

IN THE MATTER OF : **APPLICATION NO.**
: **IW 99-122**

GREY ROCK DEVELOPMENT , L.L.C. : **AUGUST 22, 2002**

FINAL DECISION ON REMAND

I. **INTRODUCTION**

On April 4, 2002, the Superior Court (Schuman, J.) remanded for further proceedings *Ambrose v. Commissioner of Environmental Protection*, Superior Court, No. CV-02-05512642 S, an administrative appeal from the *Final Decision* in the above-captioned matter. The scope of the remand focuses upon resolving whether, according to General Statutes § 22a-42a (c)(1), “the material filed with the Town of Seymour Inland Wetlands Commission (SIWC) in September, 1999, constitute[s] a new ‘application’ so as to trigger a new time period that would make Grey Rock’s appeal to the department premature.” *Memorandum of Decision* at 5.

In its *Memorandum of Decision*, the court states that it will retain jurisdiction of the case pursuant to § 4-183 (h) and that the Department of Environmental Protection (department) “shall file any modifications, new findings, or decisions with the reviewing court.” *Memorandum of Decision* at 5 n.3 and 6. The department’s proceedings are to be based on the existing administrative record as modified by the court. *Memorandum of Decision* at 2 n.1 and 6.

This matter involves a permit application submitted by Grey Rock Development, LLC (Grey Rock) to the department on or about October 21, 1999 to conduct regulated activities in 0.018 acres of wetlands in conjunction with

construction of a single-family residence, lawn and driveway in the Town of Seymour. The application was filed pursuant to § 22a-36 through 22a-45, the *Inland Wetlands and Watercourses Act (IWWA)*,

On December 6, 2000, I issued a *Final Decision* adopting the hearing officer's recommendation in the *Proposed Final Decision* to grant the above-captioned application in accordance with the draft permit as modified in the *Proposed Final Decision*. On remand, the conclusions of both the *Proposed Final Decision* and the *Final Decision* are upheld.

II. PRELIMINARY ISSUE

As stated above, the remand by the court focuses upon resolving the following issue: whether, according to § 22a-42a(c) (1) of the IWWA, “the material filed with the SIWC in September, 1999, constituted a new ‘application’ so as to trigger a new time period that would make Grey Rock’s appeal to the department premature.” *Memorandum of Decision* at 5. In order to address this issue, the character and significance of the site plan revision filed by Grey Rock before the SIWC in September, 1999 needs to be examined. The court directs the department to consider this issue based upon the existing administrative record as modified by the court. *Memorandum of Decision* at 6.

Footnote 1 on page 2 of the *Memorandum of Decision* states that “[a]t the argument of this case, the court supplemented the record with six court exhibits in order to remedy some confusion in the existing record and to add several items that the [department] had in its files but were not presented to the hearing officer. Court Exhibits 1 and 2 comprise the application submitted to the SIWC in April, 1999. Court Exhibit 3 is the document submitted to the SIWC in September, 1999. Court Exhibit 4 is a schematic attached to the application submitted to the department in October, 1999. Court Exhibits 5 and 6 consist of correspondence between the department and the Chairman of the SIWC.”

The conclusion of law regarding jurisdiction in the *Proposed Final Decision* found that “the SIWC failed to act within the requisite time period and ... the applicant was legally entitled to file its application with the

Commissioner.” Therefore, [t]he Commissioner properly reviewed and acted on the application in accordance with ... §22a-42a (c)(1).” *Proposed Final Decision* at 13.

Section 22a-42a (c)(1) provides, in pertinent part, that:

... If the inland wetlands agency, or its agent, fails to act on any application [originally filed with a municipal inland wetlands and watercourses agency] within thirty-five days after the completion of a public hearing or in the absence of a public hearing within sixty-five days from the date of receipt of the application, or within any extension of any such period, the applicant may file such application with the Commissioner of Environmental Protection who shall review and act on such application in accordance with this section...

In the *Proposed Final Decision* the hearing officer states that “the application was filed and received by the SIWC at its regularly scheduled meeting held on April 26, 1999, however, the SIWC did not render a decision or schedule and conduct a hearing on the application within sixty-five days of its receipt. The SIWC did not request an extension of time from the applicant during the time that the application was before it and the applicant did not withdraw its application at any time.” *Proposed Final Decision* at 12-13.

As part of this remand in this matter, I have reviewed the additional exhibits as directed by the court. The record now demonstrates that on April 14, 1999, Grey Rock submitted an application accompanied by a site plan to the SIWC and that in September, 1999, Grey Rock submitted a revised site plan to the SIWC. See *Court Exhibits 1-3*.

