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Land Use Increasingly Shaped by DEP

Juggernaut of environmental regulations holds sway over future of land use

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Many land use practitioners and their clients in the real estate development community believe the New Jersey Department of Environmental Protection has been directing land use for the past several years. They fear that if the DEP's role is not carefully monitored, the consequences will be disastrous.

Others, such as the environmental lobby, believe that New Jersey has simply had enough development. They welcome the use of environmental regulation not only for its nominal intention (to protect the environment) but also as a tool to stop growth they deem undesirable, derided as "sprawl."

Regardless of where one falls on the spectrum of opinions, there can be

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no debate about DEP's ever-increasing influence in the land use arena. Since the January 2003 unveiling (and later rescission) of its "Blueprint for Intelligent Growth" or BIG map, DEP has either issued or proposed a steady stream of regulations that implement BIG map concepts. Some key initiatives are surveyed below, and they ought to be on every land use attorney's radar screen so that the perils lurking in the sea of regulations can be adequately addressed or averted.

To put DEP's regulatory juggernaut in perspective, it is important to acknowledge the inherent tension between environmental regulation and land use control. Twenty years ago, in the case of *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), a majority of the Supreme Court attempted to differentiate environmental and land use regulation in the following manner: it characterized land use planning as essentially choosing particular uses of land, and environmental regulation as not mandating any particular uses of land, but requiring only that however land is used, damage to the environment is within prescribed limits.

The dissenting justices in the

Granite Rock case found that distinction to be "unsupportable, either as an interpretation of [the statutes at issue] or as a matter of logic ... a distinction ... without a rational difference."

Drawing the line between DEP's role in land use and environmental protection has never been easy, and perhaps that is at the nub of the debate about how far DEP should delve into land use control.

In the view of a recent Appellate Panel, DEP's authority over land use is virtually unlimited. See, *In the Matter of Stormwater Management Rules*, 384 N.J. Super. 451, 466 (App. Div.), cert. denied, 188 N.J. 489 (2006), ("DEP may impose a buffer to avoid development-related impacts on water quality unrelated to stormwater ... or for reasons altogether unrelated to protecting water quality, such as, for instance, recreation and aesthetics.")

DEP stepped into the land use planning field in a big way in January 2003 with the publication of its BIG Map. In traffic light parlance, the map indicated where DEP would use its regulatory authority to manage development. Growth areas were shown in green; areas in which growth might proceed with caution were depicted in yellow;

and areas where DEP's regulations would be used to halt development were colored red. Red predominated.

The map was roundly criticized, not only by the development community, but by other state agencies and legislators, too. Objectors complained that the map was not based on sound science, was not formally promulgated, yet would be used at DEP's discretion to issue or deny permits. The State Planning Commission believed that it — and not DEP — was legislatively charged with the obligation to direct the future growth of the state.

Bowing to that criticism, the DEP commissioner adjusted and republished the map, and issued a "directive" that it would not have the force and effect of a regulation. Yet skepticism still existed that these actions were nods and winks, and that DEP staff would use the map anyway. By the end of 2003 the map was rescinded, and the commissioner indicated the agency would pursue the map's land use objectives through the formal rulemaking process.

The next major impact DEP had on land use came on Feb. 2, 2004, when it adopted updated stormwater management rules at N.J.A.C. 7:8. From a land use perspective, the most draconian effect of these rules was the expansion of many stream buffers to 300 feet, and the reclassification, and increase in the miles of, waters next to which these buffers apply.

Prior to 2004, DEP regulated only the *quantity* of runoff. Now, recharge and water quality are part of the program. Quantity continues to be regulated in a manner referred to as "peak flow attenuation." These requirements became a bit stricter than pre-2004 standards, but can easily be engineered into the site planning process (increasing detention basin sizes is one way).

Recharge regulation seeks to replenish aquifers so that our drinking water supplies from groundwater sources remain intact. Water quality criteria are designed to "clean" runoff prior to discharge. The new rules provide for complicated criteria and calculations to evaluate recharge and water quality compli-

ance. These considerations must be factored into development *pro formas* and concept plans at an early stage to ensure that the project is financially and practically feasible, and if so, to keep the regulatory process at DEP and other agencies on track.

The most controversial measure used in the 2004 stormwater regulations is the preclusion of virtually any development (including stormwater systems) within the 300-foot buffer strips next to both sides of a "Category One" (C-1) stream or tributary. C-1 waters are currently defined as those designated by DEP "for protection from measurable changes in water quality characteristics because of their clarity, color, scenic setting, other characteristics of aesthetic value, exceptional ecological significance, exceptional recreational significance, exceptional water supply significance, or exceptional fisheries resource(s)." N.J.A.C. 7:9B-1.4.

DEP has recently proposed to amend the somewhat general definition of C-1 waters by adopting definitions for the terms "exceptional ecological significance," "exceptional fisheries resources" and "exceptional water supply significance." 39 N.J.R. 1863 (May 21, 2007). To the extent these additional definitions firm up standards, they reduce the potential for arbitrary application. Yet this positive development must be considered in the context of the very serious effects a C-1 designation has on development potential.

One thing about which former-Governor McGreevey was not bashful was his intention to use these new stormwater rules as a land use control tool. His press release of Jan. 5, 2004, noted that "no other state has required statewide 300-foot buffers around its high quality waters. They will prove to be a critical tool in our fight against sprawl." DEP has also called for "nominations" of C-1 waters, not from the scientific community, but from the public at large. See 35 N.J.R. 4949(a) (Nov. 3, 2003).

The C-1 designation process continues apace. In the May 21 *New Jersey*

Register, DEP proposed adding approximately 909 river miles to the existing C-1 list. The entire list can be found on the DEP's Web site (www.state.nj.us/dep) and at 39 N.J.R. 1845(a). Under these circumstances, the question of whether science or the politics of growth restriction is at the forefront remains unanswered.

DEP's next major foray into land use control can be traced to August 10, 2004, when then-Governor McGreevey signed into law the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq. Unlike the two other major regional planning and zoning agencies that predate the Highlands Council (the Meadowlands and Pinelands Commissions, established respectively in 1969 and 1979), the council is not in total control of implementing the mandates of its enabling act. Rather, DEP was granted authority to adopt rules and regulations that control all development in the Highlands preservation area. This bifurcation of responsibility is highly unusual, and for better or worse, strengthens DEP's grip over an additional 400,000 acres.

Critics of the Highlands Act argue that the boundaries are inherently political and arbitrary in nature, that it is a land use control device in the guise of a water quality measure, that it was rushed through the legislative process without sufficient thought, and that it does not strike a sufficient balance between its goals and the rights and interests of property owners.

Proponents of the legislation felt that the experience with the Pinelands Act indicated that the Highlands Act would withstand political scrutiny, public outcry and judicial review. The ongoing political firestorm over the act, and the traction that the first few court cases seem to be gaining, suggests that this may not have been an accurate assessment.

The claim being made by the Highlands staff that the Draft Proposed Master Plan for the Planning Area (which contains numerous substantive standards drawn from the standards for

the Preservation Area) is purely voluntary is being undercut by suggestions by DEP that it regards those standards as bearing on DEP permitting actions.

Numerous stakeholder groups find it troubling that sites throughout the Planning Area that have long been zoned and approved for *Mt. Laurel* housing, and in many cases are the subject of judicial consent decrees, are designated as preservation areas in the Draft Master Plan.

DEP proposed new Flood Hazard Area Control rules in the Oct. 2, 2006, *New Jersey Register*, 38 N.J.R. 3950(a), which will likely be adopted in substantially similar form shortly. These rules will establish “riparian zones” with buffers of up to 300 feet from the top bank of both sides of the stream. Current “stream buffers” are 25 or 50 feet.

“Riparian” is defined in *Merriam-Webster’s Collegiate Dictionary* as “(adjective): relating to or living or located on the bank of a natural watercourse” Yet the DEP’s new rules define a riparian zone much more broadly, and include areas adjacent to an “amorphously-shaped feature, such as a wetland complex, through which a regulated water flows but which lacks a definable channel.”

Exemptions from the new rules are applicable only if, prior to their adoption, a complete application for a stream encroachment or coastal permit is submitted, and a permit is later obtained. If a stream encroachment or coastal permit is not needed under the current rules, the property owner must obtain a final municipal building or construction permit. If no municipal building or construction permit is needed, construction must have begun prior to adoption of the rules. 38 N.J.R. 4050. DEP representatives have publicly stated they expect to adopt the rules in September, so the window for grandfathering is closing quickly.

Many riparian zones will extend far beyond the floodplain limits of waterways. The result of such restrictions — leaving significant quantities of land in an open state and apparently without

compensation to owners — implicates Fifth Amendment property rights. The definition and reach of these new zones also raise the issue of whether science or a building moratorium was the impetus for this program.

