



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ELU-FH 13080-09

AGENCY DKT. NO. 0246-04-0003.1

**JDME ACQUISITIONS, LLC AND
SHAMROCK CREEK, LLC,**

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, DIVISION
OF LAND USE REGULATION,**

Respondent.

Neil Yoskin, Esq., for petitioner (Sokok, Behot & Fiorenzo, attorneys)

Jason T. Stypinski, Deputy Attorney General, for respondent (Paula T. Dow,
Attorney General of New Jersey, attorney)

Record Closed: March 15, 2011

Decided: September 12, 2011

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

JDME proposed a development in a Special Water Resource Protection Area (SWRPA) that will reduce its functional value. Meanwhile, JDME failed to demonstrate

that it could not redesign its project or reduce its scope. Did the DEP properly deny the application for Stream Encroachment and Freshwater Wetland permits? Yes. The governing regulation requires that the functional value and overall condition of the SWRPA be maintained to the maximum extent practicable.

Although the DEP deemed the application complete, it still contained technical violations of the Stormwater Management and the Flood Hazard Area Control Act rules. Did the DEP fail to provide JDME with the opportunity to correct these violations before it denied the application? No. Once an application is deemed complete, the DEP is not obligated to notify applicants of any technical violations and provide them with the opportunity to correct them.

PROCEDURAL HISTORY

In the fall of 2002, Shamrock Creek bought approximately 35 acres of real property in Paramus, New Jersey. In the summer of 2004, Shamrock Creek sold the property to JDME. The sale, however, was conditioned upon the acquisition of the permits needed to develop the property. As a result, JDME applied to the DEP for Stream Encroachment and Freshwater Wetland permits in the fall of 2006.

On February 14, 2007, the DEP denied the application; on May 2, 2007, JDME reapplied; but on August 30, 2007, the DEP denied the application once more.

In particular, the DEP determined that JDME:

- Failed to demonstrate that the functional value and overall condition of the SWRPA would be maintained to the maximum extent practicable in accordance with N.J.A.C. 7:8-5.5(h);
- Had not demonstrated that the proposed stormwater discharge within the SWRPA complied with the standards for off-site stability in accordance with N.J.A.C. 7:8-5.5(h)(3);
- Was not in compliance with N.J.A.C. 7:13-2.13(a)(3) because several basements were below the 100-year water surface elevation level;

- Was not in compliance with N.J.A.C. 7:8-5.4(a)(3)(iii), which requires that the post-construction peak runoff rate for a 2-year storm does not exceed 50% of the pre-construction runoff rate; and
- Was not in compliance with the Freshwater Wetlands Protection Act rules because it did not comply with the Flood Hazard Area Control Act rules or the Stormwater Management rules.

On September 27, 2007, JDME and Shamrock Creek appealed the determination and requested a hearing.

On December 17, 2007, the DEP granted their request and subsequently transmitted the case to the Office of Administrative Law for a hearing.

On November 6, 2009, the DEP transmitted the case to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On December 13, 2010, the hearing was held.

The parties then submitted post-hearing briefs and the record closed upon their receipt.

FINDINGS OF FACT

Based on the documents the parties submitted, together with my assessment of their sufficiency, and the testimony the witnesses provided, together with my assessment of its credibility, I **FIND** the following as **FACT**:

The Property

Shamrock Creek, LLC is the owner of approximately 35 acres of real property in Paramus, New Jersey, identified on the tax map of the borough as Block 7706, Lot 1. For ten years, from 1947 until 1957, Paramus used the property as a landfill. Currently,

the outer 300 feet of the property is covered almost entirely with garbage—which includes decomposing bottles, timber, bricks, rubber, glass, shoes, dishes, and concrete.

Meanwhile, the remainder of the property is covered with vegetation, including mature vegetation. The vegetation, however, does not predate the landfill. In fact, the vegetation includes non-native species—meaning this vegetation sprouted after the original vegetation was cleared and the land was filled. Stated otherwise, the vegetation is second-growth vegetation.

The Acquisitions

On November 26, 2002, Shamrock Creek acquired the property from S.G., LLC.

On July 16, 2003, Shamrock Creek entered into a Memorandum of Agreement with the DEP under the Voluntary Cleanup Program for the voluntary cleanup of the property.

On February 2, 2004, as part of that program, Shamrock Creek submitted a Remedial Investigation Report identifying approximately 65,000 cubic yards of solid-waste material over 18 acres of the property.

In August 2004, the DEP designated Soldier Hill Brook, which runs through the southern edge of the property, a Category One water under N.J.A.C. 7:9B-1.15(c), because Soldier Hill Brook drains into the Oradell Reservoir, a public drinking water supply.