Even if the material submitted by Grey Rock in September, 1999 had been identified and addressed by the hearing officer in the *Proposed Final Decision*, it is not a “separate and distinct” application that procedurally would trigger a new time period for the SIWC to act on the application. It is merely a revision of the

original application. See *Julie Citrano v. Trumbull Planning and Zoning Commission*, 2001 Ct. Sup. 15238 (November 9, 2001).

When an applicant files successive applications for the same property, the court examines first whether the two applications seek substantially the same relief and second whether “there has been a change of conditions or other considerations have intervened which materially affect the merits of the matter.” *Laurel Beach Assn. v. Zoning Board of Appeals*, 66 Conn. App. 640, 645 (2001); *Bradley v. Inland Wetlands Agency*, 28 Conn. App. 48, 50-51.

In this case, the applicant did not submit successive applications as in the *Laurel Beach* case. Rather, on April 14, 1999 the applicant submitted to the SIWC an application supported and accompanied by a site plan. In September, 1999 the applicant submitted a revised site plan that also served as the companion piece to the original April, 1999 application. See *Court Exhibits* 1-3. Even if the September, 1999 submittal was viewed as an application as opposed to a revised site plan accompanying a previously submitted application and site plan, the site plan submitted by the applicant in September, 1999 was substantially the same as the site plan submitted on April 14, 1999. Substantially the same relief was requested and there is nothing in the record that indicates any change of conditions that materially affect the merits of this matter. As a result, the September, 1999 submittal was not a “separate and distinct” application that would trigger a new time frame upon which the SIWC could legitimately act upon the application under the provisions of § 22a-42a(c)(1).

The applicant, Grey Rock, sought substantially the same relief in both the April, 1999 and September, 1999 submittals: to build a house on lot #3 in the Robin Road Estates in Seymour. Consequently, the September, 1999 revised site plan displays less wetlands impacted than the April 14, 1999 submittal to the SIWC. See *Court Exhibit* 3. In the September 27, 1999 minutes of the SIWC the September, 1999, revisions of the site plan are described by Don Smith Jr. P.E. and partner of Grey Rock Development as follows: “The house placement has been moved to provide more level yard space. They will also build a 24” square cube trash rack to collect debris. There will also be a ten to twenty foot wide

buffer away from the wetlands. The plan also includes a four foot high retaining wall...that greatly reduces the impact on the wetlands from 1770 sq. ft. to 350 sq. ft.” See *Court Exhibits 3 and 6*. The revisions described by Mr. Smith demonstrate positive measures voluntarily proposed by the applicant to protect the wetlands. These types of revisions to the site plan do not represent a “separate and distinct” application but rather a modification or improvement of a previously submitted site plan that continues to support the original application filed on April 14, 1999. In fact, even the minutes of the September 27, 1999 meeting of the SIWC infer that Grey Rock’s submittal of “revised plans” was simply a continuation of a previous matter since it is listed as “old business”.

Since Grey Rock’s September, 1999 submission did not introduce a separate and distinct application, the submission of the September, 1999 material did not impact or hinder the department’s jurisdiction to review and act upon the application in accordance with § 22a-42a (c)(1). As a result, both the *Proposed Final Decision* and the *Final Decision* correctly concluded that the SIWC failed to act within the requisite time period, the applicant was legally entitled to file its application with the department, and the department properly reviewed and acted on the above-captioned application in accordance with § 22a-42a(c)(1).

III. FINDING OF FACT

I adopt the findings of fact set forth in the *Proposed Final Decision* dated November 15, 2000, and in the *Final Decision* dated December 6, 2000.

The following Finding of Fact is added after Finding of Fact 22 and before Finding of Fact 23:

22.a. In September, 1999, Grey Rock filed a document entitled “Site Development & Erosion Control Plan, Lot #3, Robin Road Estates” with the SIWC (Court Ex. 3.)

IV. ANALYSIS

I adopt the analyses set forth in the *Proposed Final Decision* dated November 15, 2000, and the *Final Decision* dated December 6, 2000.

At the end of the second paragraph of the notes section the following new sentence is added:

PART B.1. – Jurisdiction

Moreover, the revised site plan submitted by Grey Rock to the SIWC in September, 1999 was not a “separate and distinct” application that would trigger a new application but, rather, a revision to the original application submitted to the SIWC on April 14, 1999. See *Julie Citrano v. Trumbull Planning and Zoning Commission, supra*.

V. CONCLUSION

I adopt the conclusion of the *Final Decision* dated December 6, 2000.

August 22, 2002

/s/ Arthur J. Rocque, Jr.