

Draft not approved by Agency



Regulatory Programs Committee
October 10-11 2013 Agency
Meeting; REW:mlr

**Regulatory Programs Committee
October 10, 2013**

Regulatory Programs Committee ("Committee") Members and Designee present: Sherman Craig, Chairman, Richard Booth, Arthur Lussi, William Valentino and Lynne Mahoney (Department of State). Other Agency Members and Designees present: Leilani Crafts Ulrich, Chairwoman, Daniel Wilt, Robert Stegemann (Department of Environmental Conservation), Bradley Austin, (NYS Department of Economic Development), William Thomas and Karen Feldman.

Agency Staff present: Terry Martino, Executive Director, and James Townsend, Counsel

Local Government Review Board Representative present: Frederick Monroe, Executive Director

The Committee convened at 1:20 pm.

1. Approval of September Draft Regulatory Programs Committee Minutes

On motion of Mr. Lussi, seconded by Mr. Valentino, the Committee unanimously adopted the draft minutes of its September 12, 2013 meeting.

2. Deputy Director-Regulatory Programs Report (R. Weber)

Mr. Weber reviewed the Status and High Profile reports for Regulatory Programs. He briefly discussed applications received and permits issued.

3. Appeal of Notice of Complete Application

Mr. Craig introduced the appeal filed by Sunset Farm, Ltd. (P2011-095) of an August 9, 2013 notice of complete application for the proposed project issued by the Agency's Deputy Director-Regulatory Programs, Mr. Weber. Mr. Craig noted that the appeal is governed by 9 NYCRR § 572.22 and that the Committee would consider the appeal based on a record consisting of:

- a. The Project Sponsor's Notice of Appeal, dated September 6, 2013 (with two attached letters, dated August 9 and 29,

2013, from Mr. Weber to Mr. Norfolk), accompanied by an Affidavit in Support of Appeal with Legal Points and Arguments, dated September 5, 2013, and a Certification of Record on Appeal, dated September 5, 2013.

- b. Agency Staff's Response to Appeal, dated October 2, 2013, accompanied by an Affidavit of Mitch Goroski, Esq., dated October 2, 2013.
- c. Letter from Michael Hill, Esq., on behalf of Braidlea Farms, L.P., dated October 2, 2013.
- d. Reply Memorandum in Further Support of Project Sponsor's Appeal, dated October 7, 2013
- e. Memorandum from Paul Van Cott, Associate Attorney, to Agency Members and Designees, dated October 9, 2013.

The Project Sponsor was represented during the Committee meeting by Matthew Norfolk, Esq. Michael Hill, Esq. represented Bradlea Farms, L.P., which owns property near the project site. Agency staff were represented by Paul Van Cott, Esq.

During the Committee's deliberations, Agency Counsel Townsend advised the Committee. The attorneys for the Project Sponsor, Braidlea Farm, L.P. and Agency staff responded to questions posed by Agency members. At the conclusion of the deliberations, Mr. Craig asked Messrs. Norfolk, Hill and Van Cott whether they had had a full and fair opportunity to be heard, and they all replied in the affirmative.

Mr. Craig then asked for a motion to either accept or deny this appeal. Mr. Booth made a motion to deny the appeal and to move that recommendation to the Agency. Mr. Valentino seconded the motion. The Regulatory Committee voted unanimously in favor of the motion.

The Committee deliberated for 45 minutes on this appeal. The full record of the Committee's deliberations on this appeal is available on the webcast of the Agency's Thursday, October 10, 2013 meeting.

4. Projects

2011-103 (S. McSherry)
Sheila White
Town of Putnam, Washington County
Rural Use

Ms. McSherry introduced Sheila White, Attorneys Jon Lapper and Stephanie Bitter, Dennis MacElroy, Ms. White's technical consultant along with Shaun LaLonde, Beth Phillips, and Mark Rooks from Agency staff.

Ms. McSherry used a slide presentation to describe the proposed project, project site and land use area. She stated that this is a subdivision of 59.6 acres into seven lots, of which four lots are subject to Agency review.

She reviewed the detailed subdivision plan and explained that each of the three shoreline lots will be developed by an open-sided boathouse on cribbing with rooftop deck, 40 ft. by 40 ft. in size, including attached staircase, and no more than 16 ft. tall above the mean high water mark of Lake George.

Ms. McSherry noted access to the lots will be a shared gravel access road contained within a 50 ft. wide easement. A homeowners' association will be formed to maintain the common access road and administer proposed Covenants, Restrictions and Easements.

