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DIMENSIONS

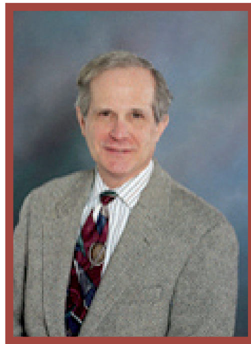
Newsletter of the New Jersey Builders Association

DEP's Proposed Flood Hazard Area Control Act Rules Could Have a Devastating Effect on Home Building

By Michael J. Gross, Esq., NJBA Environmental Counsel

In a proposal just short of 800 pages, the Corzine Administration's DEP has promulgated its first major initiative in Land Use Regulation. It proposes to revamp the current stream encroachment permitting process to such an extent that it will make it difficult, if not impossible, to obtain new permits in many circumstances. It is an open question as to whether these proposed regulations, which primarily impact new development, will have any measurable impact on future flooding.

Significantly, DEP has announced no new initiatives to address existing flooding, because it is much easier to regulate and prevent new development than to solve the problem of existing flooding. This article will focus on three of the most troublesome aspects of these new proposed regulations which, in combination, will severely limit new development in the State of New Jersey with very little, if any, impact on existing floodway.



Michael J. Gross, Esq.,
NJBA Environmental Counsel

VESTING OF CURRENT APPLICATIONS

The proposed regulations "grandfather" a limited number of pending projects. Specifically, the new restrictions will not apply to projects for which a Stream Encroachment, CAFRA or Waterfront Development Permit application is either deemed complete for review or a permit is issued prior to the effective date of the regulations. Projects for which a valid, final municipal building permit was issued prior to the adoption of the new regulations would, under the proposal, also be exempt from the new rules.

"Grandfathering" is intended to protect those who, in a good-faith reliance on existing rules, have made investments or incurred obligations which may be adversely affected by newly announced changes in public policy or its administration. Such vesting is essential as a matter of equity; it is equally important to the economic outlook, since inadequate protections can erode the confidence in the state's reliability and deter investment in the in the state's future.

This is probably the most limited vesting provision of any recent DEP land use statutory or regulatory proposal. For instance, under the Freshwater Wetlands Protection Act, not only were preliminary approvals exempted from the Act, but so were applications for a municipal planning approval that were submitted prior to a certain date. This recognized the substantial financial commitment needed to prepare

Michael J. Gross is NJBA's environmental counsel and partner with Giordano, Halleran and Ciesla, Attorneys at Law. Giordano, Halleran and Ciesla in an NJBA Master Sponsor.

subdivision or site plans. Under the Stormwater Management Rules adopted in February 2004, preliminary approval plus a land use approval served to vest a project so that the new Stormwater Rules did not apply.

Limited grandfathering is of little benefit. It recognizes that substantial expenditures have already been made when an applicant obtains a municipal building permit, for example, but ignores the reality of when those investments occurred. As any experienced professional (public or private) knows, substantial expenditures are made in the engineering design that leads to a preliminary subdivision or site plan approval. While there may be expenditures on other approvals, the majority of the engineering expenditures are made prior to obtaining preliminary approval, which occurs well in advance of the issuance of building permits.

Although the tendency is to consider grandfathering only within the confines of a specific program, the sweep of the proposal is such that virtually all projects, including those which do not now require a Stream Encroachment Permit, will be affected. The very act of proposing such a sweeping rule with such limited vesting protections will have an immediate chilling effect on investment decisions statewide.

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A simple example makes this point: for projects that do not now require a Stream Encroachment Permit, because, for instance, the drainage area of the effected stream is less than 50 acres. In those circumstances, only units for which building permits are individually obtained will be exempt from the new regulations. As everyone is well aware, municipal building permits are not usually obtained until a contract is entered into with a potential homeowner so that the building permit can match the house that is chosen for the lot. Further, such permits are based on detailed structural plans and have only limited durations. What happens if a building permit is issued and then is modified, since to be exempt the builder is forced under this proposal to obtain all building permits prior to the adoption of the regulations? What is the impact of an application to modify the building permit based on the contract with the purchaser? What of the later sections of a fully approved, but phased-development? Or of permits that expire due to construction delays (e.g., because of the current slow-down in the market).

The Summary of these proposed regulations does not explain why such a limited vesting is proposed. There is also no analysis of the social or economic impacts of such a limited vesting proposal.

THE RIPARIAN ZONE

The proposal would establish buffers from on all surface waters ranging between 50 and 300 feet. Even if the project is not located in a flood hazard area, a permit will be required for any development within those buffers. Within these buffers, there is a limitation on the amount of vegetation that can be removed.

