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Permitting Considerations for Redevelopment Projects: Alteration of Terrain Permits

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Alteration of Terrain Program (AoT)

History:

Created in 1981 to regulate significant changes in surface terrain, grade slopes and surface elevations.

Purpose:

Control stormwater flows, flooding, runoff, erosion and other physical impacts of development.

Process:

Apply for and obtain a permit.



AoT – From Inception

- One of several environmental permits necessary for any sizeable land development project.
- Until 2009, standard of review was “best management and engineering practices” (BMPs). “Make things better” approach as opposed to a “comply or die” scenario. NHDES administered the program based upon 15+/- pages of administrative rules.

AoT – Pre 2009

- NHDES enjoyed discretion in approving “means and methods” of acceptable stormwater management.
- Discretion over new development and redevelopment.
- Simply put, life was good.

The New Rules

- In late 2008 into 2009, the historic administrative rules of the AoT program were replaced in their entirety by 70+ pages of new development standards.

Adjusting to the New Rules

- During rulemaking, the development industry:
 - a) warned of negative consequences,
 - b) warned that compliance mechanisms were untested in New Hampshire,
 - c) warned that the rules failed to distinguish between new development and redevelopment, and,
 - d) expressed concern that rules represented sweeping change.

Adjusting to the New Rules

- New Rules imposed specific obligations to:
 - a) infiltrate stormwater,
 - b) add fill to boost surface elevations, and,
 - c) add capacity to collect, treat and otherwise cleanse water that in many cases could already be considered “clean” (i.e., rooftop drainage).

Redevelopment

- The effect of the New Rules was more striking. No distinction between new development of “virgin land” and the redevelopment of previously developed properties.
- Previously-developed properties often involve historic developments that pre-date the AoT program (1981).
- Often little or no meaningful stormwater treatment and management. Nothing by way of modern BMPs.

Redevelopment

- So, whereas redevelopment projects presented an opportunity to upgrade or replace a “grandfathered” series of improvements (or lack of improvements), the “all or nothing” approach of the New Rules served as a disincentive to redevelopment.
- NH engineering firms were finding it difficult to design cost-effective stormwater systems that comply with the strict letter of the new rules.
- Faced with the high costs of full compliance on redevelopment sites, developers were instead choosing to spend their dollars on virgin sites, out-of-state redevelopment sites or simply cancel beneficial projects.

MA and Redevelopment

- By contrast, the Massachusetts Stormwater Handbook squarely addressed redevelopment.
- Massachusetts created a lesser redevelopment standard.
- Compliance “to the maximum extent practicable”.
- Put differently, Massachusetts was saying, “bring systems and properties closer towards conformity, but we understand that economics may cause a project to fall short of perfect compliance.”

MA and Redevelopment

- Thus, in Massachusetts, construction costs and economic hardship, as well as site specific concerns, were routinely considered in determining whether a redevelopment proposal “complied well enough”.

The Coalition

- In response to this situation, a coalition of interested parties formed, including:
 - ▶ Homebuilders and Remodelers Association of
 - ▶ NH NH Association of Realtors
 - ▶ Commercial Investment Board of Realtors
 - ▶ Association of General Contractors
 - ▶ The Business and Industry Association
 - ▶ Technical assistance was provided by TFMoran.

The Coalition

The coalition petitioned NHDES to listen, acknowledge and react...

What happened?

NHDES listened to a description of the problem, acknowledged the existence of the problem, and agreed to work towards a solution.

What is the Solution?

- Discussions continue about creating a subseries of AoT rules specific to redevelopment.
- The concepts include:
 - ▶ defining redevelopment versus new or expanded development,
 - ▶ achieving net improvement, removing financial barriers to redevelopment,
 - ▶ achieving protections to the maximum extent practicable, and,
 - ▶ ultimately, establishing a predictable and reliable **points-system** to govern degrees of improvement.

How long will this take?

- Rulemaking is a labor-intensive process for State agencies.
- Stakeholder forums, formal filings and JLCAR proceedings can cause the simple to become complex.
- So, it's a work in progress.

What Can be Done While a Solution is Pending?

- Request waivers.
- As was stated, NHDES listened, acknowledged and is crafting a solution.
- While the fix is pending, NHDES has pledged to remain sensitive to the problem.

Waivers

- Waivers are evaluated under Env-Wq 1509.04.
- “[T]he department **shall** grant a waiver if ... granting the waiver will not result in an adverse impact on the environment, public health, public safety, or abutting properties that is more significant than that which would result from complying with the rule.”

Waivers

Final Advice:

- Appreciate that NHDES would rather encourage redevelopment than new development,
- Communicate with AoT regulators early in the redevelopment planning process,
- Explain how waivers would achieve net environmental improvements over the existing condition,
- Explain how waivers would bring the property closer towards full compliance, and,
- To the extent possible, reduce options to a cost/savings analysis so that regulators can document the relative cost of compliance versus the savings from reasonably-calculated waivers.

Conclusion

■ Questions

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