Meanwhile, Shamrock Creek entered into an agreement with JDME to sell the property. The sale, however, was conditioned upon the acquisition of the permits needed to develop the property. Toward this end, JDME and the DEP participated in a non-binding pre-application meeting.

More specifically, on October 18, 2004, JDME and the DEP met to discuss the construction of a 144-unit housing development. The proposed development included the construction of 36 townhomes in 6 buildings, 108 garden apartments in 9 buildings, and a clubhouse. The proposed development also included the construction of roadways, sidewalks, driveways, parking areas, sewers, utilities, and stormwater-management facilities. As a result of this meeting, JDME applied to the DEP for the requisite Stream Encroachment and Freshwater Wetland permits.

The Applications

To repeat, in the fall of 2006, JDME applied to the DEP for Stream Encroachment and Freshwater Wetland permits.

On February 14, 2007, the DEP denied the application; on May 2, 2007, JDME reapplied; but on August 30, 2007, the DEP denied the application once more.

When the DEP denied this last application, JDME terminated its purchase agreement with Shamrock Creek.

As a result, Shamrock Creek is now the sole party-in-interest.

The Proposal

JDME proposed to clean up the inner SWRPA and return it to its natural state. In addition, JDME proposed to replant 222 trees in the inner SWRPA and 621 shrubs in the outer SWRPA. Moreover, JDME proposed to remove the arsenic and lead from the outer SWRPA while it proposed to leave the pollutant loads in the inner SWRPA unchanged.

Shamrock Creek, however, acknowledges that the proposed roadways, sidewalks, driveways, and parking areas will increase the discharge of hydrogen and phosphorous from the site. Similarly, Shamrock Creek acknowledges that lead, zinc, copper, and other suspended solids will be realized in the outer SWRPA as will nitrogen

and biological oxygen demand. Likewise, Shamrock Creek acknowledges that the proposed development will increase the volume of runoff from 0.16 to 0.57 while it will increase the peak rate of runoff from 0.52 to 1.03.

Paramus had limited the number of housing units JDME could construct on the property to 140. JDME, however, proposed to construct 144. Moreover, JDME proposed to construct 96 of them—together with the clubhouse, roadways, sidewalks, driveways, and parking areas—in the outer SWRPA.

Nevertheless, JDME proposed to install environmentally sensitive lighting in the outer SWRPA by having it reflect downward rather than outward into the inner SWRPA.

Similarly, JDME proposed to maintain the environmentally sensitive inner SWRPA by informing the residents of its importance through interpretive and behavioral signage.

CONCLUSIONS OF LAW

1. The proposed development does not comply with the Stormwater Management Rules.

The DEP has designated waters with exceptional ecological significance, exceptional recreational significance, exceptional water-supply significance, or exceptional fisheries resources as Category One waters to protect their aesthetic value (color, clarity, and scenic setting) and ecological integrity (habitat, water quality, and biological function) from measurable change. See N.J.A.C. 7:9B-1.4.

Meanwhile, the Stormwater Management Rules, N.J.A.C. 7:8-1.1 to -6.3, provide these waters with additional protections. Under N.J.A.C. 7:8-5.5(h)(1)(i), a 300-foot Special Water Resource Protection Area (SWRPA) must be provided on each side of these waterways, and under N.J.A.C. 7:8-5.5(h)(1)(ii), encroachment will only be allowed under limited circumstances. In particular, encroachment will only be allowed where previous development or disturbance has occurred and where the applicant

demonstrates that the SWRPA will be maintained to the maximum extent possible. Ibid.
Even then, the SWRPA can be reduced no more than 150 feet:

(h) [SWRPAs] shall be established along all waters designated Category One at N.J.A.C. 7:9B and perennial or intermittent streams that drain into or upstream of the Category One waters as shown on the USGS Quadrangle Maps or in the County Soil Surveys, within the associated HUC 14 drainage. These areas shall be established for the protection of water quality, aesthetic value, exceptional ecological significance, exceptional recreational significance, exceptional water supply significance, and exceptional fisheries significance of those established Category One waters. These areas shall be designated and protected as follows:

1. The applicant shall preserve and maintain a [SWRPA] in accordance with one of the following:

i. A 300-foot [SWRPA] shall be provided on each side of the waterway, measured perpendicular to the waterway from the top of bank outwards or from the centerline of the waterway where the bank is not defined, consisting of existing vegetation or vegetation allowed to follow natural succession is provided.

ii. Encroachment within the designated [SWRPA] under (h)(1)(i) above shall only be allowed where previous development or disturbance has occurred (for example, active agricultural use, parking area or maintained lawn area). The encroachment shall only be allowed where applicant demonstrates that the functional value and overall condition of the [SWRPA] will be maintained to the maximum extent practicable. In no case shall the remaining [SWRPA] be reduced to less than 150 feet as measured perpendicular to the top of bank of the waterway or centerline of the waterway where the bank is undefined. All encroachments proposed under this subparagraph shall be subject to review and approval by the Department.