There is a 300-foot buffer on both sides of any Category 1 water and all upstream tributaries located within the same HUC-14 watershed. This is basically

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Mark Krukar
19-01 Route 208 N
Fair Lawn, NJ 07410
201-599-7024 ph
201-599-7063 fax

Jack Gangluff
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856-772-3388 ph
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the same definition as used in the Stormwater Rules. [There is, however, one very significant difference in the proposed rules, specifically: In the Stormwater Management Rules, if the outer 150-foot area is already "developed" (farm field, paving, maintained lawn area, etc.), building may occur in that area if more stringent operational requirements are met. There is no such provision proposed in these rules and, therefore, in effect, these proposed rules, if enacted, would nullify that portion of the Stormwater Rules. It is clear that subdivisions will not be able to be placed in this outer 150-foot zone and there are limits on removal of vegetation for roadways, stormwater discharges, and utility lines.]

The riparian zone is 150-feet wide on both sides of any upstream tributary to a trout production water, any trout maintenance water and any upstream tributaries within one mile, and any segment of water flowing through an area that contains documented habitat for threatened or endangered plant or animal species which is critically dependent on the regulated water for survival and includes all upstream tributaries of this water within one mile.

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The 150-foot riparian zone also includes buffers from any waters flowing through an area that contains acid-producing soils.

Since there are no exceptions for redevelopment projects, the proposed rules will have an adverse impact on the ability to redevelop Brownfield sites and other urban area sites that may contain vegetation that cannot be removed under the proposed rules. Builders and developers pursuing redevelopment projects must now reconsider the economics of those plans – particularly in light of the very limited vesting protections, this can only exacerbate the ongoing failure of New Jersey to have a coherent housing policy to guide and facilitate development in appropriate areas.

ELIMINATION OF 20% NET FILL RULE

The proposal would replace the current 20% fill option with a more convoluted rule that, translates into zero net fill. The DEP proposes to regulate development in the flood hazard area, which allows 25% more flow of water than flows through a flood plain in a 100-year storm. This means that if 10% of the flood hazard area is proposed to be filled, there must be removal of the same amount of material within the flood plain on-site or there is the ability to compensate for this fill by excavation off-site. The flood storage volume to be displaced includes both the flood hazard area design flood and the ten-year flood area. The ability to compensate off-site for displacement of flood storage volume is limited to the same water or its tributary if the flood hazard areas of both of these waters connect on-site, the waterway must be in the same HUC-14 watershed as the proposed flood storage displacement, outside a floodway and it cannot be created within a riparian zone (even though that zone will often be outside the flood

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hazard area) or within a Special Water Resource Protection Area. The compensation also cannot have "other significant, adverse environmental consequences", whatever that means, and cannot have adverse impacts on threatened and endangered species, aquatic biota, or fishery resources. There must also be a deed restriction on this off-site land against any future flood storage volume displacement by fill.

This will result in much more costly development projects. Since ultimately the costs must be passed on to the purchaser, exacerbating the states already excessive regulatory costs, the economic viability of projects – including most redevelopment projects, needs to be re-assessed.

For instance, all road crossings of streams will now have to result in zero net fill. This will probably mandate bridging in some circumstances and may prevent these road crossings from even being constructed if it is infeasible to remove structures or excavate in the flood plain on or off-site. While there are some exceptions to this Rule, they are relatively minor in nature and will probably not significantly impact restrictions on housing development proposed by these rules.

The rationale presented by the Department for its Zero Net Fill Rule is that there has been increased flooding over the past few years. That statement is unsupported by any analysis of the cause of this alleged increased flooding. Is it caused by new development that has been constructed in the past few years or by existing development constructed prior to the adoption of the 1984 Stream Encroachment Regulations that restricted fill to 20% net fill in the flood fringe area? Without such an analysis, there is no reason to accept the Department's rhetorical justification for the very restrictive zero net fill standard. Although there are many other troublesome provisions of these proposed rules -- technical and administrative – these three provisions alone will adversely impact not only the housing industry, but the future economy of the State of New Jersey, which is largely driven by the construction industry. This proposal will not only adversely impact housing construction, but it will severely impact the ability to construct commercial, industrial and governmental buildings and infrastructure. This proposal, if adopted, will impact all segments of the New Jersey economy.

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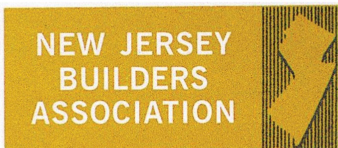

500 Horizon Center Dr.
Suite 530
Robbinsville, NJ 08691
609-587-5577
www.njba.org

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The NJBA Annual Report, as well as archived copies of past issues of *Dimensions*, are available at www.njba.org. Questions or comments may be sent to Susan Evans, Director of Public Information, at sevans@njba.org.

Editor: Susan Evans Contributing Staff: Louis Gubitosi, Kristin Hassan