

TAKEROOT JUSTICE

August 29, 2019

By email

Tamara A. Greco
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Long Island City, NY 11101
DEP.R2@dec.ny.gov

**Re: South Ave. Retail B 1707/ L 1 & 5
Article 24 Freshwater Wetlands Permit Application
2-6401-00287/00002**

Dear Ms. Greco,

We are writing from TakeRoot Justice, a nonprofit legal services organization that works with grassroots and community-based groups in New York City with the goal of dismantling racial, economic and social oppression. Our practice, Equitable Neighborhoods, works with directly impacted communities to respond to City planning processes and private developers, helping to make sure that people of color, immigrants, and other low-income residents who have built our city are not pushed out in the name of “progress.”

TakeRoot Justice is counsel to the Staten Island Coalition for Wetlands and Forests.

This is a letter requesting that your Department schedule a hearing for public comment on the above-referenced permit and ultimately deny the South Ave. Retail Application (2-6401-00287/00002) (“Application”). Given the interest in the permit application and the dissent expressed by residents and local elected officials alike,¹ the Department cannot determine that a

¹ See, e.g., Alexis Sottile, *Vital Staten Island Wetlands About To Get A BJ's Wholesale Club*, Gothamist (Aug. 28, 2019), <https://gothamist.com/news/vital-staten-island-wetlands-about-get-bjs-wholesale-club> (elected officials and

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hearing is not necessary per Article 24 of the Environmental Conservation Law, section 24-0703; the project the permit would allow is not “of such a minor nature as not to affect or endanger the balance of systems within the wetlands.”

An Environmental Justice Community Imperiled by Climate Change

The Application is for an Art. 24 Wetlands Permit to fill a large portion of the Graniteville Swamp wetlands to construct a retail store and gas station in Staten Island’s Mariners’ Harbor neighborhood. The communities neighboring the Graniteville Swamp bear disproportionate environmental burdens, which the proposed project would only worsen. The U.S. Environmental Protection Agency has recognized Staten Island’s North Shore as one of 10 Environmental Justice Showcase Communities because of the industrial history of the area.² Likewise, the Department considers the Graniteville Swamp and the neighborhoods north of Goethals Road to be “potential Environmental Justice Areas.”³ Although, as described in detail below, the permit application would be deficient in any case, the proposed fill and development should be seen against the backdrop of a long history of neglect and environmental harm experienced by the residents that will be affected by this misguided proposal.

The Application was Submitted without an Environmental Impact Statement Sufficient to Facilitate Required Review of the Potential Impacts of Granting the Requested Permit

As a threshold matter, in order to lawfully issue the requested Permit, your Department must take a sufficiently “hard look” at the consequences of doing so to satisfy the New York State Environmental Quality Review Act, N.Y. Env. Cons. L. § 8–0101 et seq (“SEQRA”).⁴ The Environmental Impact Statement (“EIS”) must be prepared to facilitate the Department’s review

residents quoted; 81 comments); Annalise Knudson, *Endangered turtle undetected, so BJ’s development enters public comment period*, Staten Island Advance (Aug. 25, 2019), <https://www.silive.com/news/2019/08/endangered-turtle-undetected-so-bjs-development-enters-public-comment-period.html> (142 comments); Petition on MoveOn.org: <https://petitions.moveon.org/sign/save-graniteville-tree?> (371 signatories); over 500 letters from residents and elected officials sent to the agency in response to the permit notice.

² See U.S. Evt’l Prot. Agency, Environmental Justice Showcase Communities by Region, <https://www.epa.gov/environmentaljustice/environmental-justice-showcase-communities-region>.

³ Dept. Evt’l Cons., Potential Environmental Justice Areas in Richmond County (Staten Island), New York, https://www.dec.ny.gov/docs/permits_ej_operations_pdf/richmondej.pdf.

⁴ E.g., *Chinese Staff and Workers Ass’n v. City of N.Y.*, 68 N.Y.2d 359, 363-64 (1986). 6 N.Y.C.R.R. § 617.3(a) (“No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR[A].”). There is no question as to whether SEQRA should be applied to the action, as that was determined in the stipulation. Appeals Board Stipulation ¶ 4, *Alpert* (“The parties are aware and agree that the Freshwater Wetlands permit process is subject to the requirements of the State Environmental Quality Review Act...”). See *Riverso v. Rockland Cty. Solid Waste Mgmt. Auth.*, 96 A.D.3d 764, 766 (2d Dept. 2012) (reversing agency decision for failure to consider all environmental impacts and improperly segmenting review).



of the potential consequences of issuing the permit.⁵ To comply with SEQRA, an agency must “identif[y] the relevant areas of environmental concern, t[ake] a hard look at them, and ma[k]e a reasoned elaboration of the basis for [its] determination.”⁶ Such review must include an analysis of “the range of reasonable alternatives to the action that are feasible” and the “range of alternatives must include the no action alternative.”⁷ The No Action alternative must assess the future “in the absence of the proposed action.”⁸ Failure to conform to SEQRA’s requirements is a ground for voiding an agency decision.⁹

Put simply, the EIS submitted to support the Application¹⁰ is founded on a lie. It claims that there is an “agreed-to development footprint” in the project area, and that “any development” within that footprint “is permitted to be developed” by the Department.¹¹ In support of this, it references a 2012 settlement with the Department in *Alpert v. Jorling*, Index No. 87-100 (Freshwater Wetlands Appeals Bd. Aug. 27, 2012) (herein “Appeals Board Stipulation”), attached here as Exhibit A.¹²

⁵ The purpose of an environmental impact statement, by statute, is to provide detailed information about the effect which a proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such action.

N.Y. Env. Cons. L. § 8-0109.

⁶ *Chinese Staff and Workers*, 68 N.Y.2d at 363-64 (internal quotations and citations omitted).

⁷ 6 N.Y.C.R.R. § 617.9(b)(5)(v) (“The no action alternative discussion should evaluate the adverse or beneficial site changes that are likely to occur in the reasonably foreseeable future, *in the absence of the proposed action*.” (emphasis added)).

⁸ *Id.*

⁹ See, e.g., *Tauber v. Vill. Of Spring Valley*, 56 A.D.3d 660 (2d Dept. 2008) (voiding sale of land because of failure to comply with SEQRA); *Kuzma v. City of Buffalo*, 45 A.D.3d 1308 (4th Dept. 2007) (annulling sale contract and municipal resolution approving sale because of negative declaration “based on erroneous information”).

¹⁰ The present Notice states, “A final environmental impact statement has been prepared on this project and is on file. SEQR Lead Agency: NYC Dept of City Planning.” NYC Dept of City Planning staff clarified that this is referring to the August 25, 2017 *South Avenue Retail Development - Final Environmental Impact Statement* available on the NYC Department of City Planning Website at <https://www1.nyc.gov/site/planning/applicants/env-review/south-avenue-retail-development.page> (herein “NYC DCP 2017 EIS”).

¹¹ NYC DCP 2017 EIS, at 1-2 n.1 (“A 2012 Stipulation Agreement issued by NYSDEC establishes a site plan for the project site with the area that is permitted to be developed; any development that conforms to the agreed-to development footprint is permitted.”).

¹² The presence of wetlands on the proposed project site has been contested for decades. The preliminary wetlands map available at the time the site was purchased in two transactions in 1977 and 1984 did not indicate it as a wetlands location. Appeals Board Stipulation, at 2. The wetlands map for the area, published in 1987, designated portions of the property as wetlands. *Id.* The Applicant challenged that designation before the Freshwater Wetlands Appeals Board in 1987, leading to prolonged negotiations. In 2012, as the Appeals Board was being terminated, see Michael B. Gerrard, N.Y.L.J., *New York Environmental Legislation and Regulations in 2012*, at 3 (Jan. 8, 2013), <https://www.arnoldporter.com/~media/files/perspectives/publications/2013/01/new-york-environmental-legislation-and-regulation/files/publication/fileattachment/arnoldporterllpnewyorklawjournalgerrard1813.pdf>, the Applicant and the Department signed a Stipulation of Settlement ending the challenge.



But the Appeals Board Stipulation states the exact opposite: in it, the Department and the Applicant agreed that the permitting process *must* be completed before the proposed development project can be completed.¹³ In fact, during negotiations the Applicant asked the Department to include an agreement to issue this permit in the Appeals Board Stipulation and the Department refused, explaining that such a request “would ride rough shod over the requirements of SEQRA.”¹⁴ The Applicant nevertheless claims that the 2012 Appeals Board Stipulation included an issuance of the requested permit in the EIS, which it now submits in support of this Application.

Although the Appeals Board Stipulation terminated the 1987 appeal and binds both the Department and the Applicant, it has very few operative terms. It memorializes the Department’s determination of the location of freshwater and tidal wetlands on the property, but does not bind future wetlands determinations.¹⁵ It also provides that the Applicant will develop the property “in substantial accordance with the Site Plan, subject to the requisite permits by the DEC and in accordance with otherwise applicable laws and regulations.”¹⁶ The Stipulation of Settlement requires the Department to “expeditiously process [the] application” for a freshwater wetlands permit, but conditions issuance of the permit on “the SEQRA process” and “public review.”¹⁷

Both the Applicant and the Department were well aware of SEQRA requirements, as demonstrated by their communication in the process of negotiating the Stipulation of Settlement, in which the Department told the Applicant that it “cannot commit to issue the permit” because “[d]oing so would ride rough shod over the requirements of SEQRA” and “would also render the public review process a farce.”¹⁸ Indeed, language stating that “DEC will...issue a freshwater wetlands permit” and that “DEC has found [the permit] application to be complete” was deleted from the Stipulation of Settlement because of these concerns.¹⁹

In 2017—after the Stipulation was signed, but before submitting this Application—the Applicant requested a special zoning permit and mapping amendment from the City of New

¹³ Appeals Board Stipulation ¶ 2 (“Appellants agree that the Property will be developed in substantial accordance with the Site Plan, *subject to the requisite permits by the DEC* and in accordance with otherwise applicable laws and regulations...” (emphasis added)).

¹⁴ Letter from Udo M. Drescher, Assistant Regional Attorney, N.Y. State Dept. of Env’tl Cons., to Charles S. Warren, Kramer Levin Naftalis & Frankel LLP (Mar. 7, 2011) (herein “Drescher letter”), attached as Exhibit B.

¹⁵ *Id.* ¶ 1 (“DEC *has determined*...that the freshwater wetlands and tidal wetlands on the Property are delineated as set forth on the Site Plan.”) (emphasis added).

¹⁶ *Id.* ¶ 2; *see also id.* Exhibit A (Site Plan).

¹⁷ *Id.* ¶ 7. Even if the Appeals Board Stipulation did contain operative terms, it must be viewed in light of the fact that Superstorm Sandy hit New York City and Staten Island just over two months after the Appeals Board Stipulation was signed.

¹⁸ Drescher letter, Exhibit B.

¹⁹ Draft Appeals Board Stipulation (Jan. 13, 2010) ¶¶ 3, 5, attached as Exhibit C.



York.²⁰ The Applicant prepared the NYC DCP 2017 EIS in support of that request, not the current Application; however, it is now inappropriately reusing the NYC DCP 2017 EIS to support this Application.

The NYC DCP 2017 EIS will not be deemed sufficient for the Department’s approval of a Wetlands Permit because it does not actually analyze the potential environmental impacts of the Department granting the Wetlands Permit that the Applicants are seeking: in both the No Action and the With Action scenarios it presents for Department’s consideration, the permit is assumed to have been granted by the build year. Further, it presents a No Action scenario that assumes a *larger* footprint of development would occur without agency action, again on the false assumption that no Wetlands Permit is required for development to go forward here.²¹ This creates an enormous number of errors throughout the Application, and particularly in the EIS, which fails to analyze potential impacts on socioeconomic conditions, open space, shadows, urban design, solid waste, and climate change; and reaches absurd results on hazardous waste, water and sewage, traffic, noise, and neighborhood character.

The EIS and Application unlawfully and incorrectly assume the requested Permit has already been issued

A Wetland Permit is required for all “activities on wetlands or adjacent areas.”²² Issuance of such a Permit is a discretionary decision within the meaning of SEQRA.²³ The Department is required by law to issue wetlands permits only after a public comment period²⁴ and completion of the SEQRA process.²⁵ The SEQRA process must run its course *before* the Department makes its decision as to whether to issue the permit; the Department cannot predetermine the outcome

²⁰ See NYC DCP 2017 EIS, at S-1 to -2. The zoning permit was necessary to allow a building to be built on the site that is large enough to accommodate the planned anchor tenant: a BJ’s Wholesale Club.

²¹ The NYC DCP 2017 EIS was designed to compare future development if the zoning permit that the applicant requested from the City to permit larger buildings was granted with development if it was not. Since without that zoning permit, development would be limited to buildings of 10,000 square feet or smaller, it is conceivable that a larger development footprint would be needed to accommodate the maximum floor area allowed on the lots. That comparison is entirely irrelevant to the comparison the Department must make now: comparing development that is permitted without the Wetlands Permit with what is permitted with the Permit.

²² See 6 N.Y.C.R.R. § 663.3(e) (“All persons proposing to conduct activities on wetlands or adjacent areas that have not been specifically exempted from regulation under section 24-0701 of the act or section 662.2(z) of this Part must obtain either a permit or a letter of permission.”).

²³ See N.Y. State Dept. of Env’tl Cons., The SEQRA Handbook, at 14 (4th ed. 2019) (“Examples of discretionary decisions are:…Environmental permits issued by DEC.”).

²⁴ See generally 6 N.Y.C.R.R. § 621.7.

²⁵ N.Y. Env’tl Cons. L. § 8-0109(2) (“All agencies…shall prepare, or cause to be prepared…an environmental impact statement on any action they propose or approve which may have a significant impact on the environment.”); 6 N.Y.C.R.R. § 617.3(a) (“No agency involved in an action may…approve the action until it has complied with the provisions of SEQRA.”).



of environmental review or commit to making a discretionary decision prior to completing SEQRA.²⁶ The public comment period did not start until July 2019, years after the NYC DCP 2017 EIS was drafted.

The EIS and application each include a No Action scenario with a future development on wetlands adjacent areas.²⁷ Therefore, the EIS's No Action development requires a discretionary approval—and the approval required is the very action that the Application seeks.

Yet the No Action section of the Application assumes that “[t]he No Action development would have the same overall development footprint as the proposed project.”²⁸ The NYC DCP 2017 EIS makes the same claim,²⁹ and also includes diagrams showing that the assumed No Action development footprint also encroaches on wetlands-adjacent areas.³⁰ That EIS is in error when it claims that “[t]he No Action development would not require any discretionary approvals.”³¹

Should the Department issues a permit in reliance on the NYC DCP 2017 EIS, it would be in clear violation of SEQRA. The Application itself is flawed because by considering an inappropriate No Action scenario it provides the Department with insufficient information to make a decision as to whether granting the requested permit “would be compatible with public health and welfare.”³²

²⁶ *Id.* § 8-0109(4) (“The purpose of a draft environmental statement is...to inform the public and other public agencies *as early as possible* about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision making process....” (emphasis added)).

²⁷ The Appeals Board Stipulation is not a permit, and it does not guarantee that a permit will be issued. In fact, it does the opposite: the applicant and the Department specifically agree that a permit will be “required” for the proposed development, Appeals Board Stipulation ¶ 3, that the permitting process would be “subject to the requirements of the State Environmental Quality Review Act,” *id.* ¶ 4, and that the Department would not issue the permit if “the SEQRA process or public review raise substantive and significant issues concerning the permissibility of the project,” *id.* ¶ 7. The Applicants even acknowledge this fact, *see* NYC DCP 2017 EIS, at 1-2 n.1 (“Per the Stipulation Agreement, NYSDEC determined that the only individual permit necessary for the proposed development *is a freshwater wetland permit* and a State Pollutant Discharge Elimination System (SPDES) general permit....” (emphasis added)), but subsequently ignore it in throughout the rest of the EIS.

²⁸ Capital Env't'l Consultants, Inc., Freshwater Wetlands Permit Application 17 (April 2018) (herein “Application”).

²⁹ *E.g.*, NYC DCP 2017 EIS, at S-9, S-2 n.1 (“any development that conforms to the agreed-to development footprint is permitted”).

³⁰ *E.g.*, NYC DCP 2017 EIS fig. 1-6.

³¹ *E.g.*, *id.* 18-10. This claim was made in response to comments noting that “the 2008 development plan is not ‘as of right;’ it requires discretionary approval from the [Department]....” *Id.* 18-9; Maria Brinkmann & Eric A. Goldstein, Comments of the Natural Resources Defense Council Concerning the Draft Environmental Impact Statement for the Proposed Graniteville Tree Swamp Development Project, at 5 (Aug. 7, 2017) (attached to EIS).

³² *See* 6 N.Y.C.R.R. § 663.5(e).



The NYC DCP 2017 EIS presents erroneous analyses

A large number of errors flow from the fundamental problem that the EIS that the Applicants provided for the Department to use when deliberating on this permit Application assumes that the permit has already been granted. Following State law and New York City guidance, nearly every section of the NYC DCP 2017 EIS is premised on comparing the proposed development with a No Action scenario that would occur in the absence of discretionary agency action. The EIS makes numerous erroneous claims that render it useless in evaluating the Application:

- That no socioeconomic-conditions analysis is necessary because the proposed development is *smaller* than the No Action condition and therefore “the proposed project would result in a net decrease in retail space.”³³
- That no open-space analysis is necessary because the proposed development would hire *fewer* workers than the No Action scenario and therefore there “would be a reduction in the worker population.”³⁴
- That no analysis of the effect of shadows on the adjacent wetlands is necessary because “the shadows cast...would be substantially similar in both” the No Action and With Action scenarios.³⁵
- That no urban-design analysis is necessary—even though an entirely new retail center is going up in what was once open space and wetland—because the No Action scenario would include “smaller retail buildings along the project site’s...frontages.”³⁶
- That no solid-waste analysis is necessary because “the proposed project would result in a reduction in solid waste generation as compared to the No Action condition.”³⁷
- That no climate-change analysis is necessary because the “proposed project would result in a commercial development...approximately 2,000 gsf. smaller than the retail development that will be constructed...in the No Action condition.”³⁸
- That it would be safer to allow the proposed development than not, from a hazardous-materials perspective, because the development will occur anyways and the applicant

³³ *Id.* S-20; see *supra* n. 18 for an explanation of how this might make sense in the context of the NYC DCP 2017 EIS.

³⁴ *Id.* S-21; see *supra* n. 18 for an explanation of how this might make sense in the context of the NYC DCP 2017 EIS.

³⁵ *Id.*; since without the permit, a smaller area of the site can be developed, the shadow analysis must compare the proposed development with a development that is only the on smaller area that avoids all wetland-adjacent portions of the site.

³⁶ *Id.*; the NYC DCP 2017 EIS analyzed an action that impacted the permitted building size on the site (the zoning permit) and that permit was granted—the size of buildings on the site will not be impacted by the wetlands permit.

³⁷ *Id.* S-22.

³⁸ *Id.*; see *supra* n. 18 for an explanation of how this might make sense in the context of the NYC DCP 2017 EIS.



committed to undertaking a Remedial Action Plan and Construction Health and Safety Plan for the proposed project.³⁹

- That allowing the proposed project would result in a decrease of the strain on water and sewage systems because it is smaller than the No Action scenario.⁴⁰
- That the proposed project would decrease midday traffic to the area, because more people would visit the development in the No Action scenario.⁴¹
- That the proposed project would create only an “imperceptible” amount of noise, because the retail development in the No Action scenario would also be noisy.⁴²
- That “the proposed project would not have the potential to affect the land uses which are a defining feature of the area’s neighborhood character” because “it would not represent a change in land use *as compared to the No Action condition*.”⁴³

The proposed project would substantially harm the community and the environment in ways that are not considered in the NYC DCP 2017 EIS and Application

The problems listed above would be sufficient to make any permit granted on the basis of this Application and EIS unlawful. Additionally, and partially because of the confusion created by those errors, there are several substantive harms to the environment and local community that have not been adequately presented or considered in the Application and EIS.

Economic harm to small businesses

The application and EIS are also deficient because they fail to present the potential impacts on existing businesses that the particular tenant which the Applicant has committed to leasing space to if the project is developed will have on existing businesses.⁴⁴ The tenant is not simply a retailer: it is the BJ’s Wholesale Club. BJ’s model is to sell goods *that other stores in the area sell*, and, per its own description, undercutting those stores by selling at a lower price and higher volume, and ensuring that customers only shop at their store through a membership

³⁹ *Id.* 5-2; the development cannot go forward without the wetlands permit currently under review. Further, a Remedial Action Plan and Construction Health and Safety Plan would be required for any development on this site based on its “E” designation by the NYC Department of Environmental Protection. *See* 15 R.C.N.Y. § 24-00 *et seq.*
⁴⁰ NYC DCP 2017 EIS, at 6-6; *see supra* n. 18 for an explanation of how this might make sense in the context of the NYC DCP 2017 EIS.

⁴¹ *Id.* 7-5 to -6 & tables 7-4 to -6; *see also id.* Table 7-17 (finding relatively few significant impacts on traffic wait times as result of project by comparing traffic levels at proposed project to No Action traffic levels); *see supra* n. 18 for an explanation of how this might make sense in the context of the NYC DCP 2017 EIS.

⁴² *Id.* 9-7; *see supra* n. 18 for an explanation of how this might make sense in the context of the NYC DCP 2017 EIS.

⁴³ *Id.* 10-5 (emphasis added); *see supra* n. 18 for an explanation of how this might make sense in the context of the NYC DCP 2017 EIS.

⁴⁴ NYC DCP 2017 EIS, at 18-8 (stating merely that “this site is a viable location for retail development that includes a variety of locally-oriented uses, including a supermarket and a wholesale warehouse”).



program.⁴⁵ The 2017 FEIS claims that BJ's will not "alter existing economic patterns in the area" because the neighborhood already includes a Home Depot.⁴⁶ But a BJ's will have a very different economic impact than a relatively specialized home-improvement retailer. Local businesses from groceries, to home-goods stores, to gas stations, will all be in direct competition with this behemoth; this cannot possibly leave the neighborhood's "economic patterns" undisturbed. The EIS fails to acknowledge the substantial, and potentially devastating, economic impact that BJ's will have on the area, hiding behind the fact that there are existing retail establishments in the study area.

Increased risk of flooding

The site itself and much of the area surrounding the site is becoming increasingly vulnerable to flooding. The federal government, in its most recent preliminary Flood Insurance Risk Maps (FIRMs) proposed changes to the flood zone subtypes on the property and surroundings: areas that are only in "minimal floor hazard" areas per the current FIRMs are proposed to be re-designated as 500-year flood zones; areas that are 500-year flood zones currently, including a significant portion of the subject property, are to be re-designated as part of the "AE" 100-year flood zone.⁴⁷ As climate change raises sea levels and increases the frequency of high-rainfall events, and as more and more of the surrounding surface area is developed with impervious surfaces, this trend is likely to continue.

If built, the proposed project would substantially raise the elevation of the developed area, further increasing the flood risk to the surrounding area. In the southeastern corner of the project, the elevation would increase almost 10 feet, from the current 4-foot elevation to a 13-foot elevation.⁴⁸ The base flood elevation is around 10 feet in the area,⁴⁹ meaning that the raised area will displace a large amount of water to neighboring properties in a flood scenario. This impact could contribute to increased flooding risk in the area and potentially lead to updated FIRMs that show that even more of the neighboring community is at risk. Yet the Application

⁴⁵ See BJ's Wholesale Club Holdings, Inc., Prospectus, at 83-84 (May 17, 2018) (BJ's "consistently offer[s] 25% or more savings on...manufacturer-branded groceries compared to traditional supermarket competitors. ... [BJ's] membership tiers and affiliations further consolidate [their] members' spend and improve customer loyalty...."), https://www.sec.gov/Archives/edgar/data/1531152/000119312518166050/d494927ds1.htm#rom494927_15.

⁴⁶ NYC DCP 2017 EIS, at 14-2.

⁴⁷ Compare NYC DCP 2017 EIS fig. 4-8 with Fed. Emergency Mgmt. Agency, Comparison of Flood Hazard (generated Aug. 19, 2019), https://p4.msc.fema.gov/arcgis/rest/directories/arcgisjobs/preliminarycomparisontool/preliminarycomparisontool_gp_server/jeb4c71c212da45fb93d03f4266ab40bb/scratch/ComparisonReport_410bed30-c2c4-11e9-a907-001b21bbe86d.pdf; see Fed. Emergency Mgmt. Agency, Flood Map Changes Viewer, <https://fema.maps.arcgis.com/apps/webappviewer/index.html?id=e7a7dc3ebd7f4ad39bb8e485bb64ce44>.

⁴⁸ See Application fig. 6.

⁴⁹ See Application fig. 10.



addresses only the flood-protection benefits of the wetlands in the area, not the impact of development.⁵⁰

Violation of the Clean Water Act

To comply with the Clean Water Act, the Army Corps of Engineers made a determination of federal jurisdiction for a portion of the site in 2012.⁵¹ Any development in that area would need to have additional permits granted by the Army Corps. Although the proposed project avoids the 2012 federal jurisdictional area, it cannot not do so absolutely. Federal regulations mandate new jurisdictional determinations that reflect current physical and legal conditions be done every five years. The 2012 Jurisdictional Determination (“JD”) expired in December 2017.

Regulations defining federal wetlands jurisdiction under the Clean Water Act were revised in 2015 to include, on a case-by-case basis, wetlands within the 100-year floodplain like the one at issue here, per the preliminary FIRMs.⁵² Since the 2012 JD would expire by end of 2017, a new JD by the Army Corps of Engineers would have been necessary by the build year of the NYC DCP 2017 EIS, yet the EIS does not disclose that this additional discretionary action is even needed, nor that it would need to be granted or denied in the context of new regulations and updated floodplain classifications.

Harm to wetlands in area

The NYC DCP 2017 EIS does not account for the harm to wetlands that would occur as the result of the project. As other commenters have detailed in their submissions, the project for which the Applicant is seeking a permit would, if allowed to be built as proposed, greatly reduce the value that the wetlands provide; permitting it would be a violation of Article 24, section 24-0105 and the Freshwater Wetlands Permit Requirements.⁵³ In addition to the “stipulated” wetlands that exist in the southern area of the site, there are several wetlands areas within the site that will be destroyed for the project.⁵⁴ These wetlands provide substantial services to the

⁵⁰ *E.g.*, Application, at 15; *e.g.*, NYC DCP 2017 EIS, at 4-41 (“Impacts to floodplains due to the proposed project are expected to be comparable to those for the No Action development. Therefore, it is concluded that the proposed project would not result in any potential significant adverse impacts on floodplains...”); *id.* 18-3 to -4, -9 (“The construction and retail operation of the proposed project would not increase flooding potential...”).

⁵¹ Application fig. 5; NYC DCP 2017 EIS, at 4-11 to -12 & n.26.

⁵² 80 Fed. Reg. 37,054, 37,105 (June 29, 2015) (codified at 33 C.F.R. § 328.3(b)(8)). This regulation is currently in effect in New York. *See* Laura Gatz, Congressional Research Serv., “Waters of the United States” (WOTUS): Current Status of the 2015 Clean Water Rule, at 6 (2018), <https://fas.org/sgp/crs/misc/R45424.pdf>.

⁵³ *See* 6 N.Y.C.R.R. § 663.5.

⁵⁴ NYC DCP 2017 EIS, fig. 4-8; *see also* N.Y. Dept. Env'tl. Prot., Environmental Resource Mapper (generated Aug. 19, 2019), http://www.dec.ny.gov/arcgis/rest/directories/arcgisoutput/Utilities/PrintingTools_GPServer/_ags_8e581b7f26384c17ac34c1c54857d018.pdf.



environment and surrounding community.⁵⁵ In particular, the area designated “Wetland E” in the northwestern portion of the site was assessed as providing “medium” levels of storm protection, wildlife habitat, recreation opportunities, pollution treatment, and erosion control.⁵⁶ Despite satisfying this array of important needs, it is not clear that the loss of this wetland, or any other, received consideration in the EIS or Application.⁵⁷

NYC DCP 2017 EIS Presents an Improperly Segmented Analysis

In order to be sufficient under SEQRA, an EIS must not be improperly segmented so as to consider “only a part or segment of an action,” rather than the action in its entirety, and “[r]elated actions should be identified and discussed to the fullest extent possible.”⁵⁸ The NYC DCP 2017 EIS is improperly segmented, as it considers only the incremental impact of the City’s discretionary actions, and not the full impact of the proposed development or all the related actions necessary to permit it.

As the Second Department Appellate Division made clear:

for purpose of determining whether action will cause significant effect on environment, reviewing agency must consider ...simultaneous or subsequent actions which are included in any long-range plan of which action under consideration is part.⁵⁹

“Considering only a part or segment of an action is contrary to the intent of SEQR.”⁶⁰ In this case, the action requires both a wetlands permit from the Department, a zoning permit and city map amendment from the City of New York, and a JD from the Army Corps of Engineers.⁶¹ But the NYC DCP 2017 EIS only provided an analysis of the City’s actions. Splitting those actions from the Department’s and the Army Corps reduces the environmental impact considered to the incremental change caused by minor zoning adjustments and a slight change to the roadway leading into the proposed development. This conceals the real harm to the environment

⁵⁵ NYC DCP 2017 EIS, table 4-1.

⁵⁶ *Id.*

⁵⁷ The NYC DCP 2017 EIS presents a proposed mitigation plan for wetland, but this appears to refer to the “stipulated” wetland and not the other wetlands. *E.g., id.* 4-31 (“To compensate for the loss of *NYSDEC freshwater wetland adjacent area*, the applicant has proposed 10.77 acres of freshwater buffer plantings, freshwater wetland enhancement area, tidal wetland adjacent area enhancement, stormwater management area, and preserved natural areas...” (emphasis added)).

⁵⁸ 6 N.Y.C.R.R. § 617.3(g)(1); *see also id.* § 617.3(g) (“The entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a whole or to only a part of it.”).

⁵⁹ *Farrington Close Condominium Bd. of Mgrs. v. Inc. Vill. of Southampton*, 205 A.D.2d 623, 623 (2d Dept. 1994) (granting Art. 78 petition against decision based on finding that action was improperly segmented).

⁶⁰ 6 N.Y.C.R.R. § 617.3(g)(1); *see also id.* § 617.3(g) (“The entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a whole or to only a part of it.”).

⁶¹ *See* Appeals Board Stipulation ¶ 3 (freshwater wetlands permit required); NYC DCP 2017 EIS, S-1, S-2 (zoning and map amendments required); Clean Water Act Sec. 404.

-



posed by the proposed project, and violates the SEQRA requirement that projects be considered as a whole.

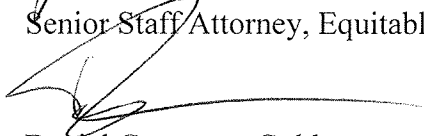
--

The Department is bound by law to preserve the wetland at Graniteville Swamp and to schedule a public hearing on this permit application. Thank you for your diligent attention to these matters.

Sincerely,



Paula Z. Segal
Senior Staff Attorney, Equitable Neighborhoods



Daniel Carpenter-Gold
Staff Attorney, Equitable Neighborhoods

-



EXHIBIT A

STATE OF NEW YORK
FRESHWATER WETLANDS APPEAL BOARD

----- X
:
CHARLES AND JOSEPH ALPERT,
:
Appellants, : Index No. 87-100
: Block 1707, Lots 1 and 5
: Wetland E-3
v. :
:
THOMAS JORLING as COMMISSIONER of the :
NEW YORK STATE DEPARTMENT OF :
ENVIRONMENTAL CONSERVATION, :
:
Respondent. :
:
----- X

STIPULATION OF SETTLEMENT

THIS STIPULATION OF SETTLEMENT (the "Stipulation") is made as of June 29, 2012, by and between appellants, CHARLES and JOSEPH ALPERT ("appellants"), and JOSEPH MARTENS as COMMISSIONER of the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ("DEC"), successor to named respondent Thomas Jorling.

WHEREAS, appellants are the owners of real property (the "Property") situated in the County of Richmond, City and State of New York, which property is designated as Tax Block 1707, Lots 1 and 5 on the tax map maintained by the City of New York, and bordered by Morrow Street to the west, Forest Avenue, Dwarf Street and Wemple Street to the north and South Avenue to the east;

WHEREAS, appellants acquired Lot 1 of the Property on March 8, 1977, pursuant to a purchase agreement dated February 25, 1976;

WHEREAS, appellants acquired Lot 5 of the Property on November 12, 1984;

WHEREAS, the Property was not designated as a freshwater wetland on the tentative freshwater wetlands map, prepared pursuant to ECL § 24-0301(2), which was filed in Richmond County in 1981;

WHEREAS, on September 1, 1987, DEC promulgated the final freshwater wetlands map for Richmond County pursuant to ECL § 24-0301(5), designating portions of the Property as freshwater wetlands and, consequently, creating regulated freshwater wetlands adjacent areas, subjecting the Property to DEC jurisdiction;

WHEREAS, on December 9, 1987, appellants filed this appeal (the "Appeal") challenging the freshwater wetlands designation of their property and seeking relief under the hardship provisions of Environmental Conservation Law § 24-1104, which before it expired on June 30, 1992 provided a particular appeals process for certain private landowners on Staten Island who prior to January 1, 1987 had acquired parcels that were not on the 1981 tentative wetlands map but were included on the final wetlands map promulgated on September 1, 1987;

WHEREAS, DEC has contested the Appeal;

WHEREAS, a portion of lot 1 is mapped as formerly connected tidal wetland ("FC") on the official tidal wetlands map 570-496, thus rendering that portion of lot 1 and an area measuring 150 linear feet from the wetlands boundary subject to the DEC's jurisdiction under the Tidal Wetlands Act (ECL Article 25) and the regulations promulgated thereunder in 6 NYCRR Part 661 over tidal wetlands and areas adjacent thereto;

WHEREAS, appellants delineated the freshwater wetlands and tidal wetlands on the Property and DEC has reviewed and concurred with such delineations;

WHEREAS, in an effort to settle the Appeal, appellants have presented to DEC a proposed site plan, identified as "Site Plan," *Forest Avenue – Forest Avenue Wetland Delineation*, Sheet SP-1, prepared by Carpenter Environmental Associates, Inc., dated 02/05/08, last revised 8/16/12 for development of the Property (the "Site Plan"), which is annexed hereto as Exhibit A and is incorporated into this Stipulation. The Site Plan shows a tentative wetland enhancement area in the bed of Morrow Street. The Appellants do not own Morrow Street and will request that it be de-mapped in connection with development of the property. If the street bed is de-mapped, it will become part of the wetland enhancement area.

WHEREAS, DEC has determined that the Site Plan in combination with this Stipulation constitutes an acceptable proposal to address and resolve the issues raised in the Appeal;

NOW, THEREFORE, the parties agree as follows:

1. DEC has determined, and Appellants agree, in accordance with ECL § 24-0301(7) and ECL § 25-0201(6), that the freshwater wetlands and tidal wetlands on the Property are delineated as set forth on the Site Plan.
2. Appellants agree that the Property will be developed in substantial accordance with the Site Plan, subject to the requisite permits by the DEC and in accordance with otherwise applicable laws and regulations and approvals by other agencies with jurisdiction.
3. DEC has determined that the only individual permit required by the Site Plan is a freshwater wetlands permit, except that an individual SPDES permit may also be required if discharges occur other than those covered by the SPDES General Permit for Discharges from Construction Activity Permit No. GP-0-10-001 (or any successor permit) or if DEC in a reasonable exercise of its discretion pursuant to Part VII.K or Part VII. O of said

general permit and supporting statutes and regulations determines that an individual permit is required for discharges from the project site.

4. The parties are aware and agree that the Freshwater Wetlands permit process is subject to the requirements of the State Environmental Quality Review Act ("SEQRA").

5. Appellants have submitted an application, under the name Josif A LLC, for a freshwater wetlands permit that comports with the Site Plan and Stipulation, which application is attached hereto as Exhibit B, and DEC has found such application meets all completeness requirements set forth at 6 NYCRR Part 621.3(a) except for the requirements set forth at 6 NYCRR Part 621.3(a)(7)-(9).

6. DEC will expeditiously process that application and, by executing this Stipulation, attests that it has tentatively concluded that such a permit application would meet the applicable standards for permit issuance pursuant to ECL article 24 as well as 6 NYCRR Part 663.

7. Unless the SEQRA process or public review raise substantive and significant issues concerning the permissibility of the project, DEC agrees to issue a freshwater wetlands permit based on the Application and Site Plan (or a site plan in substantial accordance with such Plan) within sixty (60) days of the completion of the SEQRA process. Before the completion of the SEQRA process, a site plan which depicts sanitary and stormwater piping, utility lines and similar details shall be submitted to DEC.

8. Appellants agree that the development and construction of the Property requires coverage under SPDES general permit GP-0-10-001 (or any successor permit) for discharges associated with construction activities and will obtain such coverage by filing of a

Notice of Intent and preparing a Stormwater Pollution Prevention Plan in compliance with the requirements of the general permit and applicable regulations and standards.

9. Within thirty (30) days of issuance of the freshwater wetlands permit for the Site Plan, Appellants shall cause a deed restriction, based on a template that has been provided by DEC , to be recorded in the property records for the Property to ensure that the Wetland Enhancement Area and the Buffer Planting Area, as designated on the Site Plan, will be kept as Natural Areas and not become subject to development. In addition, if Appellants obtain an ownership interest in the area designated on the Site Plan as the Tentative Wetland Enhancement Area, or any portion thereof, the deed restriction must be amended to include that area or portion as a Natural Area not subject to development.

10. The Appeal is hereby discontinued with prejudice and without costs, except that the Freshwater Wetlands Appeal Board shall retain jurisdiction of the Appeal for the purpose of enforcing this Stipulation. However, in the event that the Freshwater Wetlands Appeal Board ceases to exist, and a successor board or agency has not been appointed, DEC and appellants shall each have the right to enforce this Stipulation.

11. This Stipulation shall be governed by and construed in accordance with the laws of the State of New York.

12. This Stipulation may not be changed, modified or terminated except by a writing executed by both of the parties hereto or their respective attorneys.

13. This Stipulation shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

14. The parties hereto agree and confirm that in the negotiation and drafting of this Stipulation each of them was represented by counsel of its own choosing, that the two sides are equally responsible for the drafting of this Stipulation, and that in the event of a dispute between them each of them shall be regarded as having played an equal role in the drafting of the relevant provisions and no portion of this Stipulation shall be interpreted on the basis of a theory that it was drafted by one side or the other.

15. This Stipulation may be executed in counterparts, each of which shall constitute an original.

IN WITNESS WHEREOF, appellants and DEC have caused their respective attorneys to execute this Stipulation as of the date hereinabove written.

Dated: New York, New York

8/23/2012

KRAMER LEVIN NAFTALIS &
FRANKEL LLP

By: Charles S. Warren
Charles S. Warren

Attorneys for Appellants
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: Louis Oliva
Louis Oliva

Regional Attorney
NYSDEC Region 2
One Hunters Point Plaza
47-40 21st Street
Long Island City, New York 11101-5407

Exhibit A

Exhibit B



JOINT APPLICATION FORM



For Permits/Determinations to undertake activities affecting streams, waterways, waterbodies, wetlands, coastal areas and sources of water supply.

New York State

You must separately apply for and obtain separate Permits/Determinations from each involved agency prior to proceeding with work. Please read all instructions.

US Army Corps of Engineers (USACE)

<p>1. NYS Department of Environmental Conservation</p> <p>Check all permits that apply:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Stream Disturbance <input type="checkbox"/> Excavation and Fill in Navigable Waters <input type="checkbox"/> Docks, Moorings or Platforms <input type="checkbox"/> Dams and Impoundment Structures <input type="checkbox"/> 401 Water Quality Certification <input checked="" type="checkbox"/> Freshwater Wetlands <input type="checkbox"/> Wet Wetlands <input type="checkbox"/> Coastal Erosion Management <input type="checkbox"/> Wild, Scenic and Recreational Rivers <input type="checkbox"/> Water Supply <input type="checkbox"/> Long Island/Well <input type="checkbox"/> Aquatic Vegetation Control <input type="checkbox"/> Aquatic Insect Control <input type="checkbox"/> Fish Control <input type="checkbox"/> Incidental Take of Endangered/Threatened Species <p><input checked="" type="checkbox"/> I am sending this application to this agency.</p>	<p>2. US Army Corps of Engineers</p> <p>Check all permits that apply:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Section 404 Clean Water Act <input type="checkbox"/> Section 10 Rivers and Harbors Act <input type="checkbox"/> Nationwide Permit(s) - Identify Number(s): _____ <p>Preconstruction Notification - <input type="checkbox"/> Y <input type="checkbox"/> N</p> <p><input checked="" type="checkbox"/> I am sending this application to this agency.</p>	<p>3. NYS Office of General Services</p> <p>Check all permits that apply:</p> <ul style="list-style-type: none"> <input type="checkbox"/> State Owned Lands Under Water <input type="checkbox"/> Utility Basement (pipes, conduits, cables, etc.) <input type="checkbox"/> Docks, Moorings or Platforms <p><input type="checkbox"/> I am sending this application to this agency.</p>	<p>4. NYS Department of State</p> <p>Check if this applies:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Coastal Consistency Concurrence <p><input type="checkbox"/> I am sending this application to this agency.</p>
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<p>5. Name of Applicant (use full name) Jost A LLC db Charles Aupit</p> <p>Mailing Address 271 Madison Avenue 22nd floor</p> <p>Post Office City New York</p> <p>State NY Zip Code 10016</p> <p>Telephone (daytime) 212-692-4468</p> <p>Email caupit@jost.com</p>	<p>Applicant must be:</p> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> Owner <input type="checkbox"/> Operator <input type="checkbox"/> Lessee <p>(check all that apply)</p> <p>Taxpayer ID (if applicant is NOT an individual): 32-0346002</p>	<p>6. Name of Facility or Property Owner (if different than Applicant)</p> <p>Mailing Address</p> <p>Post Office City</p> <p>State Zip Code</p> <p>Telephone (daytime) Email</p>
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<p>7. Contact / Agent Name Greg Fleischer</p> <p>Company Name Carpenter Environmental Associates, Inc.</p> <p>Mailing Address 307 Museum Village Road</p> <p>Post Office City Monroe</p> <p>State NY Zip Code 10950</p> <p>Telephone (daytime) 846-781-4844 ext 523</p> <p>Email g.fleischer@406-enr.com</p>	<p>8. Project / Facility Name Apert Property</p> <p>Property Tax Map Section / Block / Lot Number Staten Island / Block 1707 / Lots 1-53</p> <p>Project Location - Provide directions and distances to roads, bridges and bodies of water. Bordered by Forest Avenue, South Avenue, Amador Street and Marrow Street.</p> <p>Street Address, if applicable Post Office City State Zip Code Staten Island NY 10309</p> <p>Town / Village / City County Staten Island Richmond</p> <p>Name of USGS Quadrangle Map Stream/Water Body Name Elizabeth and Arthur KR NYSDEC FWW E-3</p> <p>Location Coordinates: Enter NYTM's in kilometers, OR Latitude/Longitude</p> <table border="1" style="width: 100%;"> <tr> <td>NYTM-E</td> <td>NYTM-N</td> <td>Latitude</td> <td>Longitude</td> </tr> <tr> <td></td> <td></td> <td>40.826489</td> <td>-74.150866</td> </tr> </table>	NYTM-E	NYTM-N	Latitude	Longitude			40.826489	-74.150866
NYTM-E	NYTM-N	Latitude	Longitude						
		40.826489	-74.150866						

For Agency Use Only DEC Application Number	USACE Number
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JOINT APPLICATION FORM - PAGE 2 OF 2
 Submit this completed page as part of your Application.

9. Project Description and Purpose: Provide a complete narrative description of the proposed work and its purpose. Attach additional page(s) if necessary. Include: description of current site conditions and how the site will be modified by the proposed project; structures and fill materials to be installed; type and quantity of materials to be used (i.e., square ft. of coverage and cubic yds. of fill material and/or structures below ordinary/mean high water) area of excavation or dredging; volumes of material to be removed; and location of dredged material disposal or use; work methods and type of equipment to be used; pollution control methods and mitigation activities proposed to compensate for resource impacts; and where applicable, the phasing of activities. **ATTACH PLANS ON SEPARATE PAGES.**


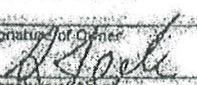
Applicant proposes to construct a commercial development with four retail buildings, accessory structures, roadways, parking areas, and a stormwater basin. Retail Buildings 'A' & 'B' will be 15,000 sq. ft. each, Retail Building 'C' will be 118,000 sq. ft., and Retail Building 'D' will be 70,000 sq. ft. Approximately 18 acres of the 27.80 acre vacant undeveloped parcel is proposed to be developed. As part of the proposed project, the applicant has provided for wetland enhancement and buffer planting areas totaling approximately 4.5 acres comprised of 1,889 trees and 7,553 native shrubs.

Proposed User: <input type="checkbox"/> Private <input type="checkbox"/> Public <input checked="" type="checkbox"/> Commercial	Proposed Start Date: 02/20/2013	Estimated Completion Date: 0/29/2016
Has Work Begun on Project? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No. If Yes, explain:		
Will Project Occupy Federal, State or Municipal Land? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No. If Yes, please specify.		

10. List Previous Permit / Application Numbers (if any) and Dates:

11. Will this project require additional Federal, State, or Local Permits including zoning changes? Yes No. If yes, please list NYCDOB, NYCDOP, NYODGP, NYSDES, and NYSDOE.

12. Signatures. If applicant is not the owner, both must sign the application. I hereby affirm that information provided on this form and all attachments submitted herewith is true to the best of my knowledge and belief. False statements made herein are punishable as a Class A misdemeanor pursuant to Section 210.45 of the Penal Law. Further, the applicant accepts full responsibility for all damage, direct or indirect, of whatever nature, and by whomsoever suffered, arising out of the project described herein and agrees to indemnify and save harmless the State from suits, actions, damages and costs of every name and description resulting from said project. In addition, Federal Law, 18 U.S.C. Section 1001 provides for a fine of not more than \$10,000 or imprisonment for not more than 5 years, or both where an applicant knowingly and willfully falsifies, conceals, or covers up a material fact, or knowingly makes or uses a false, fictitious or fraudulent statement.

Signature of Applicant: 	Printed Name: Charles Albert	Title: Member LLC	Date: 6/29/2012
Signature of Owner: 	Printed Name: Greg Fleischer	Title: Senior Scientist	Date: 6/29/2012
Signature of Agent:	Printed Name:	Title:	Date:

For Agency Use Only

DETERMINATION OF NO PERMIT REQUIRED

Agency Project Number: _____
 has determined that No Permit is required from this Agency for the project described in this application.

Agency Representative: Name (Printed): _____ Title: _____
 Signature: _____ Date: _____



PERMISSION TO INSPECT PROPERTY

By signing this permission form for submission with an application for a permit(s) to the Department of Environmental Conservation ("DEC"), the signer consents to inspection by DEC staff of the project site or facility for which a permit is sought and, to the extent necessary, areas adjacent to the project site or facility. This consent allows DEC staff to enter upon and pass through such property in order to inspect the project site or facility, without prior notice, between the hours of 7:00 a.m. and 7:00 p.m., Monday through Friday. If DEC staff should wish to conduct an inspection at any other times, DEC staff will so notify the applicant and will obtain a separate consent for such an inspection.

Inspections may take place as part of the application review prior to a decision to grant or deny the permit(s) sought. By signing this consent form, the signer agrees that this consent remains in effect as long as the application is pending, and is effective regardless of whether the signer, applicant or an agent is present at the time of the inspection. In the event that the project site or facility is posted with any form of "posted" or "keep out" notices, or fenced in with an unlocked gate, this permission authorizes DEC staff to disregard such notices or unlocked gates at the time of inspection.

The signer further agrees that during an inspection, DEC staff may, among other things, take measurements, may analyze physical characteristics of the site including, but not limited to, soils and vegetation (taking samples for analysis), and may make drawings and take photographs.

Failure to grant consent for an inspection is grounds for, and may result in, denial of the permit(s) sought by the application.

Permission is granted for inspection of property located at the following address(es):

Bordered by Forest Avenue, South Avenue, Amador Street and
Narrow Street, Staten Island, NY 10303

*By signing this form, I affirm under penalty of perjury that I am authorized to give consent to entry by DEC staff as described above. I understand that false statements made herein are punishable as a Class A misdemeanor pursuant to Section 210.45 of the Penal Law.**

Charles Alpert, Member

6/29/2012

Print Name and Title

Signature

Date

*The signer of this form must be an individual or authorized representative of a legal entity that:
• owns fee title and is in possession of the property identified above;
• maintains possessory interest in the property through a lease, rental agreement or other legally binding agreement; or
• is provided permission to act on behalf of an individual or legal entity possessing fee title or other possessory interest in the property for the purpose of consenting to inspection of such property.

EXHIBIT B

New York State Department of Environmental Conservation

Office of General Counsel, Region 2

47-40 21st Street, Long Island City, NY 11101-5401

Phone: (718) 482-4009 • Fax: (718) 482-4962

Website: www.dec.ny.gov



Joe Martens
Commissioner

March 7, 2011

Charles S. Warren, Esq.
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York NY 10036-2714

Re: Alpert v. DEC
FWAB # 87-100

Dear Mr. Warren:

1. Revised Stipulation

Attached please find our revised proposal for a stipulation. As in the past, the Department is willing to incorporate in the stipulation the notion that Staff have determined that the Site Plan as presented would meet the applicable standards for issuance of the required freshwater wetlands permit. However, the Department cannot commit to issue the permit within a set amount of time. Doing so would ride rough shod over the requirements of SEQRA, which is a condition precedent for rendering any permit application "complete" that is subject to SEQRA. It would also render the public review process a farce if the stipulation were to exclude the possible consideration of significant public comments. Finally, if the Department were to agree to approve major projects by way of stipulation rather than through the statutorily established public review and comment processes, we would open the door to use litigation for complex projects as a potentially quicker method of getting required approvals.

For these reasons, DEC Staff have persistently advised your predecessors and now you of the Department's position that the project on which the settlement of this appeal would be based must undergo the normal permit and SEQRA reviews, including public participation, albeit with the understanding the Staff would be supportive of the project.

2. Technical Comment

In our letter dated December 7, 2011, we provided a number of technical comments to the proposed site plan which largely seem to have been addressed. The following comment and response, however, need some follow-up:

We wrote:

- **Morrow Street:** The current proposal appears to de-map a portion of Morrow Street. Can the portion of Morrow adjacent to the wetland enhancement area also be de-mapped? The wetland enhancement area adjacent to Morrow should be expanded into the street bed.

The response by Carpenter Environmental Associates was:

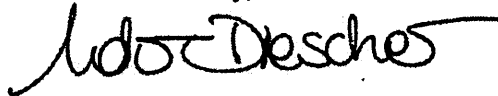
Although not part of the original concept for the proposed development, we can consult the appropriate agencies regarding the demapping of a portion of Morrow Street. For the current plan, we have tentatively included this area as being part of the proposed wetland enhancement area.

This is not sufficient. Rather, the mapped street should become part of the wetland enhancement area. As you may recall, any previous rendition of the site plan had presented Morrow Street as a required access point for the future development, wherefore the street had to be improved. Based on this presentation, Morrow Street was not included among the areas to be planted. The current version of the project plan, however, no longer provides for the use of Morrow Street but relies on a different roadway configuration. Accordingly, there is no reason not to expand the plantings into the mapped street, which pursuant to the current site plan would remain unimproved.

The request for de-mapping had been based on the assumption that the unusual roadway configuration would require a NYC approval. If that is not the case, the de-mapping can be omitted.

Please don't hesitate to contact me at (718) 482-4963 if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Udo M. Drescher". The signature is fluid and cursive, with a long horizontal stroke extending to the right from the end of the name.

Udo M. Drescher
Assistant Regional Attorney

C: L. Oliva
J. Pane

EXHIBIT C

DRAFT

Style Definition: Comment Subject: Font: 10 pt

STATE OF NEW YORK
FRESHWATER WETLANDS APPEAL BOARD

----- X

CHARLES AND JOSEPH ALPERT.,

:
: Index No. 87-100
Appellants, : Block 1707, Lots 1 and 5
: Wetland E-3

v.

:
THOMAS JORLING as COMMISSIONER of the
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

:
Respondent.
:

----- X

STIPULATION OF SETTLEMENT

THIS STIPULATION OF SETTLEMENT (the "Stipulation") is made as of __,

2012, by and between appellants, CHARLES and JOSEPH ALPERT ("appellants"), and

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JOSEPH MARTENS as COMMISSIONER of the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ("DEC"), successor to named respondent Thomas Jorling.

WHEREAS, appellants are the owners of real property (the "Property") situated in the County of Richmond, City and State of New York, which property is designated as Tax Block 1707, Lots 1 and 5 on the tax map maintained by the City of New York, and bordered by Morrow Street to the west, Forest Avenue, Dwarf Street and Wemple Street to the north and South Avenue to the east;

WHEREAS, appellants acquired Lot 1 of the Property on March 8, 1977, pursuant to a purchase agreement dated February 25, 1976;

WHEREAS, appellants acquired Lot 5 of the Property on November 12, 1984;

WHEREAS, the Property was not designated as a freshwater wetland on the tentative freshwater wetlands map, prepared pursuant to ECL § 24-0301(2), which was filed in Richmond County in 1981;

WHEREAS, on September 1, 1987, DEC promulgated the final freshwater wetlands map for Richmond County pursuant to ECL § 24-0301(5), designating portions of the Property as freshwater wetlands and, consequently, creating regulated freshwater wetlands adjacent areas;

WHEREAS, on December 9, 1987, appellants filed this appeal (the "Appeal") challenging the freshwater wetlands designation of their property and seeking relief under the hardship provisions of Environmental Conservation Law § 24-1104, which before it expired on June 30, 1992 provided a particular appeals process for certain private landowners on Staten Island who prior to January 1, 1987 had acquired parcels that were not on the 1981 tentative wetlands map but were included on the final wetlands map promulgated on September 1, 1987;

WHEREAS, DEC has contested the Appeal;

WHEREAS, a portion of lot 1 is mapped as formerly connected tidal wetland ("FC") on the official tidal wetlands map 570-496, thus rendering that portion of lot 1 and an area measuring 150 linear feet from the wetlands boundary subject to the DEC's jurisdiction under the Tidal Wetlands Act (ECL Article 25) and the regulations promulgated thereunder in 6 NYCRR Part 661 over tidal wetlands and areas adjacent thereto;

WHEREAS, appellants delineated the freshwater wetlands and tidal wetlands on and adjacent to the Property and DEC has reviewed and concurred with such delineations;

WHEREAS, in an effort to settle the Appeal, appellants have presented to DEC a proposed site plan, identified as "Site Plan," *Forest Avenue – Forest Avenue Wetland Delineation*, Sheet SP-1, prepared by Carpenter Environmental Associates, Inc., dated 02/05/08, last revised 11/05/09 "Revised Mitigation Planting Schedule," for development of the Property (the "Site Plan"), which is annexed hereto as Exhibit A and is incorporated into this Stipulation;

Comment [A1]: To be revised and updated as appropriate.

WHEREAS, DEC has determined that the Site Plan in combination with this Stipulation constitutes an acceptable proposal to address and resolve the issues raised in the Appeal;

NOW, THEREFORE, the parties agree as follows:

1. Appellants agree that the Property will be developed in substantial accordance with the Site Plan, subject to the requisite permits by the DEC and in accordance with otherwise applicable laws and regulations.

Comment [A2]: The text below was deleted because it would be redundant. The third to last "WHEREAS" clause contains the same concept.

Deleted: <#>DEC concurs with the delineation of the freshwater wetlands and tidal wetlands on and adjacent to the Property, and their respective adjacent areas, as set forth on the Site Plan.

Deleted: <#>1

2. DEC has determined that the only individual permit required by the Site Plan is a freshwater wetlands permit, except that an individual SPDES permit may also be required if discharges occur other than those covered by the SPDES General Permit for Discharges from Construction Activity Permit No. GP-0-10-001 (or any successor permit) or if DEC in a reasonable exercise of its discretion pursuant to Part VII.K or Part VII. O of said general permit and supporting statutes and regulations determines that an individual permit is required for discharges from the project site.

3. Appellants have submitted an application for a freshwater wetlands permit that comports with the Site Plan and Stipulation, which application is attached hereto as Exhibit B, and DEC agrees to expeditiously process that application and, by executing this Stipulation,

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Comment [A3]: DEC cannot "find the application to be complete" until the SEORA review process is done.

Deleted: has found such application to be complete. ¶
DEC will

attests that it has tentatively concluded that such a permit application would meet the applicable standards for permit issuance pursuant to ECL article 24 as well as 6 NYCRR Part 663.

Deleted: , and has issued a draft freshwater wetlands permit that is attached hereto as Exhibit C

4. The parties are aware and agree that the permit application is subject to the requirements of the Staten Environmental Quality Review Act and may be subject to public review.

5. Appellants agree that the development and construction of the Property requires coverage under SPDES general permit GP-0-10-001 (or any successor permit) for discharges associated with construction activities and will obtain such coverage by filing of a Notice of Intent and preparing a Stormwater Pollution Prevention Plan in compliance with the requirements of the general permit and applicable regulations and standards.

Deleted: <#>DEC will, subject to public review, issue a freshwater wetlands permit for the Site Plan (or a site plan in substantial accordance with such Plan) within ninety (90) days of the date this Stipulation is "So Ordered" by the Freshwater Wetlands Appeals Board. ¶

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6. Within thirty (30) days of issuance of the freshwater wetlands permit for the Site Plan, Appellants shall cause a deed restriction to be recorded in the property records for the Property in order to provide notice to future owners or developers of the Property that development on the Property is constrained by the presence of wetlands and regulated adjacent areas.

7. The Appeal is hereby discontinued with prejudice and without costs, except that the Freshwater Wetlands Appeal Board shall retain jurisdiction of the Appeal for the purpose of enforcing this Stipulation.

8. This Stipulation shall be governed by and construed in accordance with the laws of the State of New York.

9. This Stipulation may not be changed, modified or terminated except by a writing executed by both of the parties hereto or their respective attorneys.

10. This Stipulation shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

11. The parties hereto agree and confirm that in the negotiation and drafting of this Stipulation each of them was represented by counsel of its own choosing, that the two sides are equally responsible for the drafting of this Stipulation, and that in the event of a dispute between them each of them shall be regarded as having played an equal role in the drafting of the relevant provisions and no portion of this Stipulation shall be interpreted on the basis of a theory that it was drafted by one side or the other.

12. This Stipulation may be executed in counterparts, each of which shall constitute an original.

IN WITNESS WHEREOF, appellants and DEC have caused their respective attorneys to execute this Stipulation as of the date hereinabove written.

Dated: New York, New York

2012

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KRAMER LEVIN NAFTALIS &
FRANKEL LLP

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: _____
Charles S. Warren

By: _____
Venetia A. Lannon

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(212) 715-9100

Regional Director
NYSDEC Region 2
One Hunters Point Plaza
47-40 21st Street
Long Island City, New York 11101-5407

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This Stipulation is So Ordered and DEC shall issue a
freshwater wetlands permit within ninety (90) days
of the date hereof in accordance with the terms of
this Stipulation: _____, ¶
on behalf of the ¶
Freshwater Wetlands Appeals Board