U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION
Date: 17 July 2008

ADMINISTRATIVE APPEAL DECISION

PRECON DEVELOPMENT CORPORATION, INC.
NORFOLK DISTRICT FILE NAO-2007-240

Review Officer: James W. Haggerty, U.S. Army Corps of Engineers, North Atlantic Division

Appellant: Precon Development Corporation, Inc.

Appellant's agent: Mark R. Baumgartner, Esq., Pender & Coward Attorneys & Counsellors at Law

Date of Receipt of Request for Appeal: 10 September 2007

Date of Acceptance of Request for Appeal: 2 October 2007

Appeal Conference/Site Visit Date: 30 October 2007

NAD-ACCEPTED REASONS FOR APPEAL:

NAD accepted the following reasons for appeal as enumerated by the agent in the attachment to the Request for Appeal dated 10 September 2007:

1. The Norfolk District's determination to deny the permit was wrong. The balance of the statutory and regulatory factors clearly justifies approval of the permit; and
2. The Norfolk District's conclusion that there were practicable alternatives with less environmental impacts than the proposed project's impacts was erroneous.

BACKGROUND INFORMATION:

On 11 July 2007, the Norfolk District ("the district") denied an application for a Department of the Army ("DA") permit submitted by Precon Development Corporation, Inc. ("Precon") requesting authorization for the discharge of fill material into approximately 4.8 acres of freshwater wetlands to construct a portion of the CC1b residential section of the 658-acre Edinburgh Planned Unit Development ("PUD") in the City of Chesapeake, Virginia.

This site has an extensive history with the district dating back to 2001. Portions of the PUD have been previously authorized by an individual Department of the Army permit (for the CC2a residential component) and Nationwide Permit No. 32 (predominantly for commercial development in the eastern portion of the PUD). The district received the permit application for the portion of the CC1b section of the PUD on 4 January 2007, which requested authorization to impact 10.7 acres of forested wetlands to facilitate construction of a recreation facility, a portion of a pedestrian walkway, and 10 residential lots. The remainder of the CC1b section was previously constructed in non-jurisdictional areas of the project site. On 20 June 2007, the district requested that the applicant provide information related to alternatives for the proposal.

The applicant responded on 28 June 2007 with a revised proposal wherein the recreational facility was eliminated from the plans and the proposed impacts to wetlands reduced to 4.8 acres. However, according to the district's Statement of Findings and Environmental Assessment ("SOF/EA"), the alternatives analysis submitted by the applicant on 28 June 2007 for this particular permit application was performed for the entire PUD and not specifically for impacts associated with construction of the 10 residential lots. Also, according to the district, the applicant presented the entire PUD as a single and complete project in a December, 2003 permit application, and the district issued the permit for the CC2a component of the PUD after determining that the least environmentally damaging practicable for the overall PUD included eliminating the 10 CC1b residential lots, among other features, from the project. On the basis of this information, the district concluded that the current proposal did not comply with the Section 404 (b)(1) Guidelines since the applicant failed to rebut the presumption that practicable alternatives exist to their proposal to develop the 10 residential lots.

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

The district provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal. Also, the request for appeal included issues associated with Clean Water Act jurisdiction on the site; those issues have been addressed as part of a previous administrative appeal decision for this site.

DECISION:

The appellant's request for appeal does not have merit. The district correctly determined that the proposed discharge of fill material into waters of the United States does not comply with the 404 (b)(1) Guidelines because the applicant did not rebut the presumption at 40 CFR Part 230.10 (a) that practicable alternatives are presumed to exist for proposals involving such discharges into special aquatic sites for non-water dependent activities.

EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:

First Accepted Reason for Appeal: The Norfolk District's determination to deny the permit was wrong. The balance of the statutory and regulatory factors clearly justifies approval of the permit.

Discussion: In Part II of the memorandum attached to the request for appeal, the appellant's agent states his belief that the district's conclusion regarding the existence of less damaging "...*practical* (emphasis added) alternatives to Precon's proposal is erroneous", also that the layout for the proposed 10-lot development has been revised in order to minimize impacts to wetlands. The agent went on to point out that the district's Statement of Findings and Environmental Assessment ("SOF/EA") found no adverse impact upon over one dozen public interest review factors, and opined that the decision was based upon an erroneous application of 40 CFR 230.10 (a)(3). Specifically, the agent believes that since the wetlands on the

property are miles away from open waters, instead of constituting a transition between open waters and uplands, the rebuttable presumption does not apply.

Second Accepted Reason for Appeal: The Norfolk District's conclusion that there were practicable alternatives with less environmental impacts than the proposed project's impacts was erroneous.

Discussion: The agent states that the 10 lots in question are already owned by the appellant, front upon existing municipally approved roads, and are located adjacent to existing utilities including potable water and sanitary sewer lines. The agent also states it is "patently impracticable" to require the applicant to purchase other land, obtain necessary zoning and environmental approvals, and also install utilities without being able to sell or otherwise utilize the existing parcel. In addition to avoidance of impacts, compensatory mitigation at a 2:1 ratio has been offered to offset environmental impacts.

DETERMINATION AND OVERALL CONCLUSION:

The district's decision to deny the permit application was based on the applicant's failure to comply with the 404 (b)(1) Guidelines. Specifically, the district determined that the applicant failed to rebut the presumption at 40 CFR Part 230.10 (a)(3) that practicable alternatives exist to proposed discharges of dredged or fill material into special aquatic sites for non-water dependent activities. The applicant, through this permit application, sought approval to construct 10 residential lots. This proposed project is considered a non-water dependent activity in accordance with this part of the Guidelines in that it does not require access or proximity to, or siting within, a special aquatic site to fulfill the basic purpose of the project. In this case, discharges of fill material were proposed into freshwater wetlands; these are considered to be special aquatic sites in accordance with 40 CFR Part 230.41, As a result, the more stringent Guidelines requirements at 40 CFR 230.10 (a)(3) apply.

The main rationale for the district's determination stems from review of a previous permit application for development of a portion of the same overall PUD site. To meet the requirements of 33 CFR Part 325.1 (d)(2), the applicant had to include in that permit application all activities which it planned to undertake which are reasonably related to the same project and for which a DA permit would be required. The administrative record indicates that the district informed the applicant that it had to include all remaining proposed wetland impacts on the PUD site in one permit application. In a 21 April 2006 letter, the District Commander confirmed an agreement made with the applicant at an 18 April 206 meeting that the applicant agreed to eliminate from the site plans the 10 proposed CC1b residential lots plus other features. The district also informed the applicant that any future application for additional wetland impacts would be considered on its own merits and not interdependent with the remainder of the PUD. Consequently, the district required the scope of alternatives for the current proposal to include offsite properties.

In its 28 June 2007 response to the district's request for an analysis of alternatives for the 10-lot project, the applicant submitted such an analysis for the entire PUD site in lieu of an analysis of alternatives for the 10-lot proposal. As discussed in the SOF/EA, the district determined that submission of the alternatives analysis for the entire PUD site supports its conclusion that the 10 lots should be considered part of the overall PUD site and not a separate and complete project unto itself, thus reinforcing the requirement imposed upon the applicant to include offsite properties in its analysis of alternatives for the 10-lot project.

The administrative record supports the district's determination that the appellant's alternatives analysis for this permit application did not rebut the presumption of the existence of a less damaging practicable alternative. As stated at 40 CFR Part 230.10 (a), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. Since the appellant has not rebutted the presumption that practicable alternatives exists for its proposal, the district was required by regulation to deny the permit application exclusive of other parameters such as private and public need for the project, its anticipated environmental impacts, and evaluation of public interest factors.

I hereby uphold the district's decision in this matter, and accordingly the administrative appeals process for this permit action is hereby concluded.

TODD T. SEMONITE
Brigadier General, USA
Commanding