

DECISION AND FINDINGS
IN THE
CONSISTENCY APPEAL OF
CLAIRE PAPPAS FROM AN
OBJECTION BY THE
NEW YORK DEPARTMENT OF STATE
October 26, 1992

SYNOPSIS OF DECISION

In June of 1989, Claire Pappas (Appellant) applied to the U.S. Army Corps of Engineers (Corps) for a permit issued pursuant to section 10 of the Rivers and Harbors Act of 1899 to construct a wood deck structure for dining over a canal as an addition to her seafood restaurant in Hemstead, New York. In conjunction with that Federal permit application, the Appellant submitted to the Corps and the New York State Department of State (State), the State of New York's coastal management agency, under section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A), a certification that the proposed activity was consistent with New York's Federally-approved Coastal Management Program.

On February 15, 1990, the State objected to the Appellant's consistency certification for the proposed project on the ground that the proposed project is not in accordance with New York's coastal management public policies and objectives of facilitating the siting of water dependent uses and facilities on or adjacent to coastal waters. Letter from George R. Stafford, Special Deputy Secretary of State, New York State Department of State, to Roy L. Haje, EN-Consultants, Inc. In the objection letter, however, the State did propose alternative measures which, if adopted, would permit the Appellant's proposed activity to be conducted in a manner consistent with New York's Coastal Management Program (CMP). Specifically, the State proposed that the Appellant re-locate the proposed deck to an upland area, that the Appellant make more efficient use of existing restaurant floor space, or that the Appellant add space onto the existing restaurant structure, including adding a second story dining section.

Under CZMA section 307(c)(3)(A) and 15 C.F.R. § 930.131 (1988), the State's consistency objection precludes Federal agencies from issuing a permit for the activity unless the Secretary of Commerce determines that the activity is either consistent with the objectives or purposes of the CZMA (Ground I) or necessary in the interest of national security (Ground II). If the requirements of either Ground I or Ground II are met, the Secretary must override the State's objection.

On March 13, 1990, in accordance with CZMA section 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, counsel for the Appellant filed with the Department of Commerce a notice of appeal from the State's objection to the Appellant's consistency certification for the proposed project. The Appellant based her appeal on Ground I. To prevail, the Appellant must show that the proposed activity satisfies all four requirements set forth in 15 C.F.R. § 930.121 which define "consistent with the objectives or purposes of the Act."

Upon consideration of the information submitted by the Appellant, the State and several Federal agencies, the Secretary of Commerce found that the alternative proposed by the State of adding additional space to the existing restaurant structure was a reasonable, available alternative that would be consistent with the State's CMP. In order to find the fourth element of Ground I (15 C.F.R. § 930.121(d)) satisfied, the Secretary must find that there is no reasonable alternative to the Appellant's proposed project available that would permit the activity to be conducted in a manner consistent with the State's Coastal Management Program. Because the fourth element of Ground I was therefore not met, it was unnecessary to examine the other three elements.

Conclusion

Because the Appellant's proposed project failed to satisfy the requirements of Ground I, and the Appellant did not plead Ground II, the Secretary did not override the State's objection to the Appellant's consistency certification, and consequently, the proposed project may not be permitted by Federal agencies.

DECISION

I. Background

In June of 1989, Claire Pappas (Appellant) applied to the U.S. Army Corps of Engineers (Corps) for a permit to construct a wood deck structure for dining over a canal as an addition to her seafood restaurant in Hemstead, New York.¹ Claire Pappas' U.S. Army Corps of Engineers Permit Application; Brief in Response to Notice of Appeal and Petition (State's Initial Brief) at 1. The Appellant proposes to construct a wood deck approximately 29 ft. long by 28.5 ft. wide on top of existing pilings which currently support two piers. Id.; Letter from Roy L. Haje, President, EN-Consultants, Inc. to Secretary of Commerce, March 9, 1990 (Notice), at 2. The piers are approximately 30 ft. long by 4 ft. wide and extend over the Woodcleft Canal, a navigable waterway, from an existing bulkhead at the rear of Appellant's restaurant. Id. The Appellant's record title extends 35 ft. under Woodcleft Canal. Appellant's Memorandum of Law at 1. The proposed project will enable the Appellant to increase the capacity of the restaurant by making use of a non-utilized existing feature the modification of which is relatively low cost. Notice at 7, 8. The sole use of the deck will be restaurant seating and dining. Appellant's Memorandum of Law at 1.

In conjunction with that Federal permit application the Appellant submitted to the Corps and the New York State Department of State (State) New York's coastal management agency, under section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A), a certification that the proposed activity was consistent with New York's Federally-approved Coastal Management Program (CMP). On August 28, 1990, the State notified the Appellant that her certification and supporting information were received on August 21, 1991, and that the State's review commenced on that date. Letter from F.M. Bennett, Consistency Coordinator, New York State Department of State, to Roy L. Haje, President, EN-Consultants, Inc.

On February 15, 1990, the State objected to the Appellant's consistency certification for the proposed project on the ground that the project is not in accordance with New York's coastal management public policies and objectives of facilitating the siting of water dependent uses and facilities on or adjacent to coastal waters. Letter from George R. Stafford, Special Deputy Secretary of State, New York State Department of State, to Roy L. Haje, President, EN-Consultants, Inc. In the objection letter, however, the State did propose alternative measures which, if

¹ The Corps permit is required by section 10 of the Rivers and Harbors Act of 1899, as amended, 33 U.S.C. § 403.

adopted, would permit the Appellant's proposed activity to be conducted in a manner consistent with New York's CMP. Specifically, the State proposed that the Appellant re-locate the proposed deck to an upland area, that the Appellant make more efficient use of existing restaurant floor space, or that the Appellant add space to the existing restaurant structure, including adding a second story dining section. Id. In addition to explaining the basis of its objection, the State also notified the Appellant of her right to appeal the State's objection to the Department of Commerce (Department) as provided under CZMA section 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H. Id.

Under CZMA section 307(c)(3)(A) and 15 C.F.R. § 930.131 (1988), the State's consistency objection precludes Federal agencies from issuing a permit for the activity unless the Secretary of Commerce (Secretary) determines that the activity may be Federally approved, notwithstanding the State's objection, because the activity is either consistent with the objectives of the CZMA, or necessary in the interest of national security.

II. Appeal to the Secretary of Commerce

On March 13, 1990, in accordance with CZMA section 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, the Appellant filed with the Department a notice of appeal from the State's objection to the Appellant's consistency certification for the proposed project. The parties to the appeal are Claire Pappas and the State of New York.

The Department set a briefing schedule and solicited comments from the public and from interested agencies. On June 29, 1990, after the Appellant perfected the appeal by filing supporting data and information pursuant to 15 C.F.R. § 930.125,² the State filed a response to the appeal. State's Initial Brief. On June 12, 1991, the Department solicited the views of five Federal agencies³ on the four regulatory criteria that the project must meet for the Secretary to find it consistent with the objectives or purposes of the CZMA. The criteria appear at 15 C.F.R. § 930.121, and are discussed below.⁴ Four of the agencies

² On April 23, 1990, Mr. Roy L. Haje filed additional information in support of Appellant's appeal. Letter from Roy L. Haje, President, EM-Consultants, Inc., to Stephanie Campbell, NOAA Office of General Counsel for Ocean Services. In addition, on May 1, 1990, counsel for Appellant filed a Memorandum of Law in support of Appellant's appeal.

³ Comments were requested from the Army Corps of Engineers, the U.S. Department of Interior - Fish and Wildlife Service (FWS), the Environmental Protection Agency, the U.S. Coast Guard, and the National Marine Fisheries Service.

⁴ See infra at 4-5.

solicited responded.⁵ Public notice of the filing of the appeal and comments on the issues germane to the decision in the appeal were solicited by way of notices in the Federal Register, 55 Fed. Reg. 23781 (June 12, 1990) (request for comments), and Newsday (June 4-6, 1990). The Department received three comments opposing the proposed deck.

After the comment period closed, the Department gave the parties an opportunity to file a final response to any submittal filed in the appeal. The Appellant did so on December 31, 1990.⁶ Final Brief of Claire Pappas (Appellant's Final Brief). The State filed its response on January 28, 1991. Final Response to Submissions Filed (State's Final Brief). All materials received by the Department during the course of this appeal are included in the administrative record. However, only those comments that are relevant to the statutory and the regulatory grounds for deciding an appeal are considered. See Decision and Findings in the Consistency Appeal of Amoco Production Company (Amoco Decision), July 20, 1990, at 4.

III. Grounds for Reviewing an Appeal

Once I determine that an objection has been properly lodged⁷ and that the Appellant has filed a perfected appeal, I then determine, based on all relevant information in the record of the appeal, whether the grounds for Secretarial override have been satisfied. Since the State's objection was timely made and described how the proposed activity was inconsistent with specific, enforceable elements of the CMP, I conclude that the State's objection was properly lodged. See CZMA section 307(c)(3)(A); 15 C.F.R. §§ 930.64(a), (b).⁸

Section 307(c)(3)(A) of the CZMA provides that Federal licenses or permits required for the Appellant's proposed activity may not be issued until either the State concurs in the consistency of

The FWS did not respond.

⁶ Mr. Roy L. Haje, President, EM-Consultants, Inc. also filed a response on behalf of the Appellant on January 14, 1991.

⁷ Consistent with past consistency appeals, I have not considered whether the State was correct in its determination that the proposed activity was inconsistent with New York's CMP. Rather, the scope of my review of the State's objection is limited to determining whether it complied with the requirements of the CZMA and its implementing regulations. See Decision and Findings in the Consistency Appeal of Jose Perez-Villamil (Villamil Decision), November 20, 1991, at 3.

⁸ As a threshold issue, the Appellant argues that a permit from the Corps was not required for her proposed project. Notice at 2. The Appellant argues further that because a Corps permit was not required, the State does not have jurisdiction to review her project for consistency with its CMP. Id. As stated in prior consistency appeal decisions, the CZMA does not authorize the Secretary to examine another Federal agency's decision to require a permit or license. Decision and Findings in the Consistency Appeal of Exxon Company, U.S.A., (Exxon Decision), June 14, 1989, at 4. Therefore, because the Appellant was required by the Corps to apply for a permit for her proposed project and because the Appellant's permit application is pending before the Corps, I find that the State has jurisdiction to review the Appellant's project.

such activity with its Federally-approved coastal zone management program, or the Secretary finds that the activities are (1) consistent with the objectives of the CZMA (Ground I) or (2) otherwise necessary in the interest of national security (Ground II). See also 15 C.F.R. § 930.130(a). The Appellant has pleaded only Ground One.

To find that the proposed activity satisfies Ground I, the Secretary must determine that the activity satisfies all four of the elements specified in 15 C.F.R. § 930.121. These elements are:

1. The proposed activity furthers one or more of the competing national objectives or purposes contained in §§ 302 or 303 of the CZMA. 15 C.F.R. § 930.121(a).
2. When performed separately or when its cumulative effects are considered, it will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest. 15 C.F.R. § 930.121(b).
3. The proposed activity will not violate any of the requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended. 15 C.F.R. § 930.121(c).
4. There is no reasonable alternative available (e.g., location[,] design, etc.) that would permit the activity to be conducted in a manner consistent with [New York's coastal] management program. 15 C.F.R. § 930.121(d).

Because the fourth element is dispositive of this case, I turn immediately to it.

IV. Element Four: Whether there is a Reasonable, Available Alternative.

Whether the fourth element of Ground I (15 C.F.R. § 931.21(d)) is satisfied is usually decided by evaluating the alternative(s) proposed by a state in the consistency objection. See Decision and Findings in the Consistency Appeal of Chevron U.S.A. (Chevron Decision), October 29, 1990, at 58; Decision and Findings in the Consistency Appeal of Long Island Lighting Company (LILCO Decision), February 26, 1988, at 16. The Department's regulations at 15 C.F.R. § 930.64(b) provide in part that "state agency objections must describe . . . alternative measures (if they exist) which, if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the management program." As discussed in the Korea Drilling Decision, requiring a state to identify alternatives serves two

purposes:

First, it gives the applicant a choice: adopt the alternative (or, if more than one is identified, adopt one of the alternatives) or, if the applicant believes all alternatives not to be reasonable or available, either abandon the proposed activity or appeal to the Secretary and demonstrate the unreasonableness or unavailability of the alternatives. Second, it establishes that an alternative is consistent with a State's program because the State body charged by the Act with determining consistency makes the identification of the alternative.

Decision and Findings in the Consistency Appeal of Korea Drilling Company (Korea Drilling Decision), January 19, 1989, at 23.

In this case, the State proposed several alternatives in its objection letter that would permit the activity to be conducted in a manner consistent with the State's CMP.⁹ Letter from George R. Stafford, Special Deputy Secretary of State, New York State Department of State, to Roy L. Haje, EN-Consultants, Inc., February 15, 1990. Specifically, the State proposed that the Appellant re-locate the dining deck to an upland area, that the Appellant make more efficient use of existing restaurant floor space, or that the Appellant add space to the existing restaurant structure, including adding a second story dining section. Id. In its submissions, the State reasserts the alternatives proposed in its February 15, 1990, objection letter and, in addition, points out that since the filing of her consistency certification the Appellant has constructed an enclosed addition on an existing deck on the water side of her restaurant. State's Initial Brief at 34; State's Final Brief at 8. In essence, the State is arguing that the Appellant has implemented one of the alternatives the State proposed in its objection letter, i.e., adding space to the existing restaurant structure.

Once an alternative(s) is proposed by a state, an appellant, in order to prevail on element four, has the burden of demonstrating that the alternative(s) is unreasonable or unavailable. See Korea Drilling Decision, at 24. The Appellant, in her submissions, contends that the alternatives proposed by the State are "unworkable." Notice at 8. Specifically, because the Appellant's restaurant almost fully utilizes the available waterfront uplands, the Appellant argues that there is no suitable upland alternative. Id.; Memorandum of Law at 9; Appellant's Final Brief at 1. In addition, the Appellant contends that no additional dining area is available in the

23 The initial burden of describing any alternative is on the State. See Korea Drilling Decision at

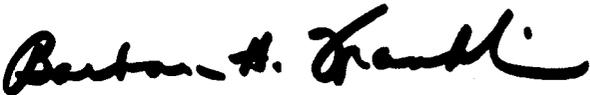
restaurant. Notice at 8. Finally, the Appellant argues that use of the roof of the restaurant would require costly structural and mechanical modifications to the structure of the restaurant resulting in a negative cost/benefit for this alternative. Notice at 8. However, the Appellant fails to address in any of her submissions the State's contention that, since the filing of her consistency certification, the Appellant has constructed an enclosed addition on an existing deck on the waterside of her restaurant.

The administrative record establishes that on October 23, 1989, the Appellant submitted an application to the Department of Buildings, Freeport, New York, to construct a 400 sq. ft. addition to the rear of the existing restaurant structure. State's Initial Brief, Exhibit Z. That application was approved on December 20, 1989. Id. The record also establishes that sometime between the approval of her application and June 19, 1990, the Appellant constructed an enclosed addition to the waterside of her restaurant on top of an existing waterfront deck. State's Initial Brief, Exhibit AA.

I am unpersuaded by the Appellant's general conclusory assertions that the alternatives proposed by the State are "unworkable." Indeed, the Appellant, by constructing an addition to her restaurant, has established that the alternative proposed by the State of adding space to the existing restaurant structure is available and reasonable. Therefore, the Appellant has failed to satisfy her burden of proof under element four. Accordingly, I find that there is an available, reasonable alternative that would permit the Appellant's proposed project to be conducted in a manner consistent with New York's CMP.

Conclusion

Because the Appellant must satisfy all four elements of the regulation in order for me to sustain her appeal, failure to satisfy any one element precludes my finding that the Appellant's project is "consistent with the objectives or purposes of the [CZMA]." Having found that the Appellant has failed to satisfy the fourth element of Ground I, it is unnecessary to examine the other three elements. Therefore, I will not override the State's objection to the Appellant's consistency certification.



Secretary of Commerce