

MASSACHUSETTS ENVIRONMENTAL, LAND USE AND REAL ESTATE ALERT



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Massachusetts Developments

MassDEP Proposes to Revise Groundwater Discharge Permitting Program

MassDEP has issued draft regulations that will significantly revise, and to some extent simplify, the state groundwater discharge permitting program. The new rules will streamline the permitting process by eliminating a number of requirements and allowing the use of several standard general permits for common discharges.

US EPA Proposes to Issue Two-Year Stormwater Construction General Permit

In five states, including Massachusetts and New Hampshire in New England, US EPA administers a National Pollutant Discharge Elimination System (NPDES) general permit for stormwater discharges from construction sites that disturb one or more acres of land. In all other states, the NPDES construction permitting program is administered by authorized state agencies. The current US EPA general permit for construction activities was issued in 2003 and is scheduled to expire on July 1, 2008.

Massachusetts Attorney General Proposes Revisions to the Brownfields Covenant Program

The Office of Attorney General Martha Coakley has proposed changes to the Brownