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DEP's Settlement Discretion Scrutinized

Alternative dispute resolution process faces radical change

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The environmental regulatory landscape in New Jersey is renowned for its difficult terrain. Out of necessity, the New Jersey Department of Environmental Protection's alternative dispute resolution process has taken a leading role in resolving disputes between the DEP and the regulated public because of the difficulty in securing development approvals due to expanded environmental protections and ratcheted-up enforcement for even minor infractions. That could drastically change, however, depending on the outcome of an anticipated appeal of a recent DEP Commissioner's decision.

In *Dragon v. DEP*, 2007 WL 1094825 (Docket No. ESA 2988-06), Judge Miller invalidated a DEP settlement and subsequent approval concluding that the DEP waived substantive regulations without authority to do so. The decision was reversed by DEP Commissioner Jackson on June 25, who found that the DEP did not waive its regulations when it entered into the settlement. Petitioner's

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counsel filed a notice of appeal with the Appellate Division, and the outcome of that decision could have significant ramifications for the regulated public, the agency and the courts that hear these disputes. To avoid such disputes and eliminate any uncertainty that may exist with respect to its authority to waive substantive regulations in the context of settlements and permit decisions, the DEP should promulgate regulations permitting the waiver of substantive provisions on a case-by-case basis to promote settlements in appropriate circumstances.

Dragon involves a garden variety, neighboring landowner dispute. Mr. Kelly applied to the DEP for a permit pursuant to the Coastal Area Facility Review Act (CAFRA) to reconstruct an existing oceanfront home with an expanded footprint and a taller building. The Dragons, who own the adjacent, westerly lot opposed the application.

The DEP denied the application, finding the reconstruction would not satisfy the "infill" exemption of the DEP's "Coastal High Hazard Area" rule. Under the Coastal High Hazard Area rule, residential development is prohibited unless it constitutes "infill." An activity is "infill" if there is a house or commercial building within 100 feet of each lot line that is perpendicular to the high tide line.

Kelly challenged the denial. Through the DEP's Office of Dispute Resolution, the DEP and Kelly entered into a settlement authorizing the proposed house

reconstruction notwithstanding the inability to satisfy the "infill" requirement. In exchange, Kelly agreed to undertake a dune enhancement program, deed restrict all dunes on the property, and construct in accordance with FEMA's flood control requirements to improve flood storage/control conditions. The Dragons challenged the settlement authorization issued by the DEP.

Other than the "infill" requirement, the DEP found that the application satisfied all of its substantive criteria and was fully protective of the environment. In agreeing to settle, rather than rigidly applying this one provision of its rules, the DEP apparently acknowledged Kelly's argument that the intent of the "infill" rule was to maintain contiguous, open, vacant areas, rather than to preclude reconstruction of existing development.

Judge Miller acknowledged that the settlement was positive from both an environmental and judicial resources standpoint. He noted that "the renovations proposed by Kelly will offer numerous environmental benefits." Additionally, he agreed that the "DEP acted reasonably under the circumstances" as "[i]t is in the public interest to support ADR and resolve controversies through this process." But, he nonetheless invalidated the settlement agreement and permit finding that the DEP waived the "infill" requirement without express regulatory authority.

Judge Miller relied on *SMB*

Associates v. NJDEP, 264 N.J. Super. 38 (App. Div. 1993), *aff'd*, 137 N.J. 58 (1994). In *SMB*, the Supreme Court affirmed the Appellate Division's invalidation of a DEP CAFRA permit on grounds that the agency lacked authority to waive substantive regulatory requirements "in the absence of a regulation ... authorizing waivers and establishing appropriate standards for the exercise of waiver authority." The case did not involve a settlement. Instead, at issue was a decision of the now-defunct CAFRA Review Board to issue a CAFRA permit notwithstanding the DEP's finding that the application failed to satisfy the "Bay Island Corridor" policy. The court concluded that permitting the waiver in the absence of specific rules contravened established case law that requires rulemaking for broad-based, generally applicable agency actions.

In reversing the ALJ, Commissioner Jackson concluded that the DEP did not waive the "infill" rule, and that the DEP had inherent authority to negotiate a settlement that appropriately took into account the "best interests of the environment" and to avoid litigation risks. It is likely that the Appellate Division, on appeal, will agree that the DEP has inherent settlement authority and afford deference to the agency's decision, which seems to have become the norm. See *Vogel v. DEP*, 2007 WL 1803200 (App. Div. 2007). But the conclusion that its failure to strictly enforce the "infill" rule to achieve environmental benefits and avoid litigation risk did not constitute a waiver is contrary to the DEP's own cited definition of waiver: the voluntary and intentional relinquishment of a known existing legal right.

Both the ALJ and DEP decisions champion the benefits of settlements. Judge Miller noted that "settlements are vital tools" and "[i]t is in the public interest to support ADR and resolve controversies through this process." The DEP acknowledged the "strong public policy in favor of settlements" to resolve disputes and avoid the "the uncertainties of litigation." The significance of ADR in promoting settlements has recently been acknowledged in a proposed bill (A-4333; S-2816) that would require state agencies and instrumentalities

to designate an ADR official in an effort to promote dispute resolution statewide.

The DEP has been ahead of the curve with respect to ADR. It created by regulation an Office of Dispute Resolution to employ mediation through ADR to "provide a forum other than the administrative and trial courts for resolution of disagreements" involving DEP decisions. DEP's regulations require that persons requesting a hearing to challenge permit decisions indicate a "willingness to settle." The requests of persons willing to settle are transmitted to the DEP's Office of Dispute Resolution before transmittal to the OAL. Clearly, the DEP's regulatory scheme contemplates administrative settlements through the ADR process.

However, neither CAFRA nor its implementing regulations provide the DEP with specific corresponding authority to waive substantive provisions in the context of settlements achieved through the ADR process. The statute only addresses specific settlement authority in the context of administrative penalties issued by the DEP. N.J.S.A. 13:19-18.d. Under the CAFRA regulations, the DEP has broad authority to relax the regulatory procedures implementing CAFRA. However, with respect to its substantive provisions, apparently contradictory regulatory provisions and a lack of specific waiver authority create uncertainties. On one hand, the regulations contain seemingly broad authority to enter into settlements with an applicant who revises an application to negotiate a settlement. N.J.A.C. 7:7-5.4. But other provisions appear to severely limit this authority to "reconsideration" requests in the context of takings claims after the DEP first renders a permit decision strictly applying its standards and all administrative and judicial appeals are exhausted. N.J.A.C. 7:7-1.10.

The existence of the DEP's ADR Program practically compels the DEP to adopt regulations to allow discretion to waive its substantive regulations in appropriate circumstances. For the Office of Dispute Resolution to function effectively as an alternative forum to resolve disputes, the DEP must have the ability to apply its substantive regulations with flexibility.

The absence of specific waiver provisions has the potential to chill future settlements, notwithstanding the hopes expressed by Judge Miller to the contrary. The call for a rigid application of the DEP's rules by environmental interest groups in an effort to stall well-planned projects that are fully protective of the environment forebodes this result. In a recent newspaper article concerning a development project in the Pinelands, objectors complained that "the [Pinelands] Commission is content to go to a settlement ... (rather than) apply their own rules strictly." "Appeals Court Upholds Development," *Burlington County Times*, June 5, 2007. In response to vocal opposition and the invalidation of approved settlements, the Department may become less inclined to agree to ADR.

The increased costs associated with the hearing request process and the increased burden on the agency and judicial system is reason enough for the DEP to take action. Moreover, rigid application of the DEP's complex regulatory provisions without consideration of real-world impacts is antithetical to the regulatory process. The DEP's regulations should be working guidelines to be applied uniformly but with sufficient flexibility to address unforeseen circumstances and to promote creativity to achieve both environmental and economic benefits. This can be solidified through the adoption of regulations that permit the waiver of its substantive standards in appropriate circumstances. The existence of waiver provisions in other contexts, such as the MLUL and Pinelands Protection Act, has not resulted in an erosion of protective regulations. But, the absence of such regulations could create an unnecessary obstacle for well-planned projects.

To clarify and confirm its settlement authority, and negate any uncertainties created by decisions like *Dragon* and *SMB*, the DEP should adopt regulations to allow it discretion to waive its substantive provisions in appropriate circumstances. The DEP had reason to do so following *SMB*, but failed to take action. It is well beyond time for DEP to take action to ensure that its settlement authority is not undermined.