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Securing a Coastal Development Permit

How to comply with the state statutes regulating the development of New Jersey's coastal lands and waters

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Three state statutes regulate the use and development of New Jersey's coastal lands and waters. The Coastal Area Facilities Review Act, N.J.S.A. 13:19-1 et seq. (CAFRA), controls the construction of any upland development in the coastal area. The Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq. (Wetlands Act), governs the draining, dredging, excavation or depositing of material as well as the erection of any structures, including pilings, in any mapped or delineated coastal wetlands. The Waterfront Development Law, N.J.S.A. 12:5-3 et seq. (WDL), regulates the filling, dredging or placement of any structures (including floating homes or navigation aides in place for more than 10 days) or obstructions within any tidal waterway or in certain upland areas adjacent to tidal waterways outside CAFRA regulated areas.

Securing a development permit under CAFRA, the Wetlands Act or the WDL is often pivotal in the successful

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development or potential sale of coastal land. Contracts of sale for coastal property typically contain contingency provisions hinging upon a buyer's ability to procure "all local, county, state and federal land use and environmental approvals and permits." The process of procuring a coastal permit is perhaps the least understood and the most time consuming development approval to obtain. This article briefly discusses the application process, statutory decision-making time frames, and the remedies available should the New Jersey Department of Environmental Protection not act in a timely fashion.

Is an Application Really Required?

Coastal permit applications are processed by the DEP's Land Use Regulation Program (LURP). LURP administers two distinct but interrelated sets of regulations that govern the issuance of CAFRA, Wetlands Act and WDL permits. The "Coastal Permit Program Rules" set out at N.J.A.C. 7:7-1.1 et seq. establish the procedures for filing and govern LURP's permit application review. The "Coastal Zone Management Rules" set out at N.J.A.C. 7:7E-1.1 et seq. contain the DEP's substantive criteria which coastal permit applications must address and satisfy in

addition to statutory criteria for CAFRA applications contained at N.J.S.A. 13:19-10. Both sets of these regulations have been enacted to satisfy the Federal Coastal Zone Management Act, 16 U.S.C. 1451 et. seq., which provides only broad guidelines rather than specific regulatory standards for coastal developments.

Unlike the Coastal Permit Program Rules which LURP may (but rarely does) relax in the public interest consistent with statutory requirements, under *In re CAFRA Permit No. 87-0959-5 Issued to Gateway Associates*, 152 N.J. 287 (1997), LURP has no authority to waive any of the substantive standards set forth in the Coastal Zone Management Rules. Although a single application is permitted when more than one type of coastal permit is required, the procedural and substantive requirements for each type of permit must still be satisfied.

The initial step in the application process should be to determine if the area and proposed activity require compliance with CAFRA, the Wetlands Act or the WDL. These statutes and their implemented regulations must be closely examined, including the Coastal Permit Program Rules' definitions of significant terms such as "development," "regulated activity," "structure" and "regulated wetland."

CAFRA regulations beginning at N.J.A.C. 7:7-2.1 delineate the specific areas and uses that are regulated as well as those that are not. For example, CAFRA does not regulate less than a 25-unit residential development if no

portion of the property is within 150 feet of a bulkhead or beach, provided the development is not part of a larger or "previous development" as defined in N.J.A.C. 7:7-2.1(b)(8).

Under the Wetlands Act, if an area is mapped and delineated, virtually any activity is regulated — including the use of pesticides, except those applied to the skin, clothing or for personal use. A listing of the maps and the activities which are regulated appear in N.J.A.C. 7:7-2.2.

Like CAFRA, under the WDL, a number of activities are exempt from regulation. Perhaps the most well known exempt activity is the replacement of lawfully existing docks and bulkheads provided they are of the same size and location. Under presently proposed rule amendments, size is to be measured by length, width and height.

An exempt CAFRA or WDL activity does not require any DEP confirmation. Independent of jurisdictional determinations which the DEP has informally made available for some time, there is a formal optional procedure in place to request and obtain a written determination. While this procedure is advisable in the event of any doubt, unlike the permit process there is no mandatory time period within which LURP must respond.

The Types of Permits

Only an "Individual Permit" is available under the Wetlands Act or WDL. However, under CAFRA, there are Permits-By-Rule, Coastal General Permits (of which there are some 22 varieties with three additional types now proposed), Long Branch Redevelopment Zone Permits and Individual Permits. In effect, a Permit-By-Rule is the equivalent of an exemption because the rule itself authorizes the development without the need for any application or written LURP determination. Coastal General and Individual Permits differ not only in terms of application procedure under the Coastal Permit Program Rules but also in terms of the applicable substantive criteria under the Coastal Zone

Management Rules. It is imperative that the proper CAFRA permit is sought because applying for the wrong type of permit will ultimately result in rejection and thus in delay. For example, an Individual Permit application requires newspaper publication while a Coastal General Permit application does not.

