STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Petition of the TOWN OF AMHERST For a Declaratory Ruling	DECLARATORY RULING DEC 24-12

The Town of Amherst, Erie County ("Town" or "Petitioner"), by its attorney, James Nesper, Esq., 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 the Town's proposed expansion of the Amherst Oakwood Golf Course (the "Project") within the Town.

In its Petition, the Town contends that the project is exempt from the permit requirements and regulatory restrictions of the Act by operation of the "grandfather" provision of ECL §24-1305 because (1) acquisition of the subject land and architectural planning for the project occurred prior to the September 1, 1975, effective date of the Act and (2) no additional governmental approvals were required. Since the project involves a substantial public recreational development proposal which, if implemented, might significantly adversely affect a large area of a valuable freshwater wetland, it is in the public interest to issue this Ruling. The facts set forth

in the correspondence and other documents submitted by the Town are assumed to be true for the purposes of this ruling. The ruling is binding only to the extent of its assumed factual predicate.

The Petition presents an issue of first impression: whether a project sponsored by a local governmental entity may be "grandfathered". Having considered the facts, as set forth in the Petition and its supporting documents, and the applicable provisions of law, I conclude that the project is not exempt from the Act. I note that Petitioner, while maintaining its position on the grandfather issue, applied for an ECL Article 24 permit on June 5, 1987. In accordance with my determination herein, Petitioner's ability to proceed with the project must be determined in the context of the permit review process.

Documentation submitted by the Town in support of its Petition indicates that prior to and during 1965, it acquired a privately owned nine-hole golf course and adjacent land comprising a 235-acre parcel. Records of Town Board actions (Exhibit A to Petition) reflect an unequivocal intent that the purpose of the acquisitions was to improve upon and expand the existing course. Upon taking title, the Town engaged Roever J. Kinkel Associates to design a golf course and other recreational facilities on the site. Exhibit B-2, dated February 15, 1965, is a plan entitled "General Plan for the Development of Oakwood Golf Course and Recreation Area, Town of Amherst". Depicted thereon are an 18-hole golf course, golf

driving range, athletic fields, park and picnic areas, toboggan run, and flycasting lagoon.

The wetland in this case is designated on the final regulatory map for Erie County as wetland CC-12 and is a Class II wetland of approximately 38 acres. The final map was filed on September 10, 1986. Following receipt of the referenced permit application, a field inspection was conducted by Region 9 program staff on June 24, 1987, at which time it was observed that the wetland had expanded in size to approximately 80 acres. In the course of a subsequent meeting and by letter dated July 16, 1987, Petitioner was advised of the changed field conditions. The original and updated boundaries were also marked by staff on the plan submitted with the application, and returned to Petitioner with that letter. The current proposal calls for significant intrusion into the wetland and its adjacent area.

The Petition states in part as follows:

> The design prepared in February, 1965 completed the work effort and planning for the golf course except for administrative functions such as financing and bid procedure implementation and execution of contract for construction.
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> * * *
>
> ... the Town of Amherst Recreation Commission completed the planning and design of the golf course in 1965. While there was no specific resolution approving the design, nevertheless, the plan was prepared and completed for Town funding and implementation.

* * *

> At the time the planning for the 18-hole golf course was completed in 1965, no additional governmental approval was required, and all that remained to commence the project was funding, as is the case in all private sector matters. (emphasis added)

Thus, as indicated, Petitioner avers that its planning and design activities carried out prior to September 1, 1975, in the absence of a formal legal approval process (e.g., subdivision approval under the Town, Village, or General Municipal Law), satisfies the criteria for exemption from the Act.

As noted above, research on the issue reveals that the applicability of a statutory grandfather clause to a municipal corporation in the State of New York is a question of first impression. However, such research reveals that this issue is not entirely without prior judicial interpretation. A 1975 decision in a case arising in the State of California, Urban Renewal Agency of the City of Monterey v. California Coastal Zone Commission, 15 Cal.3d 577, 125 Cal. Rptr. 485, 542 P.2d 645, considers a similar statute and regulatory framework for regulation of activities in wetlands, and provides a useful point of reference for analytical purposes.

California, like New York, has experienced the destruction of a substantial portion of its valuable wetlands. In an effort to provide for the protection and regulation of coastal wetlands, the California Legislature enacted the Coastal Zone Conservation Act. Provisions corresponding to those found in

the New York Freshwater Wetlands Act require the landowner to secure a permit before regulated activities are performed in the wetland. Section 27400 of the California Coastal Zone Conservation Act ("CCZCA" or "California Act") provides

> ... any person wishing to perform any development within the permit area shall obtain a permit authorizing such development from the regional commission ....

