

# HOLDING LAND FOR A FUTURE PAYOUT—DON'T BANK ON IT!

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**H**istorically, land has consistently increased in value, resulting in the practice of holding onto developable property for future sale and higher value. Such "land banking" would appear even more desirable during economic downturns in the development market. Arguably, land banking should be as viable as ever in today's market.

However, the increasing complexity and severity of the regulatory climate governing development mandates re-consideration of the value of land banking. New regulatory programs and increased complexities in inter-agency coordination suggest that decreasing potential yields may in fact decrease the value of the land in the future regardless of prevailing economic trends. While the value of each "unit" (whether dwelling units for residential development or square footage for commercial or industrial developments) will likely rebound over time, the total number of "units" a property can yield will likely not remain at today's values.

A recent series of DEP (New Jersey Department of Environmental Protection) regulatory proposals and adoptions are combining to severely restrict the ability to develop parcels even in areas designated for "growth" by local planning. The trend of tightening restrictions will, no doubt, continue to decrease the yield for the overwhelming majority of development sites. Given New Jersey's regulatory approach and lack of overall incentives for growth, those holding land and planning to reap the benefit of future unit price increases may well find themselves *losing* value as the result of dramatically decreasing yields.

While DEP seemingly has always been restricting development, several major regulatory proposals covering the full range of land use programs have recently been adopted or proposed that will dramatically alter future development throughout the state. Most recently, in November 2007, DEP adopted major changes to the stream encroachment permit regulations. The new flood hazard rules greatly expand the scope of regulated waters. DEP has created a completely new regulated area known as a "riparian zone." The "riparian zone" is a buffer extending 50, 150, or 300 feet from regulated waters, depending on ecological features or associated habitats. Rigorous restrictions apply to development in these riparian zone buffers. The new rules also require "zero net fill" (previously only applied to the Central Passaic River Basin floodplain). Up to 20 percent of the flood storage area may

be displaced on site only if an equal amount of flood storage area is created off-site. Strict limitations on off-site compensation will make it difficult to achieve for most locations. Hence, sites near waterways will be severely limited in how they are developed.

The DEP proposed amendments to its Surface Water Quality Standards rules in May 2007. It proposed more than 900 miles of additional Category One (C-1) waters, together with standards and procedures for making future C-1 designations. This designation, among other things, establishes a 300-foot buffer on either side of the water body through the state's Stormwater Management regulations. Additionally, a use that will measurably change water quality of a C-1 water is precluded.

DEP's May 2007 Water Quality Management Planning (WQMP) proposal would withdraw all sewer service area designations in the event that Wastewater Management Plans (WMPs) are not updated to meet regulatory requirements within nine months of the rule adoption. Counties would assume WMP responsibility for developing WMPs, and update the plans every six years. Amendments and revisions to a WMP will not be processed by DEP when a WMP is out of date except in limited circumstances. A large number of WMPs are out of compliance. Areas not within WMPs or WMPs that are voided since they are out of compliance will be limited to very small developments generating less than

2,000 gallons daily. The proposed rules would also preclude a large list of "environmentally sensitive" areas from being designated as sewer service areas, notwithstanding regulation of these areas through other DEP programs.

In summer 2007, DEP proposed detailed changes to the Groundwater Quality Standards (GWQS). The GWQS are used to determine effluent limitations for discharges to groundwater (such as those allowed under NJPDES permits) and as standards for remediation cases. The GWQS, therefore, significantly impact all development projects that will have wastewater or stormwater discharges to the ground as well as Brownfield sites with contaminated groundwater. Moreover, since the GWQS will be used in the WQMP pro-



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cess, it is expected that many areas will be prohibited from receiving any new discharges to groundwater. Unless there is a current sewer service area in place, any new development will be limited to low density projects on septic systems regardless of the State Plan designation or local zoning.

