



DIMENSIONS

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Highlands "Grandfather" Exemption

DEP Clarifies "Construction Beyond Site Preparation" Requirements

By: Michael J. Gross Esq. and Steven M. Dalton Esq.
Giordano, Halleran and Ciesla, Attorneys at Law

Three years have come and gone since the Highlands Water Protection and Planning Act ("Act") N.J.S.A. 13:20-1 et seq. became effective. While the Highlands Council still has not finalized the required Regional Master Plan, the three year anniversary of the effective date of the Act is significant in the context of the Act's "grandfather" exemption. This article discusses the requirements that had to be met to qualify for a "grandfather" exemption and what must be done to preserve an exemption.

The Act applies to "major Highlands development", which is defined to include residential development in the Preservation Area of the Highlands that disturbs one acre or more of land or results in a cumulative increase in impervious surface of one-quarter acre or more. N.J.S.A. 13:20-3; N.J.A.C. 7:38-1.4. There are seventeen (17) listed exemptions provided in the Act. N.J.S.A. 13:20-28.a. To qualify for a "grandfather" exemption, a "major Highlands development" must have received local approvals and a specified DEP approval prior to March 29, 2004, the date the Act was introduced in the Legislature. N.J.S.A. 13:20-28.a(3); N.J.A.C. 7:38-2.3(a)3. The required local approvals include preliminary or final site plan approval, final municipal building or construction permit, or minor, preliminary or final subdivision approval where no subsequent site plan approval is required. Applicable

DEP approvals include authorizations pursuant to the Water Supply Management Act; a Safe Drinking



Michael J. Gross, Esq.

Water Act Permit for a water main extension; authorizations pursuant to the Realty Improvement to Sewerage and Facilities Act; or a Treatment Works Approval. If no such approvals are required, then a Freshwater Wetlands Protection Act authorization or Flood Hazard Area Control Act authorization will satisfy the DEP permit requirement.

The Act and DEP's regulations place strict limitations on the "grandfather" exemption. The exemption is applicable "only to the land area and the scope of the major Highlands development addressed by the qualifying approvals." N.J.S.A. 13:20-28.a(3)(c)(ii). The exemption expires with the expiration of a qualifying approval. Additionally, the Act provides that the exemption

"shall expire if construction beyond site preparation does not commence within three (3) years after the date of enactment of this Act." DEP placed further limitations on exemption through its regulations by requiring that following August 10, 2007, for those projects that qualified for the exemption, the exemption will be lost unless construction continues without a cumulative interruption of one year or more. N.J.A.C. 7:38-2.3(a)3.

A strict reading of DEP's regulations implementing the Act require that a Highlands Applicability Determination ("HAD") be obtained from DEP prior to the commencement of work on a "major Highlands development" even if that development is exempt based on prior approvals. N.J.A.C. 7:38-2.2(a). A HAD addresses the question of whether a proposed development is a "major Highlands development" and whether a proposed development is exempt. N.J.A.C. 7:38-2.4. Thus, while the Act does not apply to an exempt development, the regulations appear to require that a HAD be obtained from DEP to confirm the exemption prior to construction. However, it would seemingly be an untenable position for DEP to assert that a project that qualifies for a "grandfather" exemption and for which construction commenced prior to August 10, 2007 is not exempt because a HAD was not issued prior to construction.

There has been a considerable amount of discussion and confusion

continued

regarding the issue of what constitutes “construction beyond site preparation” for purposes of qualifying for a “grandfather” exemption. The Act and regulations define “construction beyond site preparation” as “having completed the foundation for a building or structure, and does not include the clearing, cutting, or removing of vegetation, bringing construction materials to the site, or site grading or other earth work associated with preparing a site for construction.” N.J.S.A. 13:20-3; N.J.A.C. 7:38-1.4. Some DEP Staff took the position that all that was required to satisfy the “construction beyond site preparation” requirement was the construction of a single foundation for a multi-unit project. Others, however, interpreted the Act and regulations as requiring the construction of the foundation of every unit within a multi-unit project for the overall project to qualify for the exemption. This approach would have negated the exemption for many projects that otherwise qualify, particularly phased projects and smaller subdivisions that proceed on a lot by lot, contract by contract basis.

It appears that DEP has finally put this issue to rest. On two separate occasions, most recently in a July 10, 2007 letter, high level DEP staff members within the Division of Watershed Management and Bureau of Watershed Regulation have provided written clarification of the “grandfather” exemption requirement and its intended scope.

According to DEP, the “construction beyond site preparation” language of the Act and regulations is limited to a single foundation within an overall development. Thus, all that is required for an overall

year or more following August 10, 2007. DEP has warned that the Enforcement Bureau “will be monitoring sites to ensure compliance with the exemption criteria.”

The development restrictions of the Act are infamous. Where a project qualifies for a “grandfather” exemption from the Act based on the issuance of prior approvals, all necessary precautions should be taken to ensure

that the validity of the exemption is maintained. DEP has provided important clarification of scope of construction activities that were required prior to August 10, 2007 to qualify for a “grandfather” exemption, assuming all other criteria were satisfied. Developers with qualifying projects should take appropriate action to continue construction activities to avoid a claim that the exemption has lapsed.



This information is not to be construed as legal advice.

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

Steven M. Dalton, a shareholder in the firm's Environmental Practice Area, concentrates his practice on environmental permitting and compliance issues. Giordano, Halleran and Ciesla, Attorneys at Law is an NJBA Master Sponsor.



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development project to qualify for a “grandfather” exemption is the completion of at least one foundation for a building or structure prior to August 10, 2007. DEP confirmed that it “does not interpret the statutory language to mean that every component of a project must be under construction on August 10, 2007 in order to continue the exemption beyond that date.” Rather, “construction beyond site preparation” will be found if “at least one foundation” is completed, and the construction continues after August 10, 2007 without a cumulative interruption of one year.

Furthermore, DEP confirmed that a “grandfather” exemption is not lost with respect to individual undeveloped lots within a subdivision merely because those lots are conveyed prior to construction. If the overall development qualified for the “grandfather” exemption, the exemption will apply to undeveloped lots that are sold provided construction in the overall development continues uninterrupted for a cumulative period of one



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

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EDITOR: SUSAN EVANS CONTRIBUTING STAFF: STEFANIE LOH