conditions the [Department] may impose"]; Vitale v Jorling, Fresh Wet App Bd, Order and Decision, October 11, 1989 [same]). In this instance, the permit application process never reached the stage where Department staff could prepare project and site specific permit terms and conditions.

Because Opal Investments failed to follow through on the permit application process, no project specific permit was issued. Thus Opal Investments had no permit to transfer to Linus Realty so that Linus Realty could commence site development. Moreover treating the FWAB Decision as a permit transferred by Opal Investments to Linus Realty would deprive the Department of its authority over such transfers, which are subject to the Department's discretion. The acquisition of, or obtaining rights to use, a facility or property does not provide a new owner, lessee, operator or applicant access to permits held by the former legally responsible party as a matter of right (see DEC Program Policy, "Transfer of Permits and Pending Applications," DEP 01-1, at 3; see also 6 NYCRR 621.13).⁸

⁸ The Department's Enforcement Guidance Memorandum on Record of Compliance dated March 5, 1993 also demonstrates the discretion that the Department exercises in issuing permits.

Furthermore, although FWAB ordered the Department to issue a permit to Opal Investments consistent with its findings, nothing in the FWAB Decision states that a permit should be issued to any other party. Linus Realty was not a party to the Opal Investments' proceeding. Moreover, nowhere in the FWAB Decision is it stated that the decision "runs with the land," or that it can be relied upon by, or conveys any rights to, a successor to Opal Investments.

In addition, ECL 24-1104, pursuant to which the Opal Investments' proceeding before FWAB was conducted, does not extend relief to successors of the affected property owner. The statute and legislative intent "both point to a desire to provide a remedy only to the owner of the affected property" and the statute is to be narrowly construed (Cohn v Freshwater Wetlands Appeals Bd., 150 Misc2d 807, 810 [Sup Ct, Richmond County 1991]); Matter of Jorling v Freshwater Wetlands Appeals Bd., 160 Misc2d 137, 140 [Sup Ct, Richmond County 1994][“eminently clear that the intention was to grant jurisdiction over a limited class of cases”]; Matter of McErlean v Freshwater Wetlands Appeals Bd., 230 AD2d 798 [2d Dept 1996][contract-vendee not a “landowner”

Pursuant to that guidance, the Department undertakes an evaluation of an applicant's suitability and fitness for holding a permit (see also Matter of Bio-Tech Mills, Inc. v Williams, 105 AD2d 301 [3d Dept], affd for the reasons stated by the majority below, 65 NY2d 855 [1985]).

within the meaning of ECL 24-1104]).

ECL 24-1104, which expired in 1992, provided that those seeking relief must have owned the property in question on January 1, 1987 (see ECL 24-1104[1]; see also Matter of Jorling v Freshwater Wetlands Appeals Bd., 147 Misc2d 165, 171-172 [Sup Ct, Richmond County 1990]). In addressing requests for relief, FWAB has concluded that hardship must relate to the mapping process and that the standard to be applied requires that "some form of reliance had taken place" (Jorling, 147 Misc2d at 172; see also id. at 172-173 [describing four specific situations that could give rise to an undue or unnecessary hardship as determined by FWAB]; Crispi v Jorling, Fresh Wet App Bd, Order and Decision, January 25, 1996 [demonstration of constructive or actual reliance on 1981 wetland map must be shown]).

Opal Investments acquired the property in the 1960's and relied on the fact that no State-regulated wetlands had been identified on the site in the initial mapping in 1981. However, as a result of the later mapping, its plans for the proposed development of the site were affected. Based on the record before it, FWAB found Opal Investments to be within the class of affected landowners entitled to relief pursuant to ECL 24-1104.

Linus Realty, however, is not in the same class of property owner as Opal Investments. Linus Realty did not own the property at the time of the initial or the later mapping of wetlands in Richmond County. In fact, by the time Linus Realty acquired the site in 2003, the freshwater wetland map for Richmond County had been filed for approximately sixteen years. Linus Realty was on notice of the existence of freshwater wetlands on the property at the time it acquired the site in 2003 (see Ferdinando Affidavit, ¶ 6 [knowledge of FWAB Decision at the time of purchase]). Linus Realty's position is no different from any other landowner in the State on whose property mapped freshwater wetlands are located.

Although Opal Investments initially appealed the designation of freshwater wetlands on the site, it withdrew that appeal. Accordingly, the FWAB did not consider whether to delete the State-regulated wetlands on the site from the State wetland map for Richmond County ("demapping"). Opal Investments chose what relief it wanted to pursue and did not seek, and was not granted, the authority to undertake any type of activity on the site. As a result of its seeking only a permit, the site remained subject to freshwater wetlands permitting requirements. It is with these requirements that Linus Realty or any other successor must comply.

