STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Petition of 628 LAND ASSOCIATES For a Declaratory Ruling	DECLARATORY RULING DEC 24-11

628 Land Associates ("Petitioner"), by its attorneys, Bryer & David, has petitioned the Department of Environmental Conservation ("DEC") for a Declaratory Ruling, pursuant to §204 of the State Administrative Procedure Act and 6 NYCRR Part 619, to determine whether the provisions of the Freshwater Wetlands Act (the "Act"), Article 24 of the Environmental Conservation Law ("ECL"), are applicable to Petitioner's proposed shopping center (the "Project") on Woodrow Road, Staten Island. The Petition contends that the Project is exempt from the permit requirements of the Act by operation of the "grandfathering" provisions of ECL §24-1305. Since the Project involves a substantial commercial development proposal (a supermarket, retail stores, bank, and associated parking for over 400 cars) which, if allowed to proceed, might adversely affect portions of freshwater wetland AR-5, and since Petitioner has alleged that significant expenditures have been incurred to date, it is in the public interest to issue this Ruling.

Having reviewed both the facts of this matter, as set forth in the Petition and its supporting documents, and the applicable provisions of law, I conclude that the project did not receive final approval within the meaning of ECL §24-1305. Accordingly,

a freshwater wetlands permit is required prior to commencement of construction activity.

The subject parcel is located within an area on Staten Island encompassed by the Special South Richmond Development District (the "District"). The District was created as a means of promoting and guiding balanced development within the designated area, and was engrafted onto the New York City (the "City") zoning ordinance as an amendment to Section 200 of the New York City Charter. At the time the District came into existence, the subject parcel was owned by the City. The parcel, which had previously been zoned for residential development, was rezoned for commercial development simultaneously with the establishment of the District. Petitioner purchased the site from the City sometime thereafter.

Petitioner avers that (1) the rezoning occurred prior to the September 1, 1975, effective date of ECL Article 24, and (2) under applicable local law, a landowner is entitled to develop any parcel fronting on an open public thoroughfare and served by all necessary utilities "as of right" so long as applicable restrictions within a given zone (e.g., setbacks, size of buildings, access, parking capacity, and landscaping) are adhered to, subject to further City approvals that are merely "ministerial acts which do not involve the exercise of discretion". Petition, ¶8. Thus, it is argued, the requisite "final approval" under ECL §24-1305 was granted by the City when it rezoned the parcel in question, and therefore the project is not subject to further approval by DEC under the Act.

The validity of Petitioner's legal theory requires examination of both the terms of ECL §24-1305 and the underlying legal and factual considerations concerning the rezoning of the site. Section 24-1305 states in pertinent part as follows:

> The provisions of this article shall not apply to any land use, improvement or development for which final approval shall have been obtained prior to the effective date of this article from the local governmental authority or authorities having jurisdiction over such land use. As used in this section, the term "final approval" shall mean:
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> (b) in the case of a site plan not involving the subdivision of land, approval by the appropriate body or office of a city, village, or town of the site plan; and
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> (c) in those cases not covered by subdivision (a) or (b) above, the issuance of a building permit or other authorization for commencement of the use, improvement, or development for which such permit or authorization was issued or in those local governments which do not require such permits or authorizations, the actual commencement of the use, improvement, or development of the land.

The governing provisions of the City Charter, in effect on the effective date of the Act, concerning the City's approval process for zoning were set forth in §197-c, entitled "Uniform Land Use Review Procedure ("ULURP"). Paragraph (a) states as follows:

> a. Except as otherwise provided in this charter, proposals and applications by any person or agency respecting the use, development or improvement of real property subject to city regulation shall be reviewed pursuant to a uniform review procedure. Such procedure shall apply to changes, approvals, contracts, consents, permits, and authorizations respecting:
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> * * *

> (3) Designations of zoning districts under the zoning resolution, including conversion from one land use to another land use;
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> (7) Improvements in real property the costs of which are payable other than by the city pursuant to section two hundred twenty nine (emphasis added)....

ULURP called for initial filing of proposals with the City Planning Commission ("Commission"), followed by public hearings held by Community Boards. The written recommendation of the Community Board would then be filed with the Commission, which would approve, modify or disapprove the proposal and file its decision with the Board of Estimate ("Board"). The Board was then to "hold a public hearing on the matter and take final action by a majority vote" within sixty days. §197-c(f). Although "site plan" was not a separately defined term under the City Charter, the above-quoted language of paragraph (7) of §197-c is clearly broad enough to indicate that site plan approval was an action subject to ULURP requirements. Thus, final approval of a zoning change or a site plan required approval by the Board under existing provisions of the City Charter as of September 1, 1975.