Additionally, CCZCA §27404 establishes a "grandfather clause" as a means by which qualified landowners are exempted from the provisions of the California Act, which in pertinent part provides:

> If, prior to ... [the effective date of this act], any city or county has issued a building permit, no person who has obtained a vested right thereunder shall be required to secure a permit from the regional commission ... any such person shall be deemed to have vested rights if, prior to ... [the effective date of the act], he has in good faith and in reliance upon the building permit diligently commenced construction and performed substantial work on the development and incurred substantial liabilities for work and materials necessary therefor.

Urban Renewal Agency considers the applicability of the "grandfather clause" provision of CCZCA §27404 to the City of Monterey, a municipal corporation. The City of Monterey sought to take advantage of this provision in order to develop several parcels of protected wetlands purchased by the City before the effective date of the California Act. A determination in the City's favor would authorize it to develop the wetland without

the requisite permit in the same manner as sought by the Town in the instant case. However, while the City of Monterey was found entitled to the vested rights grandfather exemption under that law, the Town in this case does not have comparable language on which to rely and thus the exemption is not available.

The Court of Appeals has broadly described a vested right as a property interest too substantial to be justifiably deprived or destroyed in light of the objectives in question.[1] There must be more than a mere expectation based on the anticipated continuation of existing laws, and a vested right cannot be said to exist in respect to a statutory privilege or exemption.[2] Moreover, as stated in Adelman v. Adelman, 58 Misc. 2d 803, 807 (Queens Co. Sup. Ct., 1969):

> ... a distinction must be made between statutory privileges and vested rights. A citizen has no vested rights in statutory privileges and exemptions; the State may change or take away rights which were created by the law of the State, although it may not take away property which has vested by virtue of said rights.

The New York courts have held that the rights of a governmental subdivision do not become vested in the

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1. People v. Miller, 304 N.Y. 105, 108 (1952).
2. Ten Ten Lincoln Place v. Consolidated Edison, 190 Misc. 174, 177 (1947).

constitutional sense. Krull v. Bennett Homes & Lumber Co., 258 A.D.10 (Fourth Dept. 1939), reh. den. 259 A.D.790, aff'd 284 N.Y. 645. It has also been held that the rights of municipal corporations, granted for the purpose of government, do not vest against their creator. City of Rochester v. Public Service Commission, 192 Misc. 33 (1948), aff'd 301 N.Y. 801 (1950); see also William v. Mayor and City of Baltimore, 289 U.S. 36 (1933). The United States Supreme Court has definitively addressed this issue.

In New York State, a town is defined as a "municipal corporation ... formed for the purpose of exercising such powers or discharging such duties of local government and administration of public affairs as have been, or, may be conferred or imposed upon it by law". Town Law §2. Essentially, a town is a creature of the State, and the scope of a town's power is wholly within the discretion of the State. Black River Regulating District v. Adirondack League Club, 307 N.Y. 475 (1954).

In Trenton v. New Jersey, 262 U.S. 182, 188 (1923), the Court stated:

> The power of the State, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for "governmental purposes" cannot be questioned. In Hunter v. Pittsburgh, supra, 179, reference is made to the distinction between property owned by municipal corporations in their public and governmental capacity and that

> owned by them in their private or proprietary capacity, and decisions of this Court which mention that distinction are referred to. In none of these cases was any power, right or property of a city or other political subdivision held to protected by the contract clause or the Fourteenth Amendment. This Court has never held that these subdivisions may invoke such restraints upon the power of the State.

The governing principle that emerges from the foregoing is that a local governmental entity may not have vested rights as against the State.

In Urban Renewal Agency, the California Supreme Court (the State's highest court) recognized that principle, but found the specific language of the grandfather clause expressed a legislative intent to discard the principle in that context. Thus, because the clause in question defines the word "[p]erson" (when used in the language of CCZCA §27404) to include "any individual, organization, partnership, and corporation, including any utility and any agency of federal, state, and local government", the court concluded that the exemption afforded by the clause was applicable to activities undertaken by a municipal corporation.

It is thus relevant to examine the use of this term in the New York statute. The term "person" as applied throughout ECL Article 24 is defined to mean:

> any corporation, firm, partnership, association, trust, estate, one or more individuals, and any unit of government or agency of government or agency or subdivision thereof, including the State. ECL §24-0107(6).

However, the grandfather clause in ECL §24-1305 makes no reference to the term "person" and instead is keyed to "land use" without reference to the type of persons conducting it. This is clearly distinguishable from the Urban Renewal Agency case, wherein the municipality had the benefit of the grandfather exemption only because the statute conferred it upon "persons", a term defined to include municipalities. There is nothing in the language or legislative history of §24-1305 to suggest an intent that the vested rights doctrine be made available to municipalities or by any other means that the "grandfather clause" should apply to political subdivisions of the State.