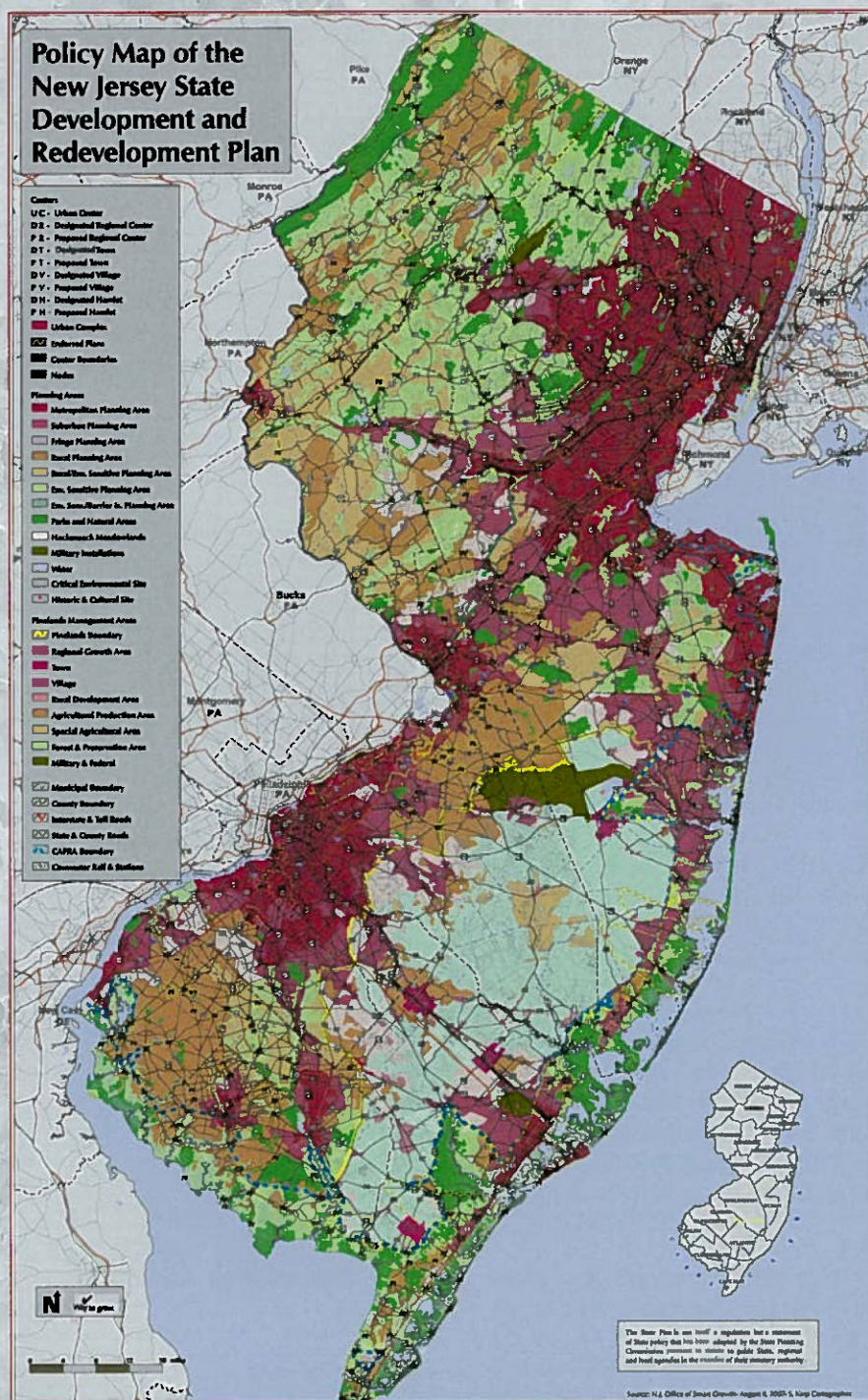
Earlier in the year, DEP proposed soil cleanup standards, amendments to the Technical Oversight rules governing approved cleanups and notification and public participation requirements for Site Remediation Program cases. These rules can impact the ability to develop Brown-field sites economically.

DEP proposed amendments to the Freshwater Wetlands rules in September 2007 that would significantly change the existing regulatory program, complicate development approvals and increase costs. The proposal limits the scope of activities presently allowed under the more streamlined General Permit (GP) process, and imposes new mitigation requirements on numerous GPs. As a result, more Individual Permits (IPs) will be required, development costs will increase and available land will be reduced. Additionally, significantly enhanced requirements are proposed with respect to cultural resources. These changes will decrease the amount of developable area whenever sites are located with or near wetland areas.

Currently awaiting formal proposal are the long-pending "Endangered and Threatened Species" rules, and the long-delayed Highlands Regional Master Plan adoption. These programs will result in additional environmental restrictions and an overall clampdown on development opportunities for vast areas of the state.

Overall, the amount of developable land continues to be constrained as each new prescriptive program is adopted. Further complicating the process is the real prospect that DEP will be unable to process applications in a timely manner due to understaffing.

In sum, newly adopted and recently proposed regulations impose severe restrictions on development. It is reasonable to predict that the ability to build on undeveloped parcels will continue to be substantially reduced. For residential sites, regardless of zoning, it is likely many sites will be developed with fewer housing units as time goes on. For commercial and industrial projects, less square footage will be able to be built as each new restriction comes on line. Over time, it is doubtful that the per unit development value will increase sufficiently to



make up for drastic cuts in the number of units or the amount of square footage that could be developed on a given property. Hence, in the long term, many "land banked" properties will lose and not gain value. Those holding properties for land banking should carefully review how new and proposed development restrictions will impact the value of their land. ■

*Messrs. Robins and Dalton are shareholders in the Environmental Department of Giordano Halleran & Ciesla. For further information please visit [www.gclaw.com](http://www.gclaw.com).*