Consider the example of a seven-acre (304,920 square foot) farm, with a C-1 stream or “riparian corridor” running through it. The farmers do not restrict grazing or pollution created by their animal waste and pesticide-laden runoff. A prospective purchaser intends to develop housing with a 20 percent affordable (*Mt. Laurel*) component, and will have her engineers design best management practices into the subdivision.

Under existing stream encroachment rules that require 50-foot buffers, an RSIS-compliant development with 75 percent lot efficiency, one acre for stormwater management facilities, and a 50-foot right-of-way, will yield 10 quarter-acre lots. Under the new Flood Hazard rules, 300-foot buffers are required, and thus, 331,200 square feet are to remain vacant, which translates to 109 percent of the seven-acre tract.

Under this scenario, all equity in the land is wiped out, needed housing will not be built, and most ironically, harm to the environment will continue because the farming operations pollute the stream more severely than would the new development.

Another reason some may question whether science or pure no-growth motives are behind these rules is that this new program will do nothing to alleviate existing conditions or patterns of development that have occurred over centuries, which have contributed to the severity of some recent flood events.

DEP has recently proposed revamping the existing Water Quality Management (WQM) Planning rules. 39 N.J.R. 1871. This proposal follows a failed attempt by the prior DEP Commissioner in October 2005 to revoke sewer service area designations where wastewater management plans were not up to date. (See 37 N.J.R. 4071(a).) The October 2005 action would have effected draconian changes

following a 60-day notice period only, and not through the formal administrative process.

Municipalities and developers decried the suddenness and severity of the impact of this 2005 “notice,” and there was widespread objection in the legal community to its procedural shortcomings. These factors led then-acting Governor Codey to nix the scheme several weeks later by extending the existing rules by Gubernatorial Order. (See 37 N.J.R. 4535(a).)

The current proposal at least acknowledges that the ordinary administrative process must be followed, which will likely take many months. This notwithstanding, the changes that would result from these rules could have a serious impact on the ability to develop property. The new program, among other things, would shift wastewater management planning responsibilities from municipalities to counties, and would alter the criteria used to delineate sewer areas. It could also kill or add months if not years to the development timeline of some projects, because the threshold for exemptions from the requirement to obtain amendments to WQM Plans would be lowered significantly. The amendment process as it now exists is very time consuming.

While the full impact of this program can not be known until the rule becomes final, it is clear that DEP is getting serious about addressing widespread noncompliance with existing requirements to update wastewater management plans every six years. From an environmental and planning perspective, it is hard to argue with DEP’s efforts to get these plans adequately updated. From a land owner’s perspective, this proposal may inspire some to quickly evaluate their existing entitlements and make development decisions accordingly.

New Jersey holds the unusual distinction of being the most densely populated State in the Union on a per capita basis while, at the same time, possessing significant numbers of threatened or endangered (T&E) species and significant expanses of open space and

T&E habitat. It is beyond debate that the state has a highly diverse landscape with significant natural communities, and that habitat modification has adversely impacted some threatened or endangered species.

DEP regulates impacts to T&E species habitat through CAFRA, the Freshwater Wetland Protection Act, the Waterfront Development Law and the Flood Hazard Area Control Act. Although it has the legal authority under the Endangered and Non-game Species Conservation Act (N.J.S.A. 23:2A-1 et seq.) to protect species anywhere in the state, it has never adopted implementing regulations.

A proposal first floated during the McGreevey administration, and recently resurrected by the current administra-

tion, would establish a permit program regulating modifications to T&E habitat in much the same way that the federal government regulates habitat modifications under the Federal Endangered Species Act (16 U.S.C. § 1531 et seq.). The federal act prohibits the “taking” of an endangered species, a term that by statutory definition includes the term “harm.” Harm, by regulation, has been defined to include habitat modification. This inclusion of habitat modification in the definition of harm was upheld by the U.S. Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995).

DEP’s Landscape Maps (available at the Department’s Web site) illustrate the ubiquitous and pervasive nature of

T&E habitat throughout the state. Regulation of habitat modification would add yet another layer of review and analysis to any development proposal. DEP indicated in a recent briefing that a new permit program would require 24 to 36 new staff, for which there is no budget, so one can only imagine the delays that will result.

Moreover, certain species (notably bald eagles and black crowned night herons) have shown a penchant for nesting and breeding in areas of the state that are designated for growth under the State Development and Redevelopment Plan. Unless these conflicts are addressed in a meaningful way, it is likely that T&E habitat protection will further inhibit development opportunities. ■