[N.J.A.C. 7:8-5.5(h)(1)(i) and (ii) (emphasis added).]

Designating existing or restored herbaceous and woody vegetation as a SWRPA is regarded as the best available and most reliable method of addressing these water quality concerns. 35 N.J.R. 119(a).

These rules, however, apply only to major developments. N.J.A.C. 7:8-5.1. Major developments are developments that disturb one or more acres of land or increase the impervious surface area by one-quarter acre or more. N.J.A.C. 7:8-1.2. In this case, the proposed development will disturb more than one acre of land and it will increase the impervious surface area by more than one-quarter of an acre. Therefore, I **CONCLUDE** that the proposed development is a major development and that these design and performance standards apply.

Still, encroachment within the SWRPA is only permissible where previous development or disturbance as occurred.

This decision then turns on whether the property was previously developed or disturbed.

A. The property was previously developed and disturbed.

First, the Stormwater Management Rules include landfills in its definition of development:

“Development” means the division of a parcel of land into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation or enlargement of any building or structure, any mining excavation or landfill, and any use or change in the use of any building or other structure, or land or extension of use of land, for which permission is required under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.

[N.J.A.C. 7:8-1.2 (emphasis added).]

Second, the Stormwater Management Rules include the movement of soil in its definition of disturbance:

. . . Disturbance for the purpose of this rule is the placement of impervious surface or exposure and/or movement of soil or bedrock or clearing, cutting, or removing of vegetation . . .

[N.J.A.C. 7:8-1.2 (emphasis added).]

In this case, the property was used as a landfill, and in that capacity, it had its soil moved. It also had its vegetation removed. Nevertheless, the DEP argues that the property was not previously developed or disturbed because it is not completely clear of vegetation and has not received active fill in years. Indeed, the DEP argues that the very existence of vegetation and forested areas in the outer SWRPA precludes such a finding.

While an argument could have been made that the property was not previously developed or disturbed had it been restored to its natural condition, the fact remains that the property has not been restored to its natural condition and remains in the same condition today as it was when it was used as a landfill. More specifically, the outer 300 feet of the property is still covered with garbage while the remainder of the property is covered with second-growth vegetation—which proves the point that the native or original vegetation had been removed or cleared in its entirety years ago as part of the landfill plan. Therefore, I **CONCLUDE** that the property was both previously developed and disturbed under N.J.A.C. 7:8-1.2.

This decision then turns to whether or not the functional value and overall condition of the SWRPA will be maintained to the maximum extent practicable.

B. The functional value and overall condition of the SWRPA will not be maintained to the maximum extent practicable.

The Stormwater Management Rules do not define the phrase “maximum extent practicable.” Nor do they provide applicants with any guidance. As a result, the DEP issued an administrative order together with an attached guidance document to assist the regulated community. See In re NJDEP Admin. Order No. 2007-01 and Admin. Order No. 2008-02, A-3092-06T1, 7-8 (App. Div. August 6, 2009).

Parenthetically, the Freshwater Protection Act Rules, N.J.A.C. 7:7A-1.1 to -17.1, define the phrase. Under its regulatory scheme, the phrase “maximum extent

practicable” means to the maximum extent after weighing, evaluating, and interpreting alternatives to protect the ecological integrity of a wetland or State open water. N.J.A.C. 7:7A-1.4. According to the Appellate Division, this qualification reflects a balanced regulatory sensitivity to the physical, economic, and other pragmatic constraints, which affect waterfront construction. See In re Riverview Dev., 411 N.J. Super. 409, 435 (App. Div. 2010). Indeed, this balanced approach is reflected in the above-referenced administrative order and its attached guidance document, which are discussed below.

(1) Administrative Order 2007-01

On January 3, 2007, the DEP issued Administrative Order 2007-01 and attached its “Special Water Resource Protection Area Functional Value Analysis.” Under its administrative order, the DEP would not approve any encroachment into a SWRPA unless the applicant demonstrated that the functional value and overall condition of the SWRPA would be maintained to the maximum extent practicable in accordance with its attached guidance document. As the guidance document explained, the DEP had rarely received a functional-value assessment as an accompaniment to an application requesting approval for an encroachment into a SWRPA. As a result, the DEP found it necessary to require one.

