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## Real Estate & Title Insurance

### DEP Gets Tough

Agency's vigorous enforcement of deed restrictions may harm redevelopment

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In 2004, the Supreme Court held that an unrecorded deed restriction required by a New Jersey Department of Environmental Protection (DEP) permit was not enforceable against a subsequent property owner who took title without notice of the restriction. *Island Venture v. NJDEP*, 179 N.J. 485 (2004). Wary of the consequences of property owners not following through with permit conditions requiring the recording of deed restrictions, and lacking the resources to undertake spot compliance evaluations, DEP's response to this decision has been to vigorously enforce deed restriction permit requirements and include permit conditions that impose arbitrary timeframes for the recording of deed restrictions. This approach may ease DEP's enforcement burden. However, because of statutory

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limitations on the release of conservation restrictions, it often creates problems for developers and landowners who seek to revise development plans as conditions change over time. DEP's systematic lack of flexibility and rigid enforcement of deed restriction requirements fails to recognize the opportunity for modifying deed restricted areas to address changing environmental conditions, and could ultimately have the unintended consequence of discouraging redevelopment and pushing development toward new parcels that are not subject to title restrictions.

Island Venture involved a DEP Coastal Area Facility Review Act (CAFRA) permit. The permit contained a condition requiring that the property for which the permit was issued be restricted to water dependent uses. The required restriction was never recorded, and a subsequent purchaser of the property took title as an "innocent purchaser" without notice of any restrictions on use of the property. The New Jersey Supreme Court concluded the public's interest in the integrity of the recording system and the policies underlying the Recording Act precluded DEP from imposing the limitations of a required deed restriction on an "innocent purchaser" who took title without notice of the restriction.

Permits issued by DEP's Division of Land Use Regulation commonly include conditions that require the placement of

restrictions within the chain of title for the parcel to be improved to protect or preserve some resource of value. For example, DEP conditions freshwater wetland transition area or buffer averaging approvals on the imposition of a deed restriction for the modified transition area and adjacent wetlands. Likewise, in the CAFRA context, it is not uncommon for DEP to include deed restriction requirements for a special resource area such as tree save areas, dunes, coastal bluffs, historic resource areas, public access areas and endangered or threatened species habitat. In the Stream Encroachment permit and stormwater context, DEP permits often require that stormwater management areas and facilities be deed restricted.

DEP has authority under the New Jersey Conservation Restriction and Historic Preservation Restriction Act to acquire an interest in land in the form of a "conservation restriction." N.J.S.A. 13:8B-3. A "conservation restriction" is an interest in land intended to "retain land or water areas predominantly in their natural, scenic or open or wooded condition, or for conservation of soil or wildlife, or for outdoor recreation or park use, or as suitable habitat for fish or wildlife." Various DEP regulatory programs incorporate this statutory authority. DEP's Coastal Permit Program Rules allow DEP to condition permits on the recording of an approved conservation restriction "in the form and terms appropriate to the property." N.J.A.C. 7:7-1.5(b)18. DEP's

Freshwater Wetlands Protection Act Rules require that all transition area waivers be conditioned upon "the recording of a Department approved conservation restriction" to restrict regulated activities in modified transition areas. N.J.A.C. 7:7A-6.1(h). The regulations do not require that adjacent wetlands be restricted, only the "boundaries of the transition area as modified from the standard transition area by the waiver" and provides for future changes to restricted areas in limited circumstances based on a showing of compelling need by the applicant. N.J.A.C. 7:7A-6.1(h).

DEP's response to the *Island Venture* decision has been three-fold: it has become more specific in drafting permit condition language regarding deed restrictions; it has become more uniform in the review and approval of deed restriction language; and it has vigorously enforced these requirements and sought to impose penalties for failure to comply with permit conditions relating to deed restrictions. Through enforcement, DEP has attempted to make an example of noncompliant permittees. It has issued Notices of Violations and assessed penalties in amounts ranging from several thousand dollars to more than one-half million dollars. These harsh penalties often involve cases where no construction has taken place in the area to be restricted and other forms of deed restrictions — such as filed plans showing the areas as restricted or conservation restrictions approved by municipalities — have been placed on the record. The imposition of excessive penalties when there has been no harm to the resource of concern and the resource is protected, albeit in some form other than that approved by DEP, is unjustified and many such penalties have been administratively appealed.

DEP has also attempted to promote compliance through more specific and limiting permit conditions. Such conditions often impose arbitrary time frames for the preparation and recording of deed restrictions. In the wetlands buffer averaging context, it has become standard practice after *Island Venture* for DEP to demand the restriction of not only the modified transition area as specifically provided for in DEP's regulations, but also of all adjacent wetlands. This significantly increases the amount of restricted lands. Additionally,

DEP has created several "form" documents, some of which are available on the DEP Web site, that include a plethora of draconian enforcement provisions and are anything but tailored "to the form and terms appropriate to the property" on a site and permit specific basis.

An example of one such condition is as follows: "Prior to construction and within 60 days of permit issuance, the permittee shall submit to [DEP] for review and approval draft conservation restrictions" and shall submit "a copy of the recorded conservation restriction to [DEP] within 30 days of notification of approval by [DEP]." Applicants who obtain approval from DEP are faced with the unenviable decision of accepting permit conditions regarding deed restrictions that in many cases cannot be timely satisfied and that impose unwarranted restrictions on the property, or appealing the permit conditions through the administrative process resulting in lengthy and expensive delays. If the conditions are accepted and not met, the potential exists for exposure to penalties though a DEP enforcement action.

Prior to *Island Venture*, it was common for DEP permits to simply require the recording of a restriction prior to commencement of authorized construction. The flexibility provided by this approach was more workable in the context of DEP's application of the New Jersey Conservation Restriction and Historic Preservation Restriction Act, governing the state's acquisition, enforcement and disposition of conservation restrictions. The statute permits the release of conservation restrictions. However, prior to the release of any deed restriction acquired by the state, there must be notice of the application to release the restriction similar to the notice required for applications under the Municipal Land Use Law, and a public hearing conducted by DEP. The DEP Commissioner must approve any release of a deed restriction. The statute requires that the DEP Commissioner "take into consideration the public interest in preserving these lands in their natural state, and any State, regional or local program in furtherance thereof, as well as any State, regional or local comprehensive land use or development plan affecting such property." N.J.S.A. 13:8B-6. DEP interprets these provisions as creating a burden on the

applicant to demonstrate that there is a "public necessity" for the requested release of deed restricted lands. It also interprets the term "release" as applying to the reconfiguration or adjustment of a deed restricted area, where the same amount of area will be restricted and there is no net relinquishment of restricted land. The act does not define the term "release." Needless to say, the process is often time consuming, costly and uncertain.

In attempting to achieve certainty through the systematic implementation and enforcement of permit conditions requiring deed restrictions, DEP's post-*Island Venture* deed restriction policies sacrifice the flexibility necessary to address changing conditions. This approach could potentially have unintended consequences. There is no basis to restrict lands unless they are actually being developed. It is often the case that a permittee, because of changing market conditions, contract disputes, financial constraints, additional permitting requirements or a multitude of other reasons, does not immediately follow through with a development that has been approved by DEP. The life span of DEP land development approvals is typically five years. With the passage of time, it is often desirable or necessary to change an approved plan, or necessary to submit a new permit application if a permit expires. If a restriction is recorded in the chain of title for the property, the property owner may be prevented from making necessary changes without obtaining a release of the existing deed restriction in addition to a permit modification or new permit. This creates a burden not only on the property owner, but also on the state, which must dedicate resources to entertain applications to release deed restrictions and conduct public hearings.

This process also makes it more difficult to modify an approved development to address changing environmental site conditions. Over time, it is not uncommon for wetlands lines, dune areas, species habitat and other environmentally sensitive areas to naturally change, or for DEP to reassess the location of such areas based on improved technologies or error in the initial identification of the location of such areas. If there is a change in the location of an environmentally sensitive area, it may be desirable to reconfigure an approved

development that has not been constructed to accommodate the resource of concern. However, if a deed restriction is already in the record title, the difficulty in securing approval to release a deed restriction usually results in the resource of concern being left unprotected by a deed restriction and the continuation of a deed restriction on land that is not considered environmentally sensitive or valuable. With the prevalent use of conservation restrictions, this scenario will become more common and will have the effect of discouraging redevelopment of sites and pushing development toward unrestricted lands.

DEP's deed restriction process needs to be more flexible. DEP is justified in its concern that required conservation restrictions actually be recorded. However, its rigid application of statutory provisions governing the release of deed restrictions may actually act as a disincentive for property owners to comply with requirements to record deed restrictions because of the difficulty in releasing or modifying the restriction to address changing conditions. The statute should not be applied to the reconfiguration or adjustment of deed restricted areas. Rather, its application should be limited to true "releases" where the restricted area will be removed forever. Further, DEP's requirement that there be a

finding of public necessity for the release of a recorded conservation restriction is not consistent with the express language of the act and fails to adequately balance the competing statutory considerations of "any State, regional or local comprehensive land use or development plan" affecting the restricted property. Application of the statute in a more flexible manner by DEP would promote redevelopment of sites consistent with the state's "smart growth" policies.

The need to ensure compliance does not justify the restriction of land in cases where development does not occur. A property owner who does not undertake an approved development and enjoy the benefit afforded by the permit should not be saddled with the burden of the land restriction. The statute should not be applied in a manner that provides a windfall to the state.

DEP has attempted to address this concern somewhat by adding specific language to form restrictions that permit modification of conservation restrictions in limited circumstances. However, the modification language is overly restrictive. To address this problem, DEP should refrain from imposing arbitrary time frames for the recordation of required conservation restrictions.

Instead, it should establish a reasonable period of time following the issuance of a permit for the submission of an approved, fully executed conservation restriction, and then allow the property owner to withhold recording the document until commencement of site construction activities.

Alternatively, to prevent the *Island Venture* scenario, instruments that are recorded should, by their own terms, not become effective until the work authorized under the permit is started. This would provide record notice while ensuring that a property owner actually enjoys the benefit of the authorization in exchange for the burden placed on land. It would also prevent the unnecessary application of the statute, and the associated expenditure of time and resources, in those situations where no development occurs, because the restriction would not become effective and there would be no need for a release. For restrictions that do become effective, the conservation restriction language should also specifically permit the reconfiguration of restricted areas without having to adhere to the statutory requirements for a public hearing and DEP Commissioner approval applicable to a true release of restricted areas. ■