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Meadowlands Commission Revises Master Plan, Rewrites Zoning Regulations — Finally

Changes are well thought out, but will pose new challenges for those seeking to develop and redevelop Meadowlands property

By Andrew R. Davis

For the first time in over 30 years, the New Jersey Meadowlands Commission has revised its Master Plan and rewritten its zoning regulations. The new plan and regulations to implement it were adopted on Jan. 8, 2004, and will take effect on Feb. 17, 2004.

To fully appreciate the environmental aspects of the new plan and rules, it is important to consider the history of the Meadowlands District and the Meadowlands Commission.

The vast urban estuary known as the Hackensack Meadowlands was created from volcanic and glacial activity approximately 17,000 years ago. Beginning in the 17th Century, and extending to the present day, various and sundry schemes have been attempted to reclaim, tame and develop por-

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tions of the Meadowlands.

Chapter 2 of the plan includes a comprehensive historical summary of the settlement of the district. Even more fascinating stories of the deeds and misdeeds of the early settlers of the Meadowlands are contained in John Quinn's book, *Fields of Sun and Grass: An Artist's Journal of the New Jersey Meadowlands*, (Rutgers Univ. Press 1997).

Noxious Debris and Phragmites Australis

For much of the 20th Century, the prevailing but ultimately misguided wisdom was that the swamps of the Hackensack Basin — which we now call wetlands — were unproductive, useless lands that had to be reclaimed for human use. Unfortunately, reclamation occurred principally by filling the wetlands with garbage and other more noxious debris.

By the late 1960s, vast quantities of solid, liquid and hazardous wastes were being openly dumped in the Meadowlands. Landfills with no engineering controls proliferated. Leachate and other nasty by-products of these wastes seeped into the ground, which is

flushed twice daily by the tide.

The resultant pollution of the estuary destroyed native habitat and severely diminished the diversity of species that had for generations thrived in the area. Mountains of unsightly, stinking and sometimes burning garbage became the identifying characteristic of the Meadowlands.

Indeed, for many people passing through Newark Airport or along the Turnpike, these images became the pathetic, albeit undeserved, hallmark of the Garden State.

This assault on the environment also fostered the virtually uncontrolled growth of *Phragmites australis* — the common reed so prevalent in the Meadowlands. There is no doubt that the fields of this hearty, 15-foot plant look pleasant enough — for example, swaying in the summer sun and breezes along the western spur of Turnpike and elsewhere in the district — but *Phragmites* are invasive and opportunistic, like crabgrass. They are incredibly resilient, pollution-tolerant and are strong enough to grow through asphalt.

While *Phragmites* have some value (they provide a level of shelter to certain wildlife) a vast monoculture of *Phragmites* presents problems. It is difficult for some wildlife to penetrate these thick reeds, and they choke out other plant species that support a variety of wildlife. Since the reed is seasonal, it withers and dies each winter, falling

down on itself and creating a “meadow mat.” Each season, new plants grow up through the mat.

Over time, this process raises the elevation of the marsh, in effect, filling it and restricting the flow of water and nutrients that support biological diversity. The commission’s long-time naturalist, Don Smith, has quipped that since this phenomenon occurred without benefit of a wetlands fill permit, the Phragmites were technically in violation of §404 of the Clean Water Act.

By 1968, the Legislature recognized that these environmental problems and the irresponsible uses of land that exacerbated them were occurring in “a land resource of incalculable opportunity for new jobs, homes and recreational sites,” located in the “heart of a vast metropolitan area.” N.J.S.A. 13:17-1.

In an effort to address these conditions, the Hackensack Meadowlands Reclamation and Development Act was passed in 1968, and became effective on Jan. 13, 1969, N.J.S.A. 13:17-1 et seq. The act established the Meadowlands Commission, its geographical jurisdiction and its powers.

In general, the act assigned to the commission three broad and potentially contradictory mandates: (1) to promote the orderly and comprehensive development of the Meadowlands; (2) to manage and control the disposal of solid waste in the district; and (3) to preserve the delicate balance of nature in the area.

