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UNRECORDED CONSERVATION RESTRICTIONS

Barry v. NJDEP

Conservation restriction instruments, like other restrictions, are typically recorded in the chain of title for the subject parcel. However, the absence of a recorded instrument may not mean that the subject parcel is free of conservation restrictions. Such restrictions may be applicable by operation of law regardless of whether a deed restriction has been recorded.

This issue was discussed in *Barry v. NJDEP*, an unpublished Appellate Division decision. The court held that notwithstanding the absence of a recorded instrument, the conservation restriction was applicable by operation of law based on the property owner having availed itself of the benefits of a NJDEP permit. The permit required the recording of a conservation restriction for a dune area as a precondition to commencement of construction. The permit provided that commencement of construction constituted acceptance of all the terms and conditions of the permit. Although the conservation restriction was not recorded, construction took place and, as a result, the court found that the restriction was accepted and applicable.

Releasing a conservation restriction is a difficult process. Governed by statute, a public hearing and NJDEP Commissioner approval are necessary to secure a release of a conservation restriction. Persons acquiring property for development purposes should thoroughly review the history of approvals for the subject parcel and include a careful condition compliance investigation as part of

the pre-acquisition due diligence to protect themselves against the negative consequences of unrecorded, yet applicable, conservation restrictions prohibiting development.

SRRA 2.0

Governor Murphy signed legislation amending the Site Remediation Reform Act

(SRRA) making various changes to SRRA. As originally proposed, the law would have required parties to notify NJDEP upon discovery of contamination during due diligence. Efforts of NJBA and others were successful in removal of the due diligence notification provision from the amendments.

The law contains several noteworthy provisions, listed in part below.

- **Notice / Public Inquiry:** Notice provisions are enhanced and accelerated. PRCRs will need to provide notice to municipalities and county health departments of remediation activities at the remedial investigation stage, rather than the remedial action stage. The notice must advise of the right to request and obtain remediation documents from the PRCR at the same time they are submitted to NJDEP. NJDEP may require both mail and sign notice. PRCR's have an enhanced obligation to respond to written public inquiries by supplying documents or a written summary status report.
- **Direct Oversight.** SRRA 2.0 provides that direct oversight runs with the land, but gives NJDEP express authority to modify the DO requirements, and enter into pre-purchase administrative consent

- orders. All forms of Remediation Funding Sources (RFSs) are now allowed under DO, except a self-guarantee. Previously only a trust fund was allowed.
- **LSRP Retention.** Except in limited circumstances (UHOT, PA/SI for due diligence), a person who is not an LSRP may not perform remediation unless under the oversight of an LSRP. LSRPs may not oversee remediation unless they have been formally retained.
 - **LSRP Reporting Obligations.** LSRP's are now required to report any discharge at any part of a site where they are performing remediation work, not just at the part of the site for which the LSRP was retained. Additionally, because remediation is defined to include a preliminary assessment and site investigation, an LSRP who performs due diligence must report the finding of contamination. An LSRP is not shielded from its reporting obligation just because it was retained to perform due diligence. Therefore, owner's selling real property should carefully consider whether to permit an LSRP to perform due diligence if they are concerned with the possibility of contamination being reported to NJDEP during due diligence. The Brownfield Act continues to provide that persons conducting pre-acquisition due diligence are not subject to the requirement to retain an LSRP, and non-LSRP consultants who perform due diligence are not subject to the same reporting obligations as LSRPs.
 - **IECs in Unoccupied Structures.** The IEC definition was amended to include "migration of contamination into a structure" producing a toxic or harmful atmosphere or other harmful condition, whether or not the structure is occupied. However, if the property owner certifies that the building is not occupied, will not be occupied, and will be demolished, remediation is not required.

- **Remediation Funding Source.** Surety bonds were added as a new RFS option.
- **Remedial Action Permits.** Permittees must retain an LSRP to oversee the permit responsibilities, consistent with current practice.
- **Green Remediation.** The law calls for NJDEP to encourage the use of green and sustainable remediation practices.

SPILL FUND CLAIM FOR SANDY DAMAGE: NEAR DECADE-LONG SAGA

US Masters Residential v. NJDEP

New Jersey courts typically afford NJDEP significant discretion in both the administrative and adjudicatory processes based on the agency's specific expertise on environmental issues. Office of Administrative Law (OAL) decisions are reviewed by the NJDEP Commissioner, who has the authority to overturn the OAL judge's decision. Accordingly, it can be a difficult burden to overcome a disputed NJDEP decision. Notwithstanding this broad grant of discretion, the agency's power is not unfettered, and there are instances where the agency takes a step too far in exercising its discretionary power. Masters is an example of the courts reigning in the discretionary power of NJDEP.

On July 29, 2019 the Supreme Court of New Jersey ordered a new arbitration proceeding to determine whether certain contamination caused by Hurricane Sandy qualified for compensation from the Spill Fund pursuant to the Spill Act.

In the wake of Hurricane Sandy, Plaintiff Masters made a claim to the Spill Fund for compensation stemming from an inundation of floodwaters laced with petroleum-based toxins. This claim spurred a legal battle spanning nearly a decade. Masters and NJDEP have engaged in a long running dispute to determine whether sufficient evidence exists to demonstrate that the contamination qualified as a "hazardous discharge" under the Spill Act.

While the Court acknowledged "flaws in the substantive reasoning of the arbitration decision", it focused its critique of the arbitration on procedural unfairness due to the "convoluted history" of delays by NJDEP. Specifically, the Court emphasized that "two years elapsed between the request for arbitration and the commencement of the arbitration proceeding." Moreover, NJDEP's expert witness did not inspect the property until January 5, 2016, several years after Hurricane Sandy, and did not submit his expert report until "the eve of the arbitration" on January 11, 2016. The arbitrator did not submit a final decision dismissing Masters' claim until April 4, 2016, ending a five-year arbitration process. The Court viewed these delays as unacceptable in light of the legislative policy underlying the Spill Act, which promotes a "swift and sure response".

The Court reversed and remanded the case taking issue with the arbitrator's decision to exclude Masters' expert report prepared in response to NJDEP's delayed expert report, notwithstanding the broad discretion afforded to arbitrators in conducting discovery. "[A] grant of wide discretion does not eliminate the appellate review function of ensuring that such proceedings adhere to basic fairness principles." The Court found that the decision to exclude this evidence was not "in keeping with the fulfillment of the truth-seeking function of adversarial proceedings." Further, the belated report containing a new theory for denying the Spill Fund claim put Masters "at a clear disadvantage." While the saga continues in the remanded arbitration proceeding, the Masters decision underscores the limits of NJDEP's discretionary authority, and the implications of those limits to reign in NJDEP discretion other contexts, such as development and permitting approvals.

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