The issue of intergovernmental authority over land use also arose in Washington County Cease, Inc. v. Persico, 99 A.D.2d 231 (3rd Dept., 1984) where, again, the outcome turned on an interpretation of the term "person." There, the State argued that the doctrine of sovereign immunity overrode the ECL Article 27 prohibition (then in effect) of siting a hazardous waste facility where the siting would conflict with local zoning laws. The State argued that the Article 27 deference to zoning did not apply, since it was performing a governmental function and the State is not subject to local zoning. The court held the State was not immune from the obligation to comply with local zoning in this context, finding that the Legislature's specific use of the term "person" within the language of ECL §27-1105 evinced a legislative intent that these provisions

should apply to the State. Once again, the contrast with ECL §24-1305 (where the term "person" is not used) is obvious.

I am also cognizant of the Court of Appeals' recent and significant ruling abolishing the traditional governmental versus proprietary categorization of action taken by the State or its subdivisions, for the purpose of determining whether zoning constraints must be adhered to. In Matter of County of Monroe's Compliance With Certain Zoning and Permit Requirements of the City of Rochester, __ N.Y.2d __ (October 20, 1988), the Court jettisoned these long-established classifications in favor of a case-by-case "balancing of the public interests" analytic approach. The Court outlined numerous factors to be considered, and concluded that the County's plans for expansion of its airport are not subject to review and approval by the City.

This decision does not address the vested rights issue, nor does it affect the result herein; if anything, my conclusion is reinforced. Applying the analytical criteria outlined by the Court, I find on the whole that the overriding State policy to preserve, protect, and conserve wetlands and their benefits (ECL §24-0103) necessitates Town compliance with ECL Article 24. This is particularly true since it has not been shown either that the Town's and Department's objectives are irreconcilable or that an alternative site is unavailable.

Although I am persuaded by the foregoing that ECL §24-1305 does not extend to governmental entities[3], thus determining the issue before me, further examination of the matter reveals that

even if the constraints discussed above did not exist, this project would not qualify for exemption. The express terms of the governing statute, ECL §24-1305, are 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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> (a) in the case of the subdivision of land, conditional approval of a final plat as the term is defined in section two hundred seventy-six of the town law, and approval as used in section 7-728 of the village law and section thirty-two of the general cities law;
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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 the 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.

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3. The Petition recognizes that ECL §24-1305 "was drafted for the private sector" (Pet., p. 1).

Here, subdivision (a) is not relevant. As to subdivision (b), though the architectural drawing of the golf course/ recreational areas (Exhibit B-2) is arguably a "site plan not involving the subdivision of land", the record does not establish the required final approval.

While the concept of using the property acquired in 1965 for expansion of the golf course is documented as having been embraced by the Town at that time, the original design has undergone significant revision several times since that date. Exhibit B-3 is dated January, 1975 and entitled "Proposed Amherst Oakwood 18 Hole Golf Course" (emphasis added). This plan depicts a course layout different from that shown on Exhibit B-2, as well as a proposed facility called the Old Amherst Colony Park Museum. This exhibit implies that the planning process was still evolving in 1975, contrary to the referenced statement in the Petition to the effect that the planning had been completed in 1965. The statement is further contradicted by Exhibit B-4, dated November, 1983 and entitled "Proposed Amherst Oakwood Golf Course Complex" (emphasis added). On this plan, the location of the club house has been shifted from the northern extreme of the site to the eastern extreme. While an area has been set aside for the Old Amherst Colony Park Museum which corresponds to that shown on Exhibit B-3, recreation areas have been deleted and a nine hole, par three course added. Finally, although not submitted as an exhibit to the Petition, I am advised that yet another project plan exists:

the Town's June 24, 1987, permit application included a drawing entitled "Oakwood Golf Course, Amherst, New York", dated May, 1987, which was prepared by Ault, Clark & Associates, Golf Course Architects.

Thus, it is clear that as of the effective date of the Act, Petitioner had not decided upon a final design for its conceptual proposal. More important for purposes of subdivision (b), however, is the absence from the record of any manifestation of approval. Indeed, the Petition concedes that "there was no specific resolution approving the design" (Pet., p. 2). Accordingly, the Town would not be entitled to the exemption under subdivision (b), if it were applicable.

With regard to subdivision (c), there is no record of issuance of a "building permit or other authorization" to commence the project prior to September 1, 1975. Finally, there is no evidence of "actual commencement" of construction as of that date.

To summarize, for the reasons stated above, I find that (1) the benefit of the grandfather exemption does not extend to governmental entities and (2) assuming otherwise for the sake of argument in the present case, Petitioner has not established that the project meets the criteria of ECL §24-1305.

DATED: Albany, New York
December 21, 1988

Mark S. Gerstman
Deputy Commissioner and
General Counsel