A pre-application conference is optionally available for any type of permit application. In fact, it is regulatorily recommended for major developments. While LURP staff accommodates requests to conduct these conferences on site, prompt scheduling is difficult because of its heavy caseload. The DEP describes pre-application conferences as intended to provide guidance rather than constituting a commitment to approve or deny a permit application. However, following the conference, if requested, LURP is required to prepare a written memorandum of record or policy compliance checklist summarizing its discussions. Given the difficulty of promptly securing a pre-application conference and because the memorandum of record has no binding effect, a conference should be requested only in perplexing cases. Independent of LURP's regulatory obligation to discuss the level of detail and areas of information which must be included in any permit application, LURP staff is generally available and quite helpful in answering questions by telephone.

Application Requirements

Once a conclusion has been reached regarding the need for and the type of permit required, a determination must be made regarding whether the development complies with the applicable substantive criteria of the Coastal Zone Management Rules. Application content and filing procedures for Individual and Coastal General Permits are set forth at N.J.A.C. 7:7-4.2, 7-4.3 and 7:7-7.3. Coastal permit application fees are contained in Subchapter 10 of the Coastal Permit Program Rules. Emergency permit application procedures are contained in N.J.A.C. 7:7-1.7. While not a regulatory requirement, an application should be submitted by cer-

tified mail or overnight carrier to prove actual receipt. E-mail filing is not authorized. All types of coastal permit applications, among other items, require the submission of a "Compliance Statement" and in major applications an "Environmental Impact Statement" (EIS), both of which are intended to demonstrate the development's adherence to the applicable Rules on Coastal Zone Management. Content requirements for an EIS and Compliance Statement are delineated in N.J.A.C. 7:7-6.2(b) and 7:7-6.3.

Timetables for Permit Decisions

On Oct. 23, 1975, some 35 days following CAFRA's effective date, the New Jersey Legislature enacted the 90-Day Construction Permits Act, N.J.S.A. 13:1D-30 et seq. (90-Day Act). The 90-Day Act requires that the DEP, within 20 working days following the filing of a Wetlands or WDL permit application, request that the applicant submit any additional information it requires. If no additional information is required, the application is deemed complete the date it was received. If additional information is requested, the application is deemed complete on the date the additional information is received. The DEP has 90 days following the date the Wetlands or WDL application is complete to act by approving, conditioning or denying it, failing which the application is deemed automatically approved to the extent it does not violate other statutes or regulations and subject to any standard terms and conditions which apply to such permits. Although N.J.A.C. 7:7-4.7(b) provides that the DEP "shall act on all Wetlands and [WDL] applications within 90 days after the application was declared complete for final review" [emphasis provided], the DEP itself concluded in *Nappi v. DEP*, 97 N.J.A.R. 2d 49 (1993) and *Iacobucci v. Division of Coastal Resources*, WL 249100 (N.J. Dept. Envir. Prot. 1998), both of which rely upon *Klimar Realty, Inc. v. NJ DEP*, 217 N.J. Super. 526 (App. Div. 1987), that the 90-Day Act supersedes any contrary time periods contained in

the WDL. Thus, the 90-day period for the DEP to act runs from the date the Wetlands or WDL permit application is, in fact, complete as distinct from when LURP declares it "complete for review." Accordingly, if the DEP does not request any additional information within 20 working days after the date it receives the application, the application is deemed complete by operation of law and the 90-day period for the DEP to act commences to run.

Although the 90-Day Act applies as well to CAFRA applications, it refers to CAFRA for the applicable time the 90-day period commences to run. Under CAFRA, the DEP has 20 working days following its receipt of an application to: 1) assign a project number, accept the application, issue notice that the application is complete for public hearing or for public comment, either one of which must be scheduled within 15 days; 2) assign a project number, accept the application and issue a deficiency notice; or 3) return the application and explain why it is unacceptable for filing.

The DEP has 15 days after it receives previously identified deficient material to state whether further information is still required, to declare the application complete for public comment if no public hearing is to be conducted or, if a public hearing is to be conducted, to declare the application complete for public hearing. Within 15 days of declaring the application complete for public comment or a public hearing, the DEP must set a date for either the commencement of a 30-day public comment period or a public hearing if one is required. Either one must occur no later than 60 days thereafter.