Pursuing Petitioner's theory as summarized above, and assuming arguendo its correctness, the relevant question becomes: Did the Board approve either the zoning change in question or a site plan for the project prior to the effective date of ECL Article 24?

Documentation (annexed as Exhibit A) submitted by the Petitioner bearing on the issue of the zoning change is by itself inconclusive. However, page two of Exhibit A, which is an excerpt from the minutes of a meeting of the Board, indicates that the Board approved the rezoning of the site on September 11, 1975. The Department of City Planning has independently confirmed this point. Accordingly, even assuming the validity of Petitioner's theory, Petitioner's assertion that the project is exempt from the Act must be rejected since the allegedly operative event occurred subsequent to September 1, 1975.

Even if the Board's approval of the rezoning had predated September 1, 1975, my conclusion would not change as to the grandfathering issue. It is manifest from the terms of the statute and from its legislative history that its purpose is to alleviate the hardship that would otherwise result where a development proposal, having obtained all necessary local approvals prior to enactment of ECL Article 24, is subjected to further review and approval under the Act. This assumes the existence of a detailed plan suitable for review and approval at the local level. Petitioner's theory that a zoning change alone, in the complete absence of even a conceptual site proposal, is sufficient to establish the exemption, cannot be reconciled with this fundamental requirement.

With respect to the issue of whether a site plan for the Project received final approval by the Board prior to

September 1, 1975,* Petitioner has submitted no evidence of the existence of a site plan for the project, either as of that date or the date on which the parcel was rezoned, much less Board approval thereof. To the contrary, the site plan submitted by the Petitioner in conjunction with the Petition conclusively establishes the complete absence of preliminary or final approval, thus rendering the timeliness issue moot. The only site plan available in this case (annexed hereto as Exhibit B) is entitled "Proposed Shopping Center Woodrow Road" (emphasis added) and is dated August 29, 1980, almost five years after the relevant date. Moreover, and most revealing in this regard, is the following statement by the preparer, which appears on the face of the plan: "This is a conceptual plan and is subject to governmental approvals."

Petitioner contends that, since further necessary approvals were ministerial, the fact that they were not granted prior to the Act is irrelevant. Even accepting arguendo that such approvals were ministerial, this contention must be rejected. Paragraph (c) of ECL §24-1305, which governs final approval as to cases not involving either subdivisions or site plans, explicitly links the grandfather exemption to issuance of a building permit,

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* Since there is no basis from which to argue that the present matter involves the subdivision of land, paragraph (a) of ECL §24-1305 is not relevant herein. Paragraph (b) of that Section explicitly requires approval of a "site plan".

an act that the Court of Appeals has held in at least one context to be ministerial.** Thus, a reading of ECL §24-1305 in its entirety shows that, in specified cases, unobtained ministerial authorizations will prevent a project from being grandfathered. In the present case, even if the determination herein were to turn on the act of rezoning rather than site plan approval (thus rendering paragraph (c) of ECL §24-1305 the governing provision), it is beyond cavil that the necessary "building permit or other authorization for the commencement of the use, improvement or development for which the permit or authorization was issued" has yet to be granted.

To summarize, since paragraph (a) of ECL §24-1305 (dealing with sudivisions) is not applicable, and since the requirements of paragraphs (b) (site plan approval) and (c) (building permit issuance) have not been fulfilled, the project is not exempt from the Act.

Finally, I note that my conclusion herein is consistent with the authority which Petitioner mistakenly interprets as mandating a determination in its favor. Miracle Mile Associates v. Department of Environmental Conservation, 73 A.D.2d 807 (3rd Dept., 1979) and Dwight Enterprises, Inc., (DEC Declaratory Ruling 24-03; September 18, 1979) both involved situations in

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**The Court, in Beckmann v. Talbot, 278 N.Y. 146, 153-54 (1938), stated: "The duty of the Building Committee to grant the permit was purely ministerial, [t]he plans were said not be objectionable. The Committee had the power to grant the permit and it was the duty of the court to compel the Committee to act."

which detailed site plans, for a shopping center and commercial park subdivision, respectively, had been approved by appropriate local government bodies. In the latter case, the Petitioner had gone as far as to have erected buildings on some of the lots. Since these circumstances do not exist in the present case, similar disposition is not dictated.

Accordingly, and for the reasons set forth above, I find that the requirements of ECL §24-1305 have not been met. Petitioner may not proceed to develop the site unless and until an ECL Article 24 permit is granted by the Department.

Dated: September 14, 1987
Albany, New York

Janice K. Corr
Deputy Commisisoner and
General Counsel