

DEP LAND USE RULE CHANGES: COASTAL RULES & FLOOD HAZARD

By: Steven M. Dalton, Esq.

Over the past several years, the Department of Environmental Protection (“DEP” or “Department”), Division of Land Use Regulation (“DLUR”) has conducted stakeholder processes concerning its substantive programs. Stakeholder meetings have been convened in response to efforts of the Christie Administration to implement change in how the Department operates by among other things reviewing certain rules, regulations and processes “that are a burden on New Jersey’s economy” to determine “whether the burdens on business and workers outweigh the intended benefits.” DEP solicited and obtained input from various interested parties, including the New Jersey Builders Association (“NJBA”). NJBA has taken an active role in the stakeholder process. As an outgrowth of this process, DEP recently adopted amendments to its regulations governing coastal development and proposed amendments to its rules governing development in flood hazard areas.

Coastal Rules

DEP’s Coastal Rules were previously contained in two regulatory chapters - the Coastal Permit Program Rules and the Coastal Zone Management Rules. They established the procedural and substantive permitting program applicable to the Coastal Area Facility Review Act, the Waterfront Development Law and coastal wetlands.

On June 2, 2014, DEP proposed amendments to the Coastal Rules that became effective June 6, 2015. DEP consolidated the Coastal Rules into a single, comprehensive chapter entitled the “Coastal Zone Management and Coastal Permit Program Rules.” NJBA,

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through the stakeholder and public comment process sought a more comprehensive, substantive overhaul of the Coastal Rules. DEP deferred taking action on many substantive issues including the Filled Water’s Edge, Coastal High Hazard Areas, the Dunes Rule, Critical Wildlife Habitat, mapping for Shellfish Habitat and Submerged Vegetation Habitat, and many others.

Some noteworthy aspects of the new Coastal Rules are listed below.

- DEP created a new category of General Permit (GP) authorizations – General Permits by Certification. This is a more streamlined GP authorization process for a limited number of activities determined to have minimal environmental impacts.
- GP By Certification authorizations may not be extended.
- GP authorizations based on applications declared complete for review after the 7/6/15 effective date of the rules may be extended for a 5-year term, but work continuation rights do not exist if an extension is not obtained.
- GP authorizations based on applications declared completed before the 7/6/15 effective date of

the rules may not be extended but authorized work may continue beyond the 5 year term limit until complete if “construction” occurs during the 5-year term. Site clearing is excluded from the definition of “construction,” even though site clearing is treated as a regulated activity for enforcement and for the triggering of certain permit condition compliance obligations like the requirement to file conservation restrictions. The work must not lapse for a cumulative period of greater than 1 year.

- DEP clarified the rule regarding duration of Individual Permits (IP). Permits for activities below the mean high water line may now be extended for an additional 5 years.
- For activities above the mean high water line, the work may continue beyond the 5 year term limit until complete if construction occurs while the permit is valid, pre-expiration notice is given to DEP, and the work continues after the permit expiration date without any cumulative interruption of one year or longer. Written approval must be obtained from DEP. If those conditions will not be met, a request may be made to DEP for a 5 year extension of the permit. Further continuation extension may be sought if work commences during the extended term and must continue thereafter.
- Where an IP has expired and a new IP is sought, if work commenced, DEP will consider reliance factors (financial investment) in determining the feasibility of compliance with the rules in effect at the time of the new

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application.

- The GP for a single-family home or duplex has been modified to increase the number of single-family homes or duplex structures that can be authorized from one to two.
- The rules implement changes to the methodology for determining whether a site is forested or unforested.
- The concept of redevelopment for certain permitting options is limited to sites that are developed and in use 5 years before the application date. Sites where the use has not occurred for 5 years or more will not qualify for certain redevelopment approvals.
- Mitigation remains a requirement for GP 11 authorizations for remediation.
- The mitigation provisions of the rules contain a number of substantive changes. Mitigation on public properties is permissible and DEP has flexibility to determine that mitigation is not required in de minimis scenarios.
- Stormwater discharge may not be used to satisfy certain hydrological requirements for proposed wetland mitigation sites.
- Financial assurance is required for mitigation similar to the Freshwater Wetland program.
- Time limitations are included for filing of conservation restrictions, but a procedure exists for release of restrictions without Commissioner approval where site disturbance or authorized activity has not occurred.
- Approvals are automatically transferred with transfer of title, but the new owner must notify DEP.
- The rules do not address outdated coastal wetland maps used for coastal wetland jurisdictional determinations.
- The rules do not address expiring mainland coastal centers.

Flood Hazard Area Control Act

Nearly a year to the day after it proposed amendments to the Coastal Rules, DEP published notice of proposed amendments to the Flood Hazard Rules and Stormwater Management Rules. NJBA and others submitted comments supporting various aspects of the proposal. The proposal contains many noteworthy provisions.

- The Stormwater Rules 300-foot Special Water Resource Protection Area (SWRPA) buffer is proposed for removal. The explanatory statement provides that the SWRPA and 300-foot riparian zone buffer under the Flood Hazard Rules are redundant, create confusion and lead to inconsistent results under the regulatory programs.
- SWRPA buffer concepts are incorporated into the 300-foot riparian zone buffer provision of the Flood Hazard rules through imposition of a requirement for compensation for impacted vegetation.
- The 150-foot riparian zone buffer for regulated waters containing acid producing soils will be replaced by a 50-foot buffer.
- The rules will allow GP's and IP's to be extended for 5 years.
- The rules contain new procedures for determining forested area utilizing aerial photography review and no net loss methodology resulting in enhanced protection for forested riparian zones compared to non-forested.
- DEP will no longer utilize USGS and County Soil Service Area maps in connection with jurisdictional determinations.
- GP by Certification category is proposed to be created, together with many additional GP's and Permit-By-Rule categories.
- The GP application review timeframe will expand from 45 to 90 days.