Once the 30-day public comment period has expired or, if a hearing was conducted, it has been concluded, the DEP has another 15 days to declare the application "complete for final review" or advise the applicant that still further information is required for its complete review. This is where most delays occur. Many times LURP will request alternate designs or modifications rather than deny a permit application because of what it conceives is non-

compliance with one or more of the Coastal Zone Management Rules. However, in *North Pointe Condominiums v. NJDEP*, 1987 WL 170750, the DEP conceded that requesting an applicant to modify a proposed development because of an inconsistency with governing substantive criteria does not constitute a request for "further information."

Finally, following the 15-day period the DEP has to declare a CAFRA application complete for final review, it has another 45 days to act unless it legitimately requests further information in which event it has 90 days. *DiDonato v. Wildwood Mun. Body Corporate and Politic*, 194 N.J. Super. 83 (App. Div. 1984), establishes that the automatic approval provision of the 90-Day Act is not triggered if the DEP timely approves, approves on conditions or denies an application but merely fails within that time to notify the applicant.

Automatic Approval Enforcement Remedies

LURP staff is committed to timely decision-making. Its attempt to resolve a troublesome application should not be seized as a short-sighted opportunity to obtain an automatic approval, especially if the eventual issuance of a permit is likely. However, should circumstances so dictate, there are two alternate procedural methods to enforce the 90-Day Act.

First, an applicant can wait until the application is denied and then assert noncompliance as part of an administrative appeal. Although some practitioners may wish to avoid this procedure because the DEP Commissioner will ultimately have the right to accept, reject or modify the conclusion of an administrative law judge, and his broad discretion is rarely disturbed, the Appellate Division in *Kilmar* has taken a much less forgiving interpretation of the 90-Day Act than it has in construing the counterpart "default approval" provision of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. This is evidenced by *D'Anna v. Planning Bd. of Wash. Tp.*, 256 N.J. Super. 78 (App.

Div.), cert. den., 130 N.J. 18 (1992); *Star Enterprise v. Wilder*, 268 N.J. Super. 371 (App. Div. 1993); *Sprint Spectrum v. Zoning Bd.*, 356 N.J. Super. 194 (Law Div. 2002); and most recently, *Fallone Prop. V. Bethlehem Plan. Bd.*, 369 N.J. Super. 552, 568-569 (App. Div. 2004). For that matter, the DEP itself has taken a strict position on these timetables as underscored in *Nappi, Iacobucci* and *North Pointe Condominiums*.

The alternative is to file a prerogative writs action in the Law Division before the DEP takes the perceived act of denying the application. Although the Appellate Division in *DiDonato* reversed the Law Division's grant of an automatic CAFRA approval, it did not do so on jurisdictional grounds. Nonetheless, Law Division jurisdiction appears evident. The issue is worthy of an extended analysis because there is no decision squarely on point.

R.4:69-5 provides:

Except where it is manifest that the interest of justice require otherwise, actions under R.4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted.

However, as Judge Sylvia Pressler has said:

While ordinarily administrative remedies must be exhausted before resort is had to the court, exhaustion is neither a jurisdictional nor absolute requirement and it may be dispensed with where the interest of justice requires, or if there is a need for prompt decision in the public interest, or *where there is no question as to administrative discretion* or judgment and only a question of law is involved or where further result to administrative recourse would be futile. [emphasis added] Pressler, Current N.J. Court Rules, Comment R.4:69-5, (GANN).

Colon v. Tedesco, 125 N.J. Super. 446 (Law Div. 1973), appears to be dispositive. There, former Assignment Judge Horn held that the Law Division has jurisdiction where an action is brought to compel a state agency to perform a ministerial duty. In *Colon*, proceedings were initiated to compel the initiation of litigation against owners of a migrant labor camp who allegedly were violating the Seasonal Farm Labor Act, N.J.S.A. 34:9A-1 et seq. In reliance upon a series of decisions, including *Reid Development Corp. v. Parsippany-Troy Hills Tp.*, 10 N.J. 229, 237 (1952), Judge Horn held:

In the instant case the statute's language is mandatory, as already indicated. It may be that the defendants have performed in accordance with their obligations but that has not been demonstrated. Plaintiffs are entitled to the aid of the court in ascertaining whether they have so performed and, if they have, whether the determination was arbitrary and an abuse of their discretion. Plaintiffs should not be blocked at the threshold without an opportunity to establish their charges. 125 N.J. Super. at 454-55.

Moss v. Shinn, 341 N.J. Super. 327, 343-44 (Law Div. 2000) explains *Colon* this way:

In *Colon*, plaintiffs charged certain individuals in control of a migrant labor camp with permitting unsanitary conditions in their operation so that it constitutes a public nuisance. The relief sought was a judgment ordering defendants to initiate proceedings against the owning and operating individuals pursuant to specific statutes to declare the camp to be a public nuisance. There, the statutes which plaintiffs cited in their complaint provided that the

Department of Labor and Industry, and Attorney General, had certain mandated duties which entailed specifically, initiating action against camps who failed to comply with those statutes.