She stated agency jurisdictional determination J2010-616 determined that a proposal to convey proposed lots 3 and 6 as bona-fide gifts were not subject to Agency jurisdiction. Ms. McSherry noted that a subsequent revision to that proposal was the subject of Agency non-jurisdictional determination J2011-200 for conveyance of lots 2, 3 and 6 as gifts to the applicant's children.

Ms. McSherry noted that the property is bounded on the south by land of NYS classified as Wild Forest and on the east and north by privately-owned lands of others.

Mr. Lalonde described the soils and slopes of the proposed project. He noted a conventional absorption trench on-site wastewater treatment system has been designed by a New York State licensed Professional Engineer to serve each dwelling. He stated slopes in the locations of all shallow absorption trench on-site wastewater treatment systems were confirmed in the field to be 8% to 12%

Mr. Lussi asked if an engineer designed the stormwater plan for the proposed project site. Mr. Lalonde replied a licensed engineer designed the stormwater plan for this project site. One of staff's concerns was to protect the water quality of Lake George. Mr. Lalonde stated one of the development considerations is to protect water quality.

Mr. Lussi asked how long the Agency has reviewed stormwater plans for proposed projects. Mr. LaLonde replied staff has reviewed stormwater plans before his arrival 10 years ago.

Mr. Lalonde stated this proposed project site has had extensive stormwater review which was coordinated with the New York State Dept. of Environmental Conservation (DEC) and the Lake George Park Commission. Mr. Lalonde stated the DEC is requiring an Individual Construction Stormwater SPDES permit for the project and he added staff are comfortable with the stormwater plans.

Mr. Monroe asked about accuracy of the principal building calculation in light of the bona fide gifts and Ms. McSherry said she will review that calculation with Mr. Monroe.

Mr. Craig made a motion for the Committee to move the proposed permit to the Agency with a recommendation of approval with conditions. Mr. Lussi seconded the motion. Four Committee members voted in favor of the motion with Commissioner Valentino voting in opposition.

2013-140 (A. Lynch)
Arthur and Mary George
Town of Franklin, Franklin County
Resource Management

Ms. Lynch introduced Mr. Duprey the authorized representative for the project sponsors.

Ms. Lynch used a slide show presentation to describe the project site, and land use area.

Ms. Lynch stated the applicants have requested an Agency variance for the lateral expansion of the existing two-story single family dwelling to construct a single-story addition located 109 feet from the mean high water mark of Franklin Falls Pond. She stated the request is a 41-foot variance from the 150-foot shoreline setback from Franklin Falls Pond.

Ms. Lynch showed several slides from various locations depicting the proposed project site. She reviewed and discussed the variance impacts and criteria with the Board.

Ms. Lynch stated the project site was created by a 1980 subdivision; as this subdivision occurred on Resource Management lands and within a designated river area and Agency records indicates that no permit was issued. She noted an Agency letter dated May 7, 2013 for Agency files E2013-41 and J2013-158 confirms that the Agency is not pursuing

any potential subdivision violation due to the age of the subdivision. Ms. Lynch stated by the issuance of this Order, the Town of Franklin shall recognize this parcel as lawful for Agency purposes.

Ms. Lynch stated the applicants thoroughly evaluated all reasonable alternatives that would not have required a variance. She stated that the applicants purchased the property not knowing an Agency permit would be required to expand the dwelling.

Ms. Lynch stated it is staffs' recommendation to approve the Agency order with conditions.

Questions were asked regarding the location of the 1,000 gallon septic tank shown on the project plans. Mr. Lalonde stated the location and design of the absorption field is approximate but is within 100 feet of wetlands and a stream (east of the project site). Ms. Lynch stated Agency jurisdiction does not involve the wastewater treatment system due to the fact the applicants are not adding any more bedrooms to the proposed project site.

Mr. Booth asked if this were a Town variance would the practical difficulties criteria disappear as one of the impact questions. Agency Counsel answered yes and case law has also interpreted practical difficulties to mean a balancing test that the Agency has adopted.

Mr. Booth suggested that the Agency should review and change the APA Regulations so the variance criteria are consistent with town laws. He continued to state the applicants in this project have not established "practical difficulty" as it was historically understood. He requested the language in No. 4 on page 12 of the draft order pertaining to the applicants not knowing that such an addition would require an Agency variance be removed.

A brief discussion regarding Condition 11 in the proposed Agency Order followed.

Mr. Booth made a motion for the Committee to move the requested variance to the Agency with a recommendation of approval. Mr. Lussi seconded the motion.

Mr. Monroe noted that this proposal could have been done without a variance before the shoreline restrictions changed in 2008, or if it were not in a River Area. Mr. Booth commented that this proposal is an example of why the Agency should have jurisdiction over this type

of expansion, but that it should be reviewed based on its impacts, not on whether there is practical difficulty.

Mr. Craig called the motion. Four Committee members voted in favor of the motion with Commissioner Valentino voting in opposition.

The Committee temporarily adjourned until the morning of October 11, 2013 at 3:30 p.m. on October 10, 2013

**Regulatory Programs Committee
October 11, 2013**

The Committee reconvened at 10:45 a.m.

2011-95 (S. McSherry/P.Van Cott)
Daniel Arbour and Sunset Farms, LTD.
Town of Willsboro, Essex County
Rural Use

Ms. McSherry stated that this is a proposal for a new private airport on existing agricultural fields. She stated that staff is asking the Agency to direct the project to public hearing to obtain information necessary to assess impacts on nearby landowners and/or to deny the project as a prohibited use under Town law.

Ms. McSherry used a slide show presentation to describe the proposed project site, jurisdiction and land use area.

Ms. McSherry showed several slides depicting the proposed project site from various locations.

She noted no lighting or structures are proposed. She stated a 7-foot tall pole with an orange nylon windsock would be installed adjacent to the runway. The use of the airstrip would be limited to daylight hours during the 12 months of the year. A maximum of 150 take-offs and landing annually are proposed. No maintenance or re-fueling will occur on-site.

Ms. McSherry stated the airport will utilize single-engine planes only, without horsepower limits.

She discussed two other airports near the proposed project site in the Town of Essex.

She referred to a website named "airportdata.com" which she stated accurately lists through FAA registered airports.

Mr. Van Cott reviewed with the Committee the decision criteria applicable to the proposed project and the basis for staffs' recommendation for an adjudicatory hearing.

Mr. Van Cott referenced 9 NYCRR § 574.6 which prohibits the Agency from issuing a permit in an approved town for a use that is prohibited. He noted that the Town of Willsboro Zoning Board of Appeals made a determination on April 23, 2012 that a use variance is required for the proposed airport. Based on that determination, it appears that the proposed airport is not an allowable use in the Town of Willsboro. However, Mr. Van Cott pointed out the Agency cannot deny a project without a hearing.

Mr. Lussi stated his understanding that the allowable use list for the Town of Willsboro is silent on this issue. Mr. Van Cott replied that the Town of Willsboro has a definition for an airport but it does not appear as an allowable use by a permit or a special use permit in any of the zones in the town. He explained that traditional zoning law states if it does not appear as an allowable use on the use list then it is prohibited. Mr. Townsend added that the Willsboro zoning code has a typical catch-all provision that uses that are not on the permitted use list are prohibited.

Mr. Lussi asked if the Agency typically requires an applicant to obtain a use variance before making a decision on a project in approved towns and Mr. VanCott replied yes. The normal consultation process between the Agency and the approved town during the project review process generally results in an affirmative statement from the town on whether a use is prohibited or allowable under the local program.

Mr. VanCott stated that in a hearing, the first issue--whether or not this is an allowable use--would need to be determined by the Town's ZBA before the second issue--noise impacts from airport--would be adjudicated.

He stated that after the amended application was first completed in February of 2012, the Agency received public comment and concern regarding the noise impacts to adjoining landowners. As a result of public comment and staffs' further review, an additional information request was sent to the Project Sponsor for any new information regarding the ZBA and information responsive to the concern about noise impacts. That information has not been provided and is the basis for staff's recommendation for a hearing issue on noise impacts.

Mr. VanCott stated that if the town issues a use variance then the noise impact issue may be addressed by conditions accompanying a variance. That may affect how extensive a hearing is necessary on the noise impact issue.

Mr. Craig asked Agency Counsel if there is particular wording that the Committee should include in a motion. Mr. Townsend responded that a simple motion would be sufficient with the understanding that the hearing would be limited to the two identified issues and that it would be undertaken in the two-step process described by staff.

Mr. Craig asked for a motion to move the proposed project to an adjudicatory hearing on the two issues recommended by Agency staff. Mr. Booth made the motion to move the proposed to an adjudicatory hearing to address the two issues and Mr. Lussi seconded the motion. The Committee was unanimous in favor of the motion.

4. Old Business: No

5. New Business: No

Adjournment: The Committee adjourned at 11:25 am.

Note: The power point presentations referred to herein are on file at the Agency. Copies are also available for inspection on request and can be viewed at http://nysapa.granicus.com/ViewPublisher.php?view_id=2 of this meeting: