



**Commission Meeting of July 21, 2010
SCWA Training Center, Coram, New York**

Present: Peter Scully (State of New York), Mark Lesko (Town of Brookhaven), Carrie Meek Gallagher (Suffolk County), Jill Lewis (Town of Riverhead), Anna Throne-Holst (Town of Southampton)

**Adopted Resolution on the Core Preservation Area Extraordinary Hardship
Application of the American Physical Society
Ridge, Town of Brookhaven
SCTM No. 200-459-1-1.4**

Peter A. Scully
Chair

Mark Lesko
Member

Steve A. Levy
Member

Anna E. Throne-Holst
Member

Sean M. Walter
Member

Whereas, the American Physical Society (the “APS”), by its attorneys, the Weber Law Group, filed an application by letter dated February 17, 2010 for a Core Preservation Area Extraordinary Hardship exemption permit for a 16,274 square foot second-story expansion to an existing 31,062 square foot commercial office building (the “Project”) in the Core Preservation Area of the Central Pine Barrens; and

Whereas, APS has owned since 1979, a five (5.0) acre project site located on the west side of William Floyd Parkway (County Route 46), in the Core Preservation Area of the Central Pine Barrens, SCTM No. 200-459-1-1.4 containing an existing 31,062 square foot commercial office building, 133 parking spaces, and associated infrastructure; 1.55 acres of existing natural area; and

Whereas, APS’ February 17, 2010 petition included an analysis of the hardship criteria contained in ECL §57-0121(10) in support of its Waiver application; APS submitted additional information to the Commission by letters dated May 14, 2010, June 10, 2010, and July 8, 2010; and

Whereas, the Commission held a hearing on the Project on April 21, 2010; and

Whereas, the Commission, by resolution dated December 12, 1994 granted APS a Core Hardship Waiver to authorize a 12,000 square foot expansion of the building on site, which was then 18,000 square feet (the 1994 Waiver); the Waiver was subject to two conditions: “1. There shall be a physical delineation in the field of the limit of clearing for the building and associated construction activities; and 2. The building addition shall be designed and constructed in such a manner that any future expansion needs of the sponsors may be accommodated by vertical expansion above the new addition;” and

Whereas, the Commission by resolution dated March 16, 2006 issued APS a “non-development” determination authorizing the removal of six trees “in order to permit emergency vehicle access, improve employee safety, and to protect APS’ services and assets;” and

Whereas, the Project requires APS’ on site septic system be expanded and upgraded to accommodate an additional 985.5 gallons per day (gpd) increase in sanitary flow, for a total of 2,748.5 gpd, which exceeds the as of right sanitary flow of 1,500 gpd and current flow of 1,762 gpd, which the current flow rate was granted a Waiver in 1997 by the Suffolk County Department of Health; and

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Whereas, the Project requires the removal of 2,613.6 square feet or 0.06 acres of natural vegetation (1.2 percent of the site area); 27 additional parking spaces, for a total of 160 spaces on site; and the reconfiguration of internal driveways and the site ingress/egress access on CR 46; and

Whereas, APS' Proposed Vegetation Plan prepared by Cameron Engineering dated June 2010, proposes the restoration of an estimated 1.14 acres (49,658.4 square feet) from developed to vegetated, of which 0.41 acres will be revegetated with native plant species and 0.73 acres will be maintained as managed landscape vegetation; and

Whereas, the Project requires a New York State Department of Environmental Conservation (DEC) Wild Scenic and Recreational Rivers (WSRR) Permit; Town of Brookhaven Site Plan approval and relief from the Town Code of the Town of Brookhaven for a 41.5 percent parking variance; relief from the Suffolk County Sanitary Code for the increase in 985.5 gpd sanitary flow over the existing flow of 1,762 gpd for a total projected flow of 2,748.5 gpd and retirement of 3.29 sanitary wastewater credits; and Suffolk County Department of Public Works review and approval for modifications to the existing curb cut and driveway on a County Road 46; and

Whereas, the DEC, by letter dated July 8, 2010, stated, "[o]n April 1, 2010, we advised this property owner that a DEC permit was necessary. However, we have not received an application from the landowner. At this time we have no comments regarding their proposal due to the lack of sufficient information about the project;" and

Whereas, the Suffolk County Department of Health Services (SCDHS) Office of Wastewater Management has issued APS a "Notice of Incomplete Application" dated April 30, 2010 for the Project; and

Whereas, the SCDHS Notice of Incomplete Application referenced the use of Pine Barrens Credits (PBCs) to exceed the allowable on site density; however, the Commission finds that the redemption of PBCs on a project site in the Core Preservation Area is contrary to the spirit and intent of the Act and the Comprehensive Land Use Plan and recommends that APS purchase and retire a minimum of 3.29 sanitary wastewater credits to comply with Article 6; and

Whereas, the Commission has indicated in policy preference that PBCs not be redeemed in the Core in Section 6.5.3.2.3 of the CLUP, which states, "No ROD may include any land within the Core Preservation Area or any Critical Resource Area," and

Whereas, pursuant to the Town of Brookhaven Town Code Article XXXVII Central Pine Barrens District §85-451, Incentive Zoning (B)(2), "The redemption of Pine Barrens development credits may be utilized to obtain an increase in density or intensity of development in connection with development proposals for parcels, lots and assemblages located outside of the Core Preservation Area subject to the review and approval by the Town Board or Planning Board as the case may be;" and

Whereas, APS' attorney stated during the public hearing on the Project, "[w]e are well aware of the question of Pine Barrens credits. We have had conversations with the Health Department and County with regard to the ability to find other sanitary credits in hydrological zone three. We're attempting to do so that so the issue of Pine Barrens Credits as a redemption would not have to be considered. We have not been able to find them yet, but that does not mean

we won't still try so that the additional septic sewage expansion can be done in a way that meets the criteria of the Health Department yet does not force the Commission to issue a ruling on something that may have a precedent. We don't want to have to set a precedent if we don't have to," and

Whereas, APS, in its June 10, 2010 letter, stated that they acknowledged the position of the Pine Barrens Credit Clearinghouse and were actively pursuing sanitary credits under the SCDHS Division of Environmental Quality TDR program; and

Whereas, the Project is an Unlisted Action pursuant to Article 8 of the Environmental Conservation Law (State Environmental Quality Review Act, SEQRA), and the Commission performed a coordinated review for Lead Agency status; and

Whereas, no objections were raised by Involved Agencies concerning the Commission's desire to assume Lead Agency status; and

Whereas, the Commission has considered the application and all related documents, including the Full Environmental Assessment Form (EAF) submitted by APS and the EAF Part II; and

Whereas, pursuant to the criteria contained in ECL §57-0121(10), APS has satisfied the conditions for and has demonstrated extraordinary hardship as the Project is unique as the site contains a pre-existing commercial building continuously occupied by the same owner since prior to the enactment of ECL Article 57; and

Whereas, pursuant to APS' demonstration of extraordinary hardship as per ECL §57-0121(10)(a), APS has satisfied the conditions for demonstrating extraordinary hardship as APS designed the proposal in harmony with the project site's physical surroundings and boundary constraints due to the site's location in the Core Preservation Area, with the objective to minimize disturbance to existing natural vegetation to the greatest extent practicable, and in accordance with the condition imposed by the Commission in its December 14, 1994 resolution to accommodate future expansions of the building on a vertical plane rather than expanding the existing building laterally, which would result in a greater amount of disturbance and adverse impacts to the site than the current proposal; and

Whereas, the Project is consistent with the Act which contemplated continuation of pre-existing uses within the Core Preservation Area, and pursuant to ECL §57-0121(10)(a)(i) through (iii), APS has satisfied the conditions for and has demonstrated extraordinary hardship as the project site was originally developed in 1979 with subsequent expansions, including one since the enactment of Article 57, for which APS was granted the 1994 Waiver; APS has owned and occupied the facility since 1979, APS, a publisher of physics journals, has invested more than 30 years in this location as their headquarters, established their editorial staff in proximity to and close association with nearby Brookhaven National Laboratory, a major physics research facility, and the surrounding community, and employs skilled scientists with an objective toward the dispersion of the findings of scientific research to the benefit the knowledge and awareness of the scientific community and others; and

Whereas, pursuant to ECL §57-0121(10)(iii), the Commission granted the 1994 Waiver which stated that any future additions be accommodated by vertical expansion; and therefore the inability to have a beneficial use was not the result of action or inaction by APS or prior owners; and

Whereas, pursuant to ECL §57-0121(10)(c), the Project will not be materially detrimental or injurious to other property or improvements in the area or result in endangering public safety or substantial impairment of the resources of the Core; APS has met these additional standards for granting a hardship permit in the Core due to the concentration of the majority of disturbance in areas of the site which were already developed, the containment of all physical activity within the subject site, and the minimal amount of on site disturbance in areas not formerly disturbed, and

Whereas, pursuant to ECL §57-0121(10)(c)(ii), the waiver is not inconsistent with the purposes, objectives or general spirit and intent of this title; the waiver is consistent with the purposes, objectives, and general spirit of Article 57 as the project site was developed prior to the Act and the current plan preserves existing natural vegetation, ecologic, and hydrologic functions of the Pine Barrens through the restoration of 0.41 acres, which is more than six times the 0.06 acres area that is proposed for disturbance, and the additional septic flow as a result of the expansion is offset and mitigated through a no net increase in flow upon the sterilization of 3.29 sanitary wastewater credits in the region; and

Whereas, pursuant to ECL §57-0121(10)(iii), the waiver is the minimum relief necessary to relieve the extraordinary hardship on behalf of APS to meet their needs and minimize adverse impacts on the project site in the Core Preservation Area to the greatest extent practicable and in accordance with the condition previously established by the Commission in the grant of the 1994 Waiver; and

Whereas, the Commission has considered all materials submitted in connection with the application, now, therefore, be it,

Resolved, that pursuant to the New York State Environmental Conservation Law (ECL) Article 8 (State Environmental Quality Review Act (SEQRA)) 6 NYCRR Part 617, the Commission hereby adopts a Negative Declaration pursuant to SEQRA for the Project, and be it further

Resolved, that the Commission hereby determines the application, as submitted, meets the criteria for Core Preservation Area Hardship based on extraordinary hardship pursuant to New York State ECL §57-0121 (10) (a) and (c) and be it further

Resolved, the Commission finds that based on the 1994 Waiver, which identified and contemplated the potential for future vertical expansion, the instant Waiver is not inconsistent with the purposes, objectives, or general spirit and intent of ECL Article 57; and be it further

Resolved, the Commission finds that APS has designed the proposal in harmony with the project site's physical surroundings and boundary constraints, with minimal disturbance to existing natural vegetation to the greatest extent practicable, and in accordance with the condition imposed by the Commission in its 1994 Waiver resolution to accommodate future expansions of the building on a vertical plane rather than expanding the existing building laterally; and be it further

Resolved, pursuant to ECL §57-0121(10)(a)(i) through (iii), the Commission finds that APS has satisfied the conditions for and has demonstrated extraordinary hardship as the project site was developed in 1979, owned, and operated by one continuous owner, APS, a publisher of scientific journals, which has established their headquarters and scientific staff in proximity to

Brookhaven National Laboratory, a major physics research facility, employs scientists with the objective to maintain awareness of emerging and important scientific research to the scientific community, and desires to continue to maintain their presence and close ties to BNL and the community from their pre-existing and current location in the Core, which is consistent with this title; and be it further

Resolved, pursuant to ECL §57-0121(10)(c), the Commission finds that APS has satisfied the conditions for and has demonstrated extraordinary hardship as the majority of proposed minimal site disturbance is in areas of the project site that are formerly disturbed and were planned to be developed under prior approvals, therefore, the project will not be materially detrimental or injurious to other property or improvements in the area or result in endangering public safety or substantial impairment of the resources of the Core; and

Resolved, pursuant to ECL §57-0121(10)(c)(ii), the Commission finds that APS has satisfied the conditions for and has demonstrated extraordinary hardship as the pre-existing nature of development on the project site and the current proposal aim to preserve existing natural resources and hydrologic functions of the Pine Barrens through the restoration of 0.41 acres of previously disturbed area and the sterilization of 3.29 sanitary wastewater credits resulting in no net groundwater impacts in Hydrogeologic Zone III, the waiver is not inconsistent with the purposes, objectives or general spirit and intent of this title; and be it further

Resolved, pursuant to ECL §57-0121(10)(iii), the waiver is the minimum relief necessary to relieve the extraordinary hardship on behalf of APS to meet the needs of the existing American Physical Society headquarters and to minimize adverse impacts on the Core and in accordance with the condition previously established by the grant of the 1994 Waiver; and

Resolved, that APS plans to minimize the impact on the resources of the Core Preservation Area to the maximum extent practicable and mitigates such impacts by the implementation of a restoration plan; and

Now therefore be it resolved

Resolved, that the application is for a Core Preservation Area hardship exemption based on extraordinary hardship approved by the Commission, on this day, July 21, 2010, in accordance with the Vegetation Plan prepared by Cameron Engineering dated June 2010 and date stamped received July 12, 2010, subject to the following specific conditions:

1. Obtain a DEC WSRR Permit and forward a copy to the Commission prior to site disturbance; and
2. Obtain SCDHS approval prior to site disturbance and forward a copy to the Commission prior to site disturbance and include proof of the retirement of 3.29 sanitary credits; and
3. APS must implement mitigation measures identified in this decision as conditions to the Waiver granted herein and APS must adopt, implement, and strictly comply with the same; and
4. APS shall purchase and retire a minimum of 3.29 sanitary wastewater credits, which must not be in the form of Pine Barrens Credits, at the Suffolk County Department of Health Services, to comply with Suffolk County Sanitary Code Article 6. Submit proof of this transaction to the Commission prior to site disturbance; and
5. The project site is not eligible for a credit allocation in the Pine Barrens Credit Program; and

6. Submit to the Commission for review and receive Commission approval of a restoration plan for 0.41 acres with specifications for planting including native species, spacing, maintenance, and irrigation requirements; and
7. Submit for Commission approval a draft Declaration of Covenants and Restrictions (C & Rs) to protect a minimum of a total of 1.96 acres of the project site, which APS proposed as the total area to remain natural (i.e., 1.55 acres of existing natural area and 0.41 acres of restored area). The C & Rs shall include a requirement for APS to ensure the survivability and maintenance of the restored area for a minimum of three years, at which time the Commission will perform a compliance inspection of the restored area; and
8. Notify the Commission within 48 hours in advance of the commencement of site disturbance activity on the project site to provide for Commission inspection of the site disturbance limits; and
9. Restore 0.41 acres of the project site, excluding the existing 1.55 acres to remain natural; and
10. Upon completion of the restoration work, notify the Commission to allow the Commission to perform a compliance inspection of the restored area; and
11. Record the C & Rs after the Commission approves the same.

now therefore be it

Resolved, if any changes occur in the elements of the project including, but not limited to, the proposal to sterilize 3.29 sanitary credits at the Health Department to exceed the current wastewater flow, APS must notify the Commission and submit an amended application, subject to review and approval; and be it further

Resolved, a copy of this resolution shall be filed with the Suffolk County Clerk indexed against the property; and be it further

Record of Motion:

Motion by: M. Lesko

Seconded by: C. Gallagher

In Favor: 4

Opposed: 0

Abstention: 1 (P. Scully)