It has been said that a prerogative writs suit seeking mandamus relief is proper "(1) to compel specific action when the duty is ministerial and wholly free from doubt, and (2) to compel the exercise of discretion, but not in a specific manner." *Loigman v. Township Committee of Middletown*, 297 N.J. Super. 287, 299 (App. Div. 1998). Where there is inaction or nonperformance of a mandatory ministerial duty, our courts have never hesitated to exercise the power of mandamus. *Cohen v. Board of Trustees of the Univ. of Medicine and Dentistry of N.J.*, 240 N.J. Super. 188, 199 (Ch. Div. 1989) (citing *Equitable Life Mortgage v. New Jersey Div. of Taxation*, 151 N.J. Super. 232, 238 (App. Div. 1977)). In most cases the pivotal issue is whether a plaintiff's complaint asserts the nonperformance of a mandated ministerial obligation, defined as one which:

[I]s absolutely certain and imperative, involving merely the execution of a set task, and the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion. *Cohen*, 240 N.J. Super. at 199-200.

State administrative agencies such as the DEP are not immune to the remedy of mandamus where they have failed to perform nondiscretionary, ministerial acts. *Switz v. Township of Middletown*, 23 N.J. 580, 588-89 (1957). A distinctly different situation exists, of course, where a challenge is based upon an agency's failure to accept a plaintiff's findings, to make a specific decision or to take specific enforcement action where its statutory obligations are discretionary. See, for example, *New Jersey Optometric Ass'n. v.*

Hillman-Kohan Eyeglasses, Inc., 160 N.J. Super. 81 (App. Div. 1978). (mandamus suit against the attorney general and the New Jersey Board of Optometrists to compel the institution of enforcement proceedings against companies allegedly violating certain optometry and antitrust laws dismissed for want of jurisdiction because the determination as to whether to institute proceedings was a discretionary function).

Local Board of Health of the Township of Bordentown v. Interstate Waste Removal Co., Inc., 191 N.J. Super. 128 (Law Div. 1983) is highly instructive. There, two governing bodies and their local boards of health, among other parties, sued the Department and Commissioner. Interstate operated a large, solid waste landfill under the jurisdiction of the Solid Waste Act. The plaintiffs charged Interstate with some 51 violations of the Solid Waste Act as a result of information they obtained from inspection reports and other data compiled by the Department itself. While the DEP had served Interstate with notices of prosecution and various administrative orders, it had not taken any other action. The first count sought an order compelling the DEP to pursue Interstate with respect to the 51 violations. The second count sought future enforcement of the Solid Waste Act.

In a rather exhaustive opinion, Judge Haines distinguished between "Plaintiff's demand for an order requiring the Department to enforce a law in the future," which he found was not legally supportable, and the Plaintiff's "Demand for an order requiring the Department to pursue known violations," which he determined "require[d] a different analysis." Judge Haines accordingly held:

When a State agency is charged with ministerial duties which it is not performing, an action to compel performance will lie. ...[A]n official duty is 'ministerial' when it is absolutely certain and imperative, involving merely the exe-

cution of a set task, and when the law which imposes it prescribes and defines a time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion. *Interstate Waste Removal*, 191 N.J. Super. at 142-143 (internal citations omitted).

Within the context of this definition of "ministerial," the court referred to the mandatory provisions of the Solid Waste Act, and specifically, N.J.S.A. 13:1E-9. 9, noting its provision that codes, rules and regulations adopted by the DEP "*shall be observed throughout the State and shall be enforced by the Department...*" [original emphasis].

In sum, where, as in the 90-Day

Act, a statute imposes a command to act or the performance of a positive duty on a state agency, the matter is ministerial, not discretionary, and mandamus is available to compel obedience. Of course, filing suit before the DEP acts on an application is not only a likely guaranty of a permit denial but will also preclude substantive settlement negotiations between counsel and LURP staff, which are very important in expediting any ultimate resolution.

Conclusion

The processing of a New Jersey coastal development application involves detailed procedures which should not be undertaken by a novice practitioner without the aid of an experienced surveyor and engineer. Further,

the process does not obviate the need to determine whether United States Department of Army approval is required under various federal legislation, including Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 1344, Section 404 of the Clean Water Act, 33 U.S.C. 1344, and Section 103 of the Marine Protection Research, and Sanctuaries Act of 1972, 33 U.S.C. 1413.

To avoid frustration and delay, the permit process should be undertaken with the understanding that the burden to prove a development application satisfies Rule criteria rests upon the applicant and that in safeguarding the coastal environmental LURP has limited flexibility in applying statutory and regulatory criteria. ■