The environmental and political challenges that were at hand loomed large. The need for a *regional* entity possessed of planning and zoning authority that superseded municipal boundaries was evident for many reasons.

First and foremost, left to their own devices, local officials had made environmentally disastrous land-use decisions. It was not uncommon for officials to lease vast stretches of unproductive municipally owned wetlands for long terms and for very little money. The lessees — private landfill operators — in turn, made lots of money by charging to collect waste and dumping it openly in the Meadowlands.

The fact that the Meadowlands

were geographically distributed among 14 municipalities also made it practically and politically difficult to comprehensively address the needs of the district.

Geography and Governance

The Hackensack Meadowlands District, as set forth in N.J.S.A. 13:17-4, consists of 19,485 acres (or 30.4 square miles) in a roughly rectangular shape, 5 miles west of Manhattan as the Green-winged Teal flies. These figures are based on 2002 field inspection data of the commission and its GIS Parcel Map of June 2002.

It is interesting to compare the accuracy of current-day figures with the more crude and now rather dated description contained in the 1968 act: “21,000 acres of salt water swamps, meadows and marshes.” The district consists of portions of 14 municipalities: 10 in Bergen County (Carlstadt, East Rutherford, Little Ferry, Lyndhurst, Moonachie, North Arlington, Ridgefield, Rutherford, South Hackensack and Teterboro); and four in Hudson (Jersey City, Kearny, North Bergen and Secaucus).

No one municipality falls entirely within the district, but for those portions that are included, the Meadowlands’ zoning regulations trump local ordinances. N.J.S.A. 13:17-11(b).

The commission is established in, but not of, the Department of Community Affairs. N.J.S.A. 13:17-5(a). It is governed by a board (appointed by the governor), consisting of the commissioner of the Department of Community Affairs and six other public members.

The governor designates the chairman (traditionally, the DCA commissioner), and the board elects other officers. The public members serve staggered terms, as is typical for a quasi-independent authority.

The act also requires that the board be politically balanced by not having any more than three public members of the same political party.

The commission is run on a day-to-day basis by a full-time professional staff headed by an executive director. Since July 2002, Robert Ceberio, a 20-

year veteran of the agency, has led the commission staff in this role. The act also requires consultation with a committee that consists of the mayors of each of the constituent municipalities.

The “Hackensack Meadowlands Development Commission” became the “New Jersey Meadowlands Commission” on Aug. 27, 2001, pursuant to P.L. 2001 c.232. This name change — although not explained in the law or the statements to the bill — was quietly sought by the commission for two main reasons.

The first reason was its desire to be identified in a more eco-friendly manner by eliminating the term “development” from its moniker. The second, and perhaps less significant reason, was to end the confusion that was caused by having the term “Hackensack” in its name. That term, of course, refers to the Hackensack River Basin — the Hackensack Meadowlands — and not the town of Hackensack, which is not in the Meadowlands District.

New Master Plan Precursor

By the mid-1980s, overlapping and inconsistent state and federal environmental laws and policies were stifling large-scale development in the Meadowlands. It had become extremely time consuming and expensive for developers to work through the Clean Water Act’s §404 process to obtain wetlands fill permits.

The commission’s land use plans and implementing zoning regulations had been adopted prior to the creation of the §404 program, and before the Environmental Protection Agency and the New Jersey Department of Environmental Protection were created. Yet, the commission’s 1970 Master Plan (effectively its zoning regulations) served as the federally approved Coastal Management Plan for the Meadowlands region of the state.

These circumstances called out for a comprehensive and cooperative planning approach to reconcile various environmental regulations with land use rules in the Meadowlands district.

Amendments to the federal Coastal Zone Management Act that became effective in 1980 allowed for the prepa-

ration of Special Area Management Plans, or SAMPs. The intended result of the SAMP for the Hackensack Meadowlands was a streamlined permitting process, coupled with an environmental improvement program for the district.

This improvement program was designed to raise funds to offset costs associated with closing abandoned landfills in an environmentally responsible manner. The program was to be funded largely by private interests, as a result of impact fees that would be imposed as conditions of wetlands fill permits to be issued under the SAMP. The SAMP was also intended to serve as the commission's updated master plan.