More specifically, the functional-value assessment was to be a test of the functional value of the SWRPA as it existed pre-development in comparison with the functional value of the SWRPA as it would exist post-development without any consideration of possible structural-mitigation measures or averaging of impacts within the buffer. Any encroachment into the outer 150 feet of the disturbed SWRPA, which resulted in a loss of any functional value, would not be permitted, unless the applicant demonstrated that the loss would be unavoidable despite project redesign, including a reduction in the scope of the development. Toward this end, the guidance document considered four key areas of functional value:

- Habitat
- Nonpoint Source Pollutant Load Reduction
- Temperature Moderation
- Channel Integrity

Although the DEP would rescind its administrative order and revise its guidance document the following year, its new order and the revised document were largely the same. See Admin. Order No. 2007-01 and Admin. Order No. 2008-02, supra.

(2) Administrative Order 2008-02

On January 24, 2008, the DEP issued Administrative Order 2008-02, which rescinded Administrative Order 2007-01, and updated its SWRPA Functional Value Analysis. Ostensibly, the DEP had determined that the original guidance document did not account for activities that would enhance the overall functional value of the SWRPA, and projects that would have had a net-positive effect in the SWRPA had failed the analysis. In addition, the DEP recognized that other scientifically valid functional-value assessments could have been used to demonstrate that the functional value and overall condition of the SWRPA would have been maintained. As a result, the DEP revised and updated the 2007 guidance document. See Admin. Order No. 2007-01 and Admin. Order No. 2008-02, supra.

Incidentally, the DEP did not publish the 2008 guidance document until April 11, 2008, because the DEP sought experience implementing it. See Public Notice.

(a) The 2008 guidance document applies under the time-of-decision rule.

Although JDME and the DEP relied upon the 2007 guidance document, the DEP argues that the 2008 guidance document applies under the time-of-decision rule. Under the time-of-decision rule, a regulation may be applied retroactively when any one of three circumstances obtain: (1) the regulation was intended to be applied retroactively; (2) the reasonable expectations of those affected by the regulation warrant its retroactive application; or (3) the regulation was intended to be “ameliorative or curative.” Seashore Ambulatory Surgery Ctr. v. State Dep’t of Health, 288 N.J. Super. 87, 97 (App. Div. 1996).

A regulation is intended to be ameliorative or curative when it is intended to “carry out or explain” the intent of the original. Serrano v. Gibson, 304 N.J. Super. 314, 319 (App. Div. 1977). Stated otherwise, an amendment is intended to be ameliorative or curative when the purpose of the amendment is to remedy an “imperfection or misapplication” of the original. Ibid. Nevertheless, a regulation cannot be applied retroactively if such application will result in a “manifest injustice” to a party adversely affected. Seashore, supra, 288 N.J. Super. at 98.

In this case, the 2008 guidance document is neither a statute nor a regulation. Rather, it is a technical manual. See Admin. Order No. 2007-01 and Admin. Order No. 2008-02, supra. Nevertheless, the 2007 guidance document was published to carry out or explain the meaning of N.J.A.C. 7:8-5.5(h), while the 2008 guidance document was published to remedy an imperfection or misapplication of its functional-value analysis. Moreover, its retroactive application will not result in a manifest injustice to Shamrock Creek. In fact, the revised functional-value analysis is less restrictive. Therefore, I **CONCLUDE** that its publication is ameliorative or curative and can be applied retroactively to the application at issue in this case.

(b) The SWRPA Functional Value Analysis is a two-step process.

The 2008 guidance document is similar to the 2007 guidance document but firmly establishes a two-step process for determining whether the functional value and overall condition of the SWRPA are maintained to the maximum extent practicable. See Admin. Order No. 2007-01 and Admin. Order No. 2008-02, supra.

Once again, the first step includes an assessment of the four key functions of the SWRPA based on the existing and proposed conditions. If the encroachment will not lead to the loss of any of the four functional values, then the encroachment may occur. If, however, the encroachment leads to the loss of any functional value, then the second step is invoked. As the Appellate Division explained, this second step focuses on whether “the functional value and overall condition of the SWRPA are maintained to the maximum extent practicable.” Ibid.

In determining whether the functional value and overall condition of the SWRPA are maintained to the maximum extent practicable, the 2008 guidance document explains that this second step requires a demonstration that the encroachment is necessary to accomplish the purpose of the project; that the encroachment cannot be avoided despite a redesign of the project or a reduction in its scope; and that the encroachment cannot be avoided despite an alternate means of accessing the property.

The guidance document also explains that this second step may require that the encroachment has been minimized and mitigated.

