

DIMENSIONS

CHANGES COMING TO DEP LAND USE PERMITTING PROGRAMS

By: Steve M. Dalton, Esq.

The New Jersey Department of Environmental Protection (DEP) recently proposed amendments to rules applicable to its Division of Land Use Regulation permitting programs. The rule proposal was published July 17, 2017 and the public comment period expires September 15, 2017. The New Jersey Builders Association submitted comments to DEP regarding several provisions of the proposed amendments. Builders, developers and land owners should consult with their environmental professionals to assess what impact the proposed rule changes may have on planned development.

The bulk of the proposal relates to DEP's Coastal permitting program. The proposal follows DEP's earlier July 2015 amendments that consolidated the procedural Coastal Permit Program Rules and the substantive Coastal Zone Management rules into one comprehensive set of regulations applicable to coastal development. The 2015 amendments focused primarily on procedural provisions of the Coastal rules. The current proposal addresses substantive provisions of the rules, though the scope of the proposal is fairly limited. In addition to the proposed amendments to the Coastal Rules, amendments to certain provisions of the Freshwater Wetland and Flood Hazard rules are also proposed.

Of note, DEP acknowledges that water-dependent use may not be feasible at certain Filled Water's Edge sites. The Filled Water's Edge Rule is proposed to be amended to allow applicants to demonstrate that water dependent use is not feasible enabling DEP to authorize non-water dependent development. Feasibility factors include the length of water frontage on the

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site; corresponding area of upland to support water dependent use; the presence of special areas between the upland and navigable water that may preclude approval of a water dependent development; compatibility of surrounding development; the existence of contamination that may prevent implementation of a water-dependent use; and factually-specific conditions unique to the property that may result in peculiar or exceptional practical difficulties in development of water-dependent use. The rule summary clarifies that the feasibility criteria set forth in new subsection N.J.A.C. 7:7-9.23(e) are meant to apply to development or redevelopment where there is not already an existing water dependent use. If there is an existing water dependent use, development with a non-water dependent use will not be permitted.

Limitations in the existing rule related to the size of Filled Water's Edge sites are also proposed to be relaxed. N.J.A.C. 7:7-9.23(d)3 currently provides that

larger sites of 10 acres or more may be developed with a mix of water-dependent and water oriented uses with other development. DEP is amending this rule so that it applies to any Filled Water's Edge site not just "large" sites, recognizing that size is just one factor in determining whether a mix of uses is appropriate for a site. Applicants will need to demonstrate that the non-water related uses do not adversely affect access to or use of the waterfront portion of the site for water dependent use.

The Scenic Resources and High-Rise Structures rules will be combined into a single rule. High-rise structures will continue to be more strictly regulated, and DEP has stated that the amendments are being made in recognition that some standards in the current rules are applied across the board in a one-size-fits-all approach, which is not appropriate in all circumstances. However, some provisions currently only applicable to high-rise structures, such as the requirement that development be in character with surrounding development heights and residential densities or be in character with municipal comprehensive development patterns, will be made applicable to non-high-rise structures if the rule proposal is adopted. Thus, an enhanced justification and analysis will be required to demonstrate compliance with the rule in the context of non-high-rise structures.

New subsection 16.10(c)3 will include standards applicable solely to high-rise structures. High-rise structures will be encouraged in areas that already have such structures or other intense development. The rule will require that high-rise structures be set back by one public road or at 50 feet from

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coastal waters for both visual and physical access. Subsection 16.10(e) relating to views in the context of development on oceanfront and bay front areas and requiring views to be considered when designing oceanfront or bay front development, will be made applicable to the Northern Waterfront region and Delaware River as well as other development. Only Atlantic City is proposed to be excepted from the rule whereas currently, the Northern Waterfront region and Delaware River region are also excepted.

The Coastal High Hazard rule is proposed to be amended to provide a limited allowance for development in V-Zones, applicable primarily to development in existing densely developed areas such as the Hudson River Waterfront Area and Atlantic City. DEP is also proposing to amend its Definitions section of the Rules to replace FIRM with "FEMA flood mapping". The new definition will be made consistent with the Flood Hazard Rules to provide that preliminary or advisory maps will be utilized in place of existing, current FEMA mapping if the advisory or preliminary maps would result in a higher flood elevation.

The incorporated list of CAFRA Section 10 requirements will be amended with respect to public access requirements under the Public Trust Doctrine. In the aftermath of the [Hackensack Riverkeeper](#) decision that declared DEP's public access rules invalid, the Legislature took action to amend CAFRA requiring public access to be addressed in connection with CAFRA coastal applications subject to rules to be adopted by DEP. A separate DEP proposal is pending to amend the public access provisions of the existing rules, which DEP has never recognized as being invalidated given the action taken by the Legislature following [Hackensack Riverkeeper](#). NJBA has consistently taken the position that any action taken by the Legislature or DEP to implement the Public Trust Doctrine and require

public access must be consistent with the Public Trust Doctrine as developed and implemented under well-established case law, taking into account private property rights and due process interests protected under both the State and Federal Constitutions. A concern exists that that proposed subsection 1.4(b)8 could be interpreted in a manner that is inconsistent with the Public Trust Doctrine to require on-site or off-site public access to be provided as a mandatory condition in connection with approval of all Coastal applications, regardless of whether public trust interests are implicated, or whether public access is necessary based on the specific factual circumstances involving the property that is the subject of the application. Such an interpretation and application of the rule would contravene the Public Trust Doctrine.

The proposed amendments will also affect permitting involving dune walkovers and trails, paths and footbridges. At grade dune walkovers will continue to be exempt, but permitting will be required for elevated dune walkover structures. DEP is also proposing to update and add to its rules Rationale discussions. The Rationale provisions are sometimes useful in resolving questions of interpretation in the context of factually specific issues.

With respect to the Flood Hazard Rules, the amendments will facilitate certain residential redevelopment in inland fluvial flood hazard areas. Under the current Rules, such sites developed with multi-residence buildings (building serving 3 or more units) must be served by an existing or new roadway elevated one-foot above the applicable flood hazard design flood elevation. The proposed amendments if adopted will create an exception allowing applicant's proposing to redevelop a site with multi-residence buildings to demonstrate that it is not feasible to construct an access roadway that meets the elevation requirement. All multi-resident buildings

that are not a part of redevelopment must have at least one roadway with a travel surface that is one foot above the flood hazard area design flood elevation. Additionally, whether redevelopment or new development, roadways or parking area serving a multi-residence building in a fluvial flood hazard area cannot be more than 1-foot below the flood hazard area design flood elevation. DEP's stated justification for having an absolute bar against roadways more than one foot below the DFE is to allow emergency vehicles access to the building.

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community. Testimonials take more time and effort to develop, but they have proven extremely valuable. Potential buyers can relate to these stories, identifying with the homeowners who are featured, and consequently envisioning themselves living there, too. We have heard story after story from different builders over the years who told us that whenever testimonial stories have run, sales representatives at the community have noticed an increase in traffic. Visitors and new prospects mention that they read the story and sometimes even visit with a copy of the story in hand. Now that's a successful press release – and a builder's dream!