- DEP provided an analysis of its experience with its Hardship Exception process and is proposing various substantive changes to its permitting options and riparian zone disturbance limitations in an effort to reduce the number of Hardship Exception requests.
- Riparian zone disturbance is activity specific and is not viewed on a cumulative basis. Multiple activities within a riparian zone may be approved up to the disturbance limit for each activity.
- Riparian zone disturbance limits will be expanded for various activities including single-family house construction. Former Table C riparian zone clearing limits is proposed to be replaced by Table 11.2.
- Mitigation is required for all vegetation removal in excess of riparian zone disturbance limits. The rules would expand opportunities to satisfy mitigation conditions by expanding the area where mitigation, through restoration or enhancement, may occur. DEP is proposing to align the mitigation provisions of the Flood Hazard Rules with the FWPA mitigation program. Opportunities for riparian zone creation and preservation are being proposed.
- The grandfathering concept will be expanded to a larger category of local approvals akin to the Stormwater Management Rule process.
- A definition of "project" is being created to cover cumulative impacts from phased development.
- The rule will specifically exempt swales under the FWPA from regulated waters as they are defined to have a drainage area of less than 50 acres.
- Only defined regulated activities require a permit. Not all activities that occur within any Flood Hazard Area or a riparian zone constitute regulated

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activities that require a permit.

- Applicability determinations will no longer have a five-year duration limit.
- The proposal clarifies that the barrier island complex does not have a riparian zone, and further clarifies that Bay Islands located between the mainland and barrier island are not included as part of the Barrier Island Complex.
- The method for establishing top-of-bank for linear features with drainage area of less than 150 acres is clarified; measurements of the riparian zone to be taken from the center line of the water feature.
- The proposal includes a new definition of "actively disturbed area." Regular and on-going human use and intervention with significant impairment to the typical functions and benefits of a riparian zone being the key element. Any land covered by impervious surface is considered actively disturbed area, as are actively farmed areas, easement, right-of-way, garden, lawn or park area that is regularly maintained.
- Temporary disturbance in an actively disturbed riparian zone is not subject to the Table 11.2 limits. The net loss of 1/4 acre or less of riparian zone in an actively disturbed area is not subject to the Table 11.2 disturbance limits.
- Conservation restriction provisions are modeled after the FWPA and Coastal Rules.

Land owners and developers will need to account for the now effective Coastal Rules amendments and the proposed Flood Hazard Rule amendments during the planning and development approval process and in the context of due diligence. Those with pending coastal applications submitted prior to the Coastal Rules adoption should confirm with DEP how their applications will be processed. DEP has, in the past, taken the position that it will apply its previously

existing rules to applications that are already determined to be complete at the time that the rule amendments are adopted, and will apply the amended rules to all other applications. While provisions of the regulatory amendments support such treatment, those with pending applications should consult with their professionals and DEP to determine how their applications will be treated. Additionally, substantive aspects of the newly adopted Coastal Rules and proposed Flood Hazard Rules should be carefully examined to assess potential impacts on planned development.

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Builder's Remedy Suits

At this point in time, builder's remedy suits can be effectively filed against towns that have not filed DJ cases if they are otherwise vulnerable to such suits. Those contemplating such suits should discuss the pre-suit negotiation requirement with counsel.

Conclusion

The new chapter of Mount Laurel compliance commenced by the Supreme Court's March 10, 2015 opinion is well underway, and builders interested in participating and seeking rezonings are well-advised to promptly review the status of towns of interest to those builders.

Hill Wallack LLP, Land Use Counsel to the NJBA, represented the NJBA when playing a lead role in the COAH regulation litigation, and has also represented the NJBA and individual builders in many of the DJ actions discussed in this article. Please feel free to contact the author to learn more about the cases and what they may mean to you.

FORECLOSURES

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22 counties in New Jersey being tracked in Zonda, 11 of them have actually experienced a decline in foreclosures over the past year. Through the first half of the year, Hunterdon County has posted the biggest year-over-year drop in foreclosures. The three top counties posting a decline in foreclosures are also the three counties in the state with the least number of foreclosures nominally. Essex, Cumberland and Atlantic counties posted the biggest increases in foreclosures over the past year.

Biggest Drops in Foreclosure Activity	
MSA	Foreclosures Y-o-Y Change
Hunterdon County	-64.2%
Somerset County	-55.3%
Hudson County	-54.0%
Morris County	-35.7%
Burlington County	-26.9%
New Jersey Average	+6.8%

Source: Zonda Analytics

Until New Jersey is able to get the backlog of defaults in the state processed and then absorbed by the market, foreclosures will continue to be a strain on home prices in the state. However, there are signs that the distressed market will improve. First, the state is taking steps to stop further damage by launching a foreclosure prevention program in July, with \$17 million in federal funds, that offers up to \$50,000 in financial aid to eligible homeowners to help bring their monthly housing payment to a more affordable level. Data from Zonda also shows that notices of default are starting to trend lower which is a positive sign. Notices of default have decreased for three consecutive months and are 3% lower than they were this time last year. This may be a signal that foreclosures could see some stabilization during the second half of the year.