And once again, the focus of this analysis is the outer 150 feet of the SWRPA:

Any encroachment into the outer 150 feet of a disturbed SWRPA that results in a loss of any functional value in any portion of the outer 150 feet of the disturbed buffer shall not be permitted unless it is demonstrated that the loss is unavoidable through project redesign including a reduction in the scope of the development.

[(Guidance Document at 3 (2008).)]

Similarly, the four key areas of functional value considered for this evaluation remain (1) habitat, (2) nonpoint source pollutant load reduction, (3) temperature moderation, and (4) channel integrity.

This decision then turns to whether or not the development will result in the loss of any of these four functional values.

(3) The proposed development will result in the loss of all four functional values.

Like the 2007 guidance document, the 2008 guidance document provides standards to measure loss of functional value.

(a) Habitat

According to the 2008 guidance document, a loss in this functional value will occur if the proposed development would result in a shift to a less-valuable overall vegetative condition of the SWRPA. As the guidance document explains, all vegetated areas provide some habitat value. Thus, the current level of habitat will be presumed to decrease from greatest to least.

Meanwhile, a loss in this functional value will also occur if the proposed development would result in a shift to a greater level of human disturbance. As the 2008 guidance document also explains, human intrusion affects the suitability and the use of the habitat for those species that are intolerant of human intrusion. Thus, the current level of habitat value will be presumed to decrease from greatest to least and human disturbance will be presumed to increase from least to greatest along the following continuum: forest, scrub or shrub, pasture or meadow, cultivated agriculture, maintained lawn, unpaved impervious, paved impervious, other structures.

Nevertheless, the net effect of improvements to the inner SWRPA may be considered—except for reforestation. As the 2008 guidance document further explains, “In assessing potentially offsetting vegetative changes, a proposal to reforest cannot be used to assess the new land use condition since an actual functioning forest could not be created within any reasonable time frame.” Thus, a loss in functional value will occur if changes are proposed in any portion of the SWRPA that would increase human disturbance unless the proposed increase is compensated by an equivalent reduction in human disturbance in the inner SWRPA except for reforestation.

In this case, Shamrock Creek argues that a loss in this functional value will not occur because the increase in human disturbance will be compensated by a reduction in human disturbance in the inner SWRPA. More specifically, Shamrock Creek argues that JDME proposed to clean up the inner SWRPA and return it to its natural vegetative state. Similarly, Shamrock Creek argues that JDME proposed to plant trees, shrubs, and grass in the outer SWRPA.

Reforestation, however, cannot be considered as an offset to any vegetative change. And JDME still proposed to remove all of the vegetation in the SWRPA. Meanwhile, the current vegetative state of the property—aside from its sporadic recreational use—is undisturbed by human activity. Therefore, I **CONCLUDE** that there will be an unavoidable increase in human disturbance in the SWRPA, an inevitable shift to a less-valuable overall vegetative condition of the SWRPA, and a concomitant loss of this specific functional value should the proposed development be constructed as planned.

(b) Nonpoint Source Pollutant Load Reduction

According to the 2008 guidance document, a loss in this functional value will occur if the proposed development will increase the load of any pollutant in the “buffer of the project site,” meaning any portion of the SWRPA. As the guidance document explains, vegetative buffers filter stormwater and reduce pollutant loads. Or as Raymond Walker, Shamrock Creek’s expert, explained more fully at the hearing, vegetative buffers absorb pollutants and reduce their loads by allowing the various biological processes to render their chemical composition less harmful or innocuous.

In this case, Shamrock Creek argues that a loss in this functional value will not occur because JDME proposed to remove the arsenic and lead from the outer SWRPA and leave the pollutant loads in the inner SWRPA unchanged.

The 2008 guidance document, however, does not distinguish between pollutant loads in the outer SWRPA and pollutant loads in the inner SWRPA. Stated otherwise, the guidance document does not consider the net effect of any decreases to the pollutant load in the inner SWRPA. Moreover, Walker testified that the proposed roads and sidewalks will increase the discharge of hydrogen and phosphorous from the site and that lead, zinc, copper, and other suspended solids would be realized in the outer SWRPA as would nitrogen and biological oxygen demand. Therefore, I **CONCLUDE** that there will be loss of this specific functional value should the proposed development be constructed as planned.

(c) Temperature Moderation

According to the 2008 guidance document, a loss in this functional value will occur if the proposed development places new structures or other impervious surfaces in the SWRPA. Parenthetically, the Stormwater Management Rules define an impervious surface as a surface that has been covered with a layer of material so that it is highly resistant to infiltration by water. N.J.A.C. 7:8-1.2. As the guidance document explains, the greater the density and permanence of the vegetation, the less heat from the ground or sun the stormwater will pick up as it flows through the SWRPA. Conversely, structures and other impervious surfaces retain heat and artificially raise the temperature of both the air and the stormwater runoff. Thus, the removal or relocation of such structures or surfaces away from the watercourse will reduce such temperatures and improve this functional value of the buffer.

