STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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In The Matter of a Request For a Reconsideration of a Declaratory Ruling by

EARL L. OOT

Under Section 204 of The State Administrative Procedure Act

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RECONSIDERATION OF DECLARATORY RULING 24-04

On May 7, 1980, I issued a Declaratory Ruling requested by Earl L. Oot and three brothers pursuant to 6 NYCRR §619 as to the applicability of the Freshwater Wetlands Act [Article 24 of the Environmental Conservation Law ("ECL")] determined under ECL §24-1305(b) to a certain parcel they own in the Town of Manlius, Onondaga County. That Ruling held that the Freshwater Wetlands Act is applicable to the parcel and is incorporated by reference and attached hereto as Exhibit A.

Thereafter, Mr. Oot sent my office further documentation he had found to support a request for a reconsideration of the Declaratory Ruling. The further documentation indicates that the 1970 special permit was renewed in 1973 and 1976. It consisted of a copy of the minutes of the public hearing and resolution of the Town of Manlius adopted dated November 30, 1973, granting a renewal of the special permit held by the Oots to remove gravel and topsoil and to create an artificial lake on their property, and a copy of a subsequent resolution extending the permit granted by the Town Board for the period of April, 1976 to October 1, 1979, adopted by the Oots September 26, 1979. At no time did the Oots apply for approval of the Town Board for the construction of the apartment buildings also shown on the 1970 Site Development Plan.

Since that time, we have received from the Town of Manlius their most recent permit resolution covering the years 1980-1982. Together with all the documents previously received, including those evidencing the town's plan to purchase the parcel in question, the continuity of special permits from the Town of Manlius appears to comply with the requirements of ECL §24-1305(b) as set out in our original Declaratory Ruling and as interpreted in Miracle Mile Associates v. DEC, 98 Misc. 2d 519, 414 N.Y.S. 2d 277 (Sup. Ct. Monroe Co., 1979), 73 App. Div. 2d 807, 423 N.Y.S. 2d 732 (4th Dep't 1979) and prior decisions by my office.

However, in light of the uncertainty Mr. Oot has injected into the matter, a ruling on this request must await further action by the Town of Manlius. In the Town of Manlius' most recent resolution is a letter from Mr. Oot indicating that his intentions for the site have changed. For instance, the lake which was to be 60 acres is now to be from 20 to 25 acres. Further, in a recent conversation with one of my assistant counsels, Mr. Oot indicated that instead of the development that is shown on the 1970 Site Development Plan, he now intends to develop cluster housing and a golf course.

In the earlier special permits issued, condition 14 read, "that the final grading will [continue to] correspond to the contours as shown on Site Development Plan prepared by Anthony J. Malley, Consulting Engineer, dated September 10, 1969 and submitted to the Town Board on June 10, 1970." However, in the most recent resolution dated September 15, 1980, condition 14 has been amended. It now goes on to state "or to any subdivision or site plan duly approved by the Town of Manlius, after such alternative plan is specifically authorized by the Town Board."

The relevant grandfathering standard in ECL §24-1305(b)

is not as difficult for a developer such as Mr. Oot to meet as the general zoning standard for nonconforming uses is because the general zoning standard requires that such uses must be "substantial" at the effective date of the ordinance (I New York Zoning Law & Practice §6.12), while ECL §24-1305(b) merely requires that the uses be "approved" at the effective date. Nonetheless, another doctrine applied to nonconforming uses is entirely appropriate when applied to the present situation. In zoning cases, only the existing nonconforming use may be continued; a different use is not authorized. Id. §6.21. For example, a school may be an accepted nonconforming use, but the owners may not be able to rely on their right to that nonconforming use to start a day camp on the same premises. See Margo Operating Corp. v. Great Neck, 129 N.Y.S. 2d 436 (Sup. Ct. 1954). Although the legislature clearly did not intend to prohibit uses which were already approved on the effective date of the Act, nothing in the language of §24-1305 implies that grandfathering extends beyond the use which has been approved. Any other interpretation would eviscerate the entire Act.

Therefore, if the work set out in the 1970 Site Development Plan is indeed performed, because the Oots have presented sufficient documentation of the continuous nature of their special permits from the Town of Manlius, the Freshwater Wetlands Act would not apply. If the Town approves some lesser development which is still within the contours of the original plan, the Act would still not apply. For example, the smaller lake, to be excavated within the area set out for the larger lake on the 1970 Plan, is clearly within the contemplated development set out in the 1970 plan. However,

if the contours of the subdivision or site plan submitted to the Town Board do not conform substantially to the 1970 Site Development Plan, and some alternative plan were authorized by the Town Board, the permit would have been so materially altered from its 1975 terms that the grandfathering provision would no longer apply, the Freshwater Wetlands Act would be triggered and a permit thereunder required.

Therefore, before I conclude that the plan is "grandfathered" and the Oots proceed to destroy the wetland, their subdivision or site plan, whether it be the 1970 plan or some other, must be submitted to and approved by the Town of Manlius in order for me to properly rule.

Dated: Albany New York
October 9, 1980

Richard A. Persico
General Counsel/Deputy Commissioner

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DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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In the Matter of a Request for a Further Declaratory Ruling by

EARL L. OOT

FURTHER DECLARATORY RULING

Under Section 204 of the State Administrative Procedure Act
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By letter dated March 17, 1981, with attachments, Earl L. Oot requested a further declaratory ruling as to the applicability of the Freshwater Wetlands Act to certain land he owns in the Town of Manilus, Onondaga County. That letter and its attachments are attached hereto. I have previously issued a Declaratory Ruling and a Reconsideration of my Declaratory Ruling, each of which are also attached hereto. In reliance on my previous reasoning in this matter and on Mr. Oot's most recent submission, I find that, if the work set out in the 1970 Site Development Plan, and the March 11, 1981, Special Permit is performed or some lesser development which is still within the contours of the original plan is undertaken, because the Oots have presented sufficient documentation of the continuous nature of their special permits from the Town of Manlius, the Freshwater Wetlands Act will not apply.

Dated: Albany, New York
April 29, 1981

Richard A. Persico
General Counsel/Deputy Commissioner