Finally, the record indicates that the development proposal advanced by Linus Realty is different from Opal Investment's proposal, and would potentially result in significantly greater impacts on the site's freshwater wetlands. Opal Investments was planning to ensure that wetland segments of Class I wetland AR-7 would continue to be replenished with water by providing appropriate piping of the onsite water course. The value of this water course was expressly recognized in the FWAB Decision (see FWAB Decision, at 9).

Linus Realty, although suggesting that it may pipe the water course (see Applicant's Reply Memorandum of Law dated September 26, 2005, at 5),⁹ proposes to fill the ravine in which the water course is located (see, e.g., Issues Ruling, at 8-9; Permit Application of Linus Realty dated July 28, 2003). Department staff's Denial Letter noted the adverse impacts of Linus Realty's proposal to fill the ravine, including "severely" restricting the water flow across the site and negatively impacting upstream and downstream wetland areas (Denial Letter, at 3). A Department staff memorandum addressing

⁹ The site plan dated July 24, 2003 and revised December 9, 2003 that Linus Realty submitted does not provide specific details for such piping nor were any such details provided at the issues conference. The only reference in applicant's reply memorandum of law is to a general comment that is contained in applicant's December 14, 2003 response to the Department's notice of incomplete application dated September 4, 2003.

environmental issues listed the adverse and significant impacts that would result from Linus Realty's proposed project, including the reduction or elimination of the functions and benefits of the wetland (see Issues Conference Exhibit 3A [Department memorandum dated August 17, 2005 from John F. Cryan to Udo Drescher ("August 2005 Memorandum") ¶¶ 2 & 3]). Even if a permit had been issued to Opal Investments pursuant to the FWAB Decision, it would not be relevant or applicable to the project being proposed by Linus Realty, which contemplates filling the ravine and more extensive impacts to the wetland system. In sum, Linus Realty's proposed project is not "consistent with" the FWAB Decision (FWAB Decision, at 9).

Other Environmental Review and Permits

In addition, Department staff concluded that Linus Realty's proposed placement of fill on the site constitutes a regulated activity pursuant to title 5 of ECL article 15 and 6 NYCRR 608.5, which requires a stream disturbance permit, in addition to a water quality certification (see 6 NYCRR 608.9). Linus Realty contends that, because of the FWAB Decision, its project need not satisfy other ECL permit requirements or the environmental review process established pursuant to ECL article 8 (State Environmental Quality Review Act ["SEQRA"]).

Linus Realty's contention relating to other Department approvals is baseless. The statutory jurisdiction of the FWAB is limited to a review of freshwater wetland determinations and decisions pursuant to ECL article 24 (see ECL 24-1103[1][c] and [d]). Permits and approvals required by other articles of the ECL are outside of FWAB's purview and must still be met by any applicant. In fact, the FWAB in its decisions has recognized the limits of its jurisdiction and has stated that it does not presume to address the outcome of other environmental or regulatory reviews that may be required for a project (see, e.g., Rabbinical Seminary Yeshiva Ch'San Sofer v Jorling, Fresh Wet App Bd, Decision and Order, January 10, 1991).

Similarly, nothing in FWAB's authorizing legislation authorizes it to override the requirements of SEQRA with respect to permit application reviews, particularly where, as here, a new project is being proposed that has potentially significant environmental impacts. The wetland that Linus Realty would impact is designated as Class I (the highest classification for State freshwater wetlands). Linus Realty's project constitutes a "Type I" action for purposes of SEQRA review, and may require the preparation of an environmental impact statement (see August 2005 Memorandum [listing potentially significant environmental impacts of the Linus Realty proposal, including environmental impacts in

addition to impacts on wetlands]).

I also reject Linus Realty's assertion that the Department did not comply with the applicable timeframes as established pursuant to ECL article 70 (Uniform Procedures Act). Based on my review of the record, the discussion in the Denial Letter demonstrates that Department staff complied with the appropriate timeframes (see Denial Letter, at 1; see also letter dated July 8, 2004 from Department staff to applicant's attorney).

Furthermore, based on this record including but not limited to the reasons discussed in the Issues Ruling, Linus Realty's argument that the doctrine of collateral estoppel precludes the Department from denying its permit application is meritless (see, e.g., Issues Ruling, at 12-13).

To the extent that Linus Realty has raised other arguments in support of its appeal, they have been considered and rejected.

CONCLUSION

In sum, Linus Realty would have the Department interpret the FWAB Decision as issuing a permit to Opal Investments to construct whatever development Opal Investments or a successor might conceive. This was clearly not the intention of the FWAB Decision. In addition, the FWAB lacks the authority to obviate review under other provisions of the ECL, which review must still be conducted in this case. Accordingly, Linus Realty's contention that the FWAB Decision provides it with "carte blanche" to proceed with its proposed development without any further environmental review is rejected.

The ALJ's Issues Ruling is affirmed. Accordingly, this matter is remanded to ALJ O'Connell for further proceedings consistent with this Interim Decision.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: _____/s/_____
Denise M. Sheehan,
Commissioner

Albany, New York
September 20, 2006