In this case, Shamrock Creek argues a loss in this functional value will not occur because JDME proposed to remove the waste from the inner SWRPA.

In addition, Shamrock Creek argues that a loss in this functional value will not occur because JDME proposed to restore the shading in the inner SWRPA to its current level by replanting 222 trees in it.

The removal of waste, however, is not the removal of an impervious surface. And as previously discussed, reforestation cannot be considered as an offset to any functional change. Moreover, JDME still proposed to construct 96 townhouses and garden apartments as well as a clubhouse and other impervious structures—roadways, sidewalks, driveways, and parking areas—in the outer SWRPA. Therefore, I **CONCLUDE** that there will be loss of this specific functional value should the proposed development be constructed as planned.

(d) Channel Integrity

According to the 2008 guidance document, a loss in this functional value will occur if the proposed development will increase the volume or velocity of runoff.

Similarly, the guidance document states that a loss in this functional value will occur if the proposed development reduces infiltration by changing the vegetation or imperviousness of the SWRPA. As the guidance documents explains, vegetation adjacent to a stream provides bank stabilization and reduces the velocity of the runoff as it passes through the riparian area and influences the amount of stormwater recharge.

In this case, Shamrock Creek does not argue that a loss in this functional value will not occur. In fact, Shamrock Creek acknowledged that the proposed development will increase both the volume and velocity of runoff. More specifically, Walker wrote and testified that the volume of runoff will increase from 0.16 to 0.57 while the peak rate of runoff will increase from 0.52 to 1.03 even after mitigation. Therefore, I **CONCLUDE** that there will be loss of this specific functional value should the proposed development be constructed as planned.

Since the proposed development will result in the loss of all four enumerated functional values, this decision then turns to whether or not the encroachment is unavoidable, including whether or not the development can be reduced in size or scope.

(4) Shamrock Creek has not demonstrated that the loss in functional value is unavoidable through project redesign including a reduction in the scope of the development.

To repeat, the 2008 guidance document firmly establishes a two-step process for determining whether the functional value and overall condition of the SWRPA are maintained to the maximum extent practicable: If the development will result in the loss of any functional value in the outer 150 feet of the SWRPA, then the encroachment will not be permitted unless the loss would be unavoidable despite project redesign including a reduction in the scope of the development.

As previously stated, this second step requires a demonstration that the encroachment is necessary to accomplish the purpose of the project; that the encroachment cannot be avoided despite a redesign of the project or a reduction in its

scope; and that the encroachment cannot be avoided despite an alternate means of accessing the property.

It may also require that the encroachment has been minimized and mitigated.

Once again, this qualification reflects a balanced regulatory sensitivity to the physical, economic, and other pragmatic constraints, which affect waterfront construction. See In re Riverview Dev., 411 N.J. Super. 409, 435 (App. Div. 2010).

(a) Shamrock Creek has not demonstrated that the encroachment is necessary to accomplish the purpose of the project, that the encroachment cannot be avoided despite a redesign of the project or a reduction in its scope, and that the encroachment cannot be avoided despite an alternate means of accessing the property.

Shamrock Creek did not argue that the encroachment is necessary to accomplish the purpose of the project, that the encroachment cannot be avoided despite a redesign of the project or a reduction in its scope, or that the encroachment cannot be avoided despite an alternate means of accessing the property. For example, Shamrock Creek did not demonstrate why the clubhouse or some of the garden apartments could not be built outside the SWRPA between Solider Hill Road and the townhouses, which would have left more of the outer SWRPA undisturbed. Similarly, Shamrock Creek did not demonstrate why the clubhouse or the garden apartments could not be built outside the SWRPA between Solider Hill Road and the detention basin, which would have also left more of the outer SWRPA undisturbed. Likewise, Shamrock Creek did not demonstrate why it was physically impracticable or economically infeasible to reduce the scope of the project and construct the development entirely outside SWRPA.

In fact, Shamrock Creek did not argue that JDME even considered a redesign of the project or a reduction in its scope. When asked if JDME had done so, Walker simply answered that the project was designed as-is because that was what was

necessary from a financial standpoint, without providing any proof to substantiate his claim:

As far as I understand, the scope of development that was presented here was the scope of development that was required to move the project forward from a financial standpoint.

[(Tr. at pp. 136-37.)]

To make matters worse, JDME proposed an encroachment that maximizes development. More pointedly, Paramus had limited the number of housing units JDME could construct to 140 yet JDME proposed to construct 144. Still, Shamrock Creek argues that the functional value and overall condition of the SWRP will be maintained to the maximum extent practicable because the encroachment has been minimized and mitigated.

(b) Shamrock Creek has not demonstrated that the encroachment has been minimized and mitigated.

Shamrock Creek argues that the functional value and overall condition of the SWRPA will be maintained to the maximum extent practicable because the encroachment—and the concomitant losses in functional values—has been minimized and mitigated. Regarding the functional value of habitat, Shamrock Creek argues that JMDE proposed to construct the 144 townhome and garden apartments in the central portion of the historic fill area to avoid more sensitive habitats north and south of it. Shamrock Creek also argues that JDME proposed to replant 222 trees, many of which are native to the area, in what will remain the undeveloped inner SWRPA. Similarly, Shamrock Creek argues that JDME proposed to plant 621 shrubs in what will be the developed outer SWRPA.

In addition, Shamrock Creek argues that JDME proposed to install environmentally sensitive lighting in the outer SWRPA by having it reflect downward rather than outward into the inner SWRPA. Shamrock Creek also argues that JDME proposed to maintain the environmentally sensitive inner SWRPA by informing the

residents of its importance through interpretive and behavioral signage. Finally, Shamrock Creek argues that JDME proposed to enhance the riparian corridor by removing all of the trash and debris.

Regarding the functional value of nonpoint source pollutant-load reduction, Shamrock Creek argues that JDME proposed to reduce nonpoint source pollutant loads through its stormwater plan, including the use of its detention basin.

Regarding the functional value of temperature moderation, Shamrock Creek argues that JDME proposed to reduce the temperature of any accumulated water by restoring portions of the outer SWRPA and planting shade trees near the detention basin.

Regarding the functional value of channel integrity, Shamrock Creek argues that JDME proposed to reduce any anticipated increases in the volume and velocity of runoff through its stormwater plan, including the restoration of the inner SWRPA, the restoration of portions of the outer SWRPA, and the use of its detention basin.

But Shamrock Creek did not demonstrate the balance this analysis requires. For example, Shamrock Creek did not demonstrate how removing the existing forest and vegetation in the outer SWRPA and replacing it with impervious structures and surfaces would—on balance—be preferable to leaving the existing forest and vegetation in the outer SWRPA in its current state. Therefore, I **CONCLUDE** that Shamrock Creek has not demonstrated that the loss in functional value is unavoidable through project redesign including a reduction in the scope of the development.

More expansively, I **CONCLUDE** that Shamrock Creek has not demonstrated that the functional value and overall condition of the SWRPA will be maintained to the maximum extent practicable.

2. The DEP was not obligated to notify JDME that its application contained technical violations of either the Stormwater Management or Flood Hazard Control Act rules.

Under the Flood Hazard Control Act rule in effect at the time of the application, once an application was deemed complete, the DEP was not obligated to notify an applicant of any inaccurate statements or technical violations before it rendered its decision. The DEP had a choice. If it determined that further information was required, it could permit the applicant to amend the application or it could simply deny the application on its merits:

If, while reviewing the merits of an application deemed complete for review, the Department determines that further information is required from the applicant to assess the accuracy of the statements in the application or to otherwise determine whether the proposed regulated activity complies with these rules, the Department may, time permitting, permit the applicant to amend the application by submitting this additional information within a specified time, or deny the application on its merits.

[N.J.A.C. 7:13-4.7(c).]

Although the regulation has since been repealed, its replacement imposes no greater obligation:

If the Department determines during the review of a complete application . . . the application does not meet the requirements of this chapter, the Department can request additional information and/or changes to the project in order to bring the project into compliance, provided such changes are possible within the remaining application review period . . .

[N.J.A.C. 7:13-9.3(d).]

In this case, the DEP denied the application for the Stream Encroachment and Freshwater Wetlands permits because the DEP had determined that JDME had failed to demonstrate that the functional value and overall condition of the SWRPA would be

maintained to the maximum extent practicable in accordance with N.J.A.C. 7:8-5.5(h). But the DEP also determined that the application contained three other violations. First, the DEP determined that JDME had failed to demonstrate that the proposed stormwater discharge within the SWRPA complied with the standards for off-site stability in accordance with N.J.A.C. 7:8-5.5(h)(3) because JDME proposed to place the stormwater discharge inside the SWRPA without first demonstrating that it could not place the stormwater discharge outside the SWRPA.

Second, the DEP determined that JDME had failed to demonstrate that all of the basements were above the 100-year water-surface-elevation level in accordance with N.J.A.C. 7:13-2.13(a)(3) because JDME proposed to construct several of the basements below that level.

Although this regulation was later repealed, its replacement still required the lowest floor to be constructed at least one foot above that level. See N.J.A.C. 7:13-11.5(k)(1).

Third, the DEP determined that JDME had failed to demonstrate that the post-construction peak-runoff rate for the two-year storm did not exceed fifty percent of the pre-construction runoff rate in accordance with N.J.A.C. 7:8-5.4(a)(3)(iii) because JDME had in-fact proposed a stormwater-management plan that exceeded this mark.

Shamrock Creek argues that JDME could have corrected these technical violations if the DEP had only given it a chance. Regarding the first technical violation, Shamrock Creek argues that JDME could have demonstrated that it could not place the stormwater discharge outside the SWRPA if the DEP had made it aware of this violation and given it a chance to amend its application and provide this additional information.

Regarding the second technical violation, Shamrock Creek argues that this was a simple oversight, which could have easily been corrected.

Regarding the third technical violation, Shamrock Creek argues that JDME could have changed its stormwater-management plan had the DEP made it aware of this

violation and given it a chance to amend its application and provide this additional information as well.

The DEP, however, was under no obligation to do so. Even if it had, JDME had still failed to demonstrate that the functional value and overall condition of the SWRPA would be maintained to the maximum extent practicable in accordance with N.J.A.C. 7:8-5.5(h). Either way, I **CONCLUDE** that the DEP did not fail to provide JDME with the opportunity to correct these technical violations before it rendered its decision.

As such, I **CONCLUDE** that the DEP properly denied the application for Stream Encroachment and Freshwater Wetland permits.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that this case be **DISMISSED**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 12, 2011
DATE


BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: September 12, 2011

Date Mailed to Parties: September 13, 2011

dr

APPENDIX

WITNESSES

For Petitioner:

James Biegen
Robert Zelle
Louis Kaufman
Raymond Walker

For Respondent:

Vincent Mazzei

EXHIBITS

For Petitioner and Respondent:

J-1 Joint Stipulation of Facts

For Petitioner:

- P-1 Not in evidence
- P-2 Memorandum of Agreement between DEP and Shamrock Creek, LLC dated July 16, 2002
- P-3 Letter from DEP to Maser Consulting, PA dated June 28, 2004, re: approval of remedial action workplan
- P-4 Letter from DEP to Maser Consulting dated August 12, 2004, re: interpretation of wetlands
- P-5 Not in evidence
- P-6 Not in evidence
- P-7 Not in evidence
- P-8 Functional Value Analysis by Maser Consulting dated April 23, 2007
- P-9 Not in evidence

- P-10 June 7/July 2007 Surface Water and Supplemental Subsurface Investigation Results by Maser Consulting dated August 8, 2007
- P-11 Letter from DEP to JDME dated August 30, 2007, re: denial of Stream Encroachment Permit and Freshwater Wetlands Permit applications
- P-12 Amendment to Remedial Action Workplan by Maser Consulting dated May 1, 2007
- P-13 Remedial Investigation Report Approval by DEP dated September 10, 2007
- P-14 2005 Housing Element and Fair Share Plan for Paramus by Burgis Associates adopted December 19, 2005
- P-15 Declaratory Judgment by the Honorable Jonathan Harris, JSC dated May 14, 2008
- P-16 Not in evidence
- P-17 Not in evidence
- P-18 Curriculum Vitae of Zelley
- P-19 Curriculum Vitae of Biegen
- P-20 Not in evidence
- P-21 Surface Water Sampling Plan by Maser Consulting dated January 9, 2009
- P-22 Letter from DEP to Shamrock Creek dated June 25, 2009, re: Surface Water Sampling Plan
- P-23(a) Historic Fill Extent Exhibit by Maser Consulting dated December 8, 2010
- P-23(b) Special Water Resources Protection Area Exhibit by Maser Consulting dated December 8, 2010
- P-23(c) Special Water Resources Protection Area and Historic Fill Exhibit by Maser Consulting dated December 8, 2010
- P-23(d) Special Water Resources Protection Area (SWRPA) Plan: Categories of Regulated Land within the Inner & Outer SWRPA Zone Exhibit by Maser Consulting dated December 8, 2010
- P-24 Sediment & Surface Water Sample Locations and Analytical Results Summary by Maser Consulting undated

For Respondent:

- R-1 Resume of Mazzei
- R-2 Report of Govind Ramamurthy dated August 20, 2007, and approved by Mazzei

- R-3 Flood Hazard Area Environmental Report by Cathryn Schaffer and approved by John King on August 23, 2007
- R-4 Public Comments