In September 1988, the EPA and the Army Corps of Engineers (the federal agencies that jointly administer the §404 program) entered into a Memorandum of Understanding with the Meadowlands Commission, the DEP and the National Oceanic and Atmospheric Administration, agreeing to prepare the Meadowlands SAMP. That agreement set the wheels in motion for what would become a seven-year planning process that culminated in the publication of a 1995 Draft Environmental Impact Statement for the SAMP.

A rancorous public review process ensued. Devoted professional staff members of the state and federal SAMP partners laudably continued their efforts to address and refine the SAMP documents — a process that lasted another four years, culminating only in the publication of the five-page Federal Register Notice in April 1999, outlining further proposed changes to the SAMP.

From 1999 through 2001, the SAMP process continued, albeit slowly and sporadically. Finally, at the beginning of 2002, the commission saw there was no light at the end of the tunnel, and it formally withdrew from the SAMP process.

Stakeholders in the SAMP process ranged from the White House's Council on Environmental Quality, headed by the vice-president and his staff, to ordinary citizens of the Meadowlands' constituent municipalities, from major real estate developers to environmental

interest groups that opposed any new development in or near wetlands.

The planning process took so long that the data, studies and assumptions that supported the plan became obsolete prior to completion of the plan itself, resulting in a Catch-22 situation.

The phrase, "it's always an election year" also had an impact. Every time a new administration took control at the federal, state or local level, the process was delayed to afford the new political regime time to "review" the SAMP. The fact that so many constituencies with such different agendas and political influences were involved made what was a great planning concept impossible to implement in the real world.

After withdrawing from the process in 2002, the commission went to work creating its own new master plan, building on the 13 years of planning it had led in connection with the SAMP. Much of the work that went into the SAMP was carried over into the commission's newly proposed plan, with more fashionable concepts like smart growth, grayfield development and sustainability added to the mix.

New Plan and Regulations

A draft of the commission's new master plan was unveiled in February 2003, and public hearings were held in April and May 2003. A public information session on a final draft of the plan occurred on Dec. 1, 2003. New zoning regulations designed to implement the plan appeared in the Oct. 6, 2003, *New Jersey Register* at 35 N.J.R. 4458.

Public hearings on the regulations were held in November 2003, and the comment period closed Dec. 5, 2003. As noted above, the master plan and implementing regulations were adopted simultaneously at the commission's Jan. 8, 2004 monthly meeting, and will become effective Feb. 17, 2004.

It is important to remember that the Meadowlands Commission is not subject to the Municipal Land Use Law. Accordingly, the re-examination of master plans that is required of municipalities every six years pursuant to N.J.S.A. 40:55D-89 is not applicable to the commission.

Similarly, the rebuttable presump-

tion created by N.J.S.A. 40:55D-89.1 that development regulations are no longer reasonable in the absence of such a review does not attach to the zoning regulations adopted by the commission. As a state agency, however, the commission is subject to the provisions of the Administrative Procedure Act that require re-examination and re-adoption of rules every five years. N.J.S.A. 52:14B-5.1.

Interestingly, more frequent examinations are in store. Chapter 12 of the commission's new plan states that, going forward, the commission staff will prepare annual reports to the commission that evaluate how effectively the new plan is being implemented by the new zoning regulations, with a major revision to the plan to be initiated after 10 years.

A look at the new plan is in order. Indeed, for almost 30 years after the commission adopted its original plan, dubbed the "Hackensack Meadowlands Comprehensive Land Use Plan," it sat on the shelf, with the commission focused on developing and revising its zoning regulations. Now it has completely updated its master plan and entirely re-promulgated its zoning and subdivision regulations to implement the new plan.

Trustee of Natural Resources

"Environmental Preservation and Enhancement" is the name of the fifth chapter of the master plan. This chapter sets forth, among other things, the basis for the commission's perceived need for additional lands and facilities to serve as recreational and open spaces. The chapter begins with an acknowledgment that the commission views itself as a "trustee of the natural resources of the Meadowlands District."

In that role, the commission also states that one of its goals is "to foster a sustainable regional economy." One of the most significant environmental aspects of the master plan is the virtual elimination of any further wetlands fill in the district.

The commission reports in Chapter 12 of the plan that it anticipates the filling of only an additional 83 of the remaining 6,500 acres of wetlands in

the district. Development would account for 23 of those acres and transportation improvements for the remaining 60.

These numbers stand in marked contrast to those in the 1970 plan and the 1995 SAMP Draft EIS. At full build out, the 1970 plan envisioned only 1,500 wetland acres being preserved. The 1995 SAMP Draft EIS would have left 5,700 acres unfilled.

Accordingly, this most recent master plan increases that number by approximately 800 acres. (Note that these acreage figures are net of 1,900 acres of open water, which would essentially be unaffected by zoning designations.) Continued funding to enable the commission to acquire privately-owned wetlands for fair market value will be necessary for it to achieve these goals, as well as to avoid takings claims in connection with zoning such properties for preservation.

The emphasis on environmental protection and preservation established in the master plan is carried forward in the new regulations. Three distinct areas of the regulations reveal the commission's emphasis on the environment: (1) the purpose section; (2) the Environmental Conservation zone; and (3) the "Project Impact Assessment" subchapter.

Protection as a Purpose

Right up front, the first four provisions of the 15 stated purposes of the zoning regulations are as follows:

- to provide for the orderly and comprehensive development of the District, consistent with the carrying capacity of the land and the preservation of critical wetland areas in accordance with the [NJMC] Master Plan;
 - to consider the ecology of the District in order to protect the delicate environmental balance therein;
 - to promote the conservation of open space and valuable natural resources and to prevent sprawl and degradation of the environment through improper use of land; [and]
 - to preserve an ecological balance between natural an open areas and development.
- The list continues with the other typical

purposes of zoning regulations, such as providing for the adequate provision of light and air, prevention of overcrowding of land through the separation of uses and imposition of bulk standards, and the like.

The placement of environmental concerns in the commission's lists stands in contrast to MLUL. "Natural resources" and the "environment" are not mentioned until the bottom of the MLUL's list of 15 purposes. See N.J.S.A. 40:55D-2(j).

While rank is obviously of no legal significance, it has symbolic value. The pre-eminence of environmental concerns in the commission's list is probably reflective of its desire to be perceived more as a steward of the environment than a development facilitator.

Environmental Conservation Zone

The commission has proposed the creation of a new zone for environmental conservation. The stated purpose of this zone is to "preserve and enhance the ecological values of wetlands, open water and adjacent uplands in the District [and] to provide public access to these areas and encourage scientific and educational study in regard to wetland ecology."

Permitted uses include: access to water features and structures that facilitate wildlife observation; study of wetland ecology; wetland enhancement and creation; and habitat creation. The only use that allows for an economic return is "public utility equipment and appurtenances" — which acknowledges existing radio towers and associated support facilities that exist in many open areas of the Meadowlands.

The commission asserts in its rule proposal that the land area included in this new zone has nearly doubled from that contained in the roughly equivalent expiring Marshland Preservation zone. 35 N.J.R. 4459.

It is axiomatic that zoning alone is not a viable preservation technique. Downzonings that completely eliminate the economic value of property raise Fifth Amendment takings issues. Indeed, in dicta as far back as 1973 — a good 14 years before *First English Evangelical Lutheran Church v. County*

of Los Angeles, 482 U.S. 304 (1987) — the New Jersey Supreme Court warned that "if privately owned property in the District is zoned for a public use by the Commission, the land will have to be condemned and the owners compensated." *Meadowlands Regional Redevelopment Agency v. State*, 63 N.J. 35, 37 (1973).

The commission appears to be aware of the need to be vigilant in this area, and has stated a willingness to engage in good-faith discussions with private property owners to acquire wetland properties that fall within this zone.

In fact, as a part of the land preservation strategy contained in its master plan, the commission notes that it will seek to acquire approximately 2,600 acres of wetlands. The commission actually began a pronounced wetlands and open space acquisition program in the mid-1990s.

Funding to enable the commission to provide owners with fair market value for their property is important from a public policy perspective and, as noted above, will be necessary to avert takings claims.

PIAs

Just when you thought there were enough acronyms in the environmental lexicon, along comes PIA, which stands for Project Impact Assessment. Similar in nature to Environmental Impact Statements (EISs) and Environmental Assessments (EAs), PIAs will be required to measure the impacts of certain projects.

Thresholds and specific areas that must be considered are set forth at 35 N.J.R. 4598. PIAs will be required for the following projects:

- all office or commercial/retail projects greater than 75,000 square feet;
- all residential development over 25 dwelling units;
- all industrial, warehouse/distribution or intermodal development over 10 acres in size;
- any project proposing to fill in excess of one acre of wetland; and
- any project that, in the opinion of the commission's chief engineer, may have a substantial impact on the envi-

ronment.

Absolute thresholds are double-edged swords. They are beneficial from a notice point of view, but can be used as mechanisms to avoid regulatory scrutiny.

Remember the 25-unit CAFRA threshold? Some have said that in the event of a cataclysmic environmental event along the Jersey Shore the likes of which buried the fabled City of Atlantis, archeologists of the future would be puzzled to find so many 24-unit buildings.

One has to question whether the PIA thresholds will create incentives to build 74,999 square foot commercial and retail developments and 25-unit residential structures.

The last, broad "catch-all" criterion may address this concern. That criterion allows the commission's chief engineer to require a PIA if she deems that *any project may* have a substantial impact on the environment. How the chief engineer exercises her judgment will be important. Sound reasoning and fair application of this last criterion will be necessary for the commission to deflect charges of arbitrariness.

Proposed developments that are required to prepare a PIA must address the following topics:

- its impact on the viability of the surrounding area and adjoining properties;
- analysis of its compatibility with zoning requirements and any variance requested from those requirements;
- how it affects the visual quality of the site and the surrounding environs;
- a wetlands and open water area delineation;

- a mini-404(b)(1) analysis (discussing alternatives, minimization techniques and compensation methods for proposed wetlands fill);

- hydrologic and hydraulic studies;
- water quality impacts;
- impact on habitat, traffic, air quality and noise;
- site remediation history;
- cultural and historic resources;
- effect on provision of public services; and
- fiscal impacts, including demographics, consideration of county and local budgets, and analysis of projected ratables and municipal and school budget increases due to the proposed development.

Some of these areas are hot-button issues, like taxes and school budgets, and go far beyond what has traditionally been considered an "environmental impact." The extent to which such analyses and evaluations are used by the commission staff to condition approvals will be areas to watch.

Streamlined Approval

Finally, the new regulations, as initially proposed, had included a provision that required the execution of a developer's agreement with the municipality in which any PIA-eligible project was to be built. 35 N.J.R. 4600. This requirement had the potential to invite abuse and cause project delays, and was of particular concern to development interests.

One of the hallmarks of the Meadowlands Commission has been its ability to actually streamline the review and approval process. While stream-

lined approval might at first blush seem counterintuitive where multiple agencies are involved, in reality, the process has proven to be much quicker and simpler than the MLUL's.

There are two main reasons for this phenomenon: first; there is no municipal zoning review subsequent to commission approval and there is no hearing process if the development proposal complies with the commission's zoning regulations. In such a case, approval is granted as of right and within two weeks of receipt of a completed application. N.J.A.C. 19:4-4.135.

The good news is that this process is not slated to change. The potentially bad news was that the requirement to enter into a developer's agreement could have ground the process to a halt.

Fortunately, the commission staff has indicated that the developer's agreement requirement has been modified. The developer's agreement will be executed with the commission, with input from the municipality, rather than solely with the host municipality.

While this will certainly add some time to the process, this change, which is anticipated to be reflected in the final version of the rules published in the Feb. 17, 2004, *New Jersey Register*, is a good sign. The potential to become completely stymied at the local level after receiving approvals should be diminished by this modification.

The new master plan and implementing regulations are certainly well thought out, and in many respects, long overdue, but they will pose new challenges and requirements for those seeking to develop and redevelop property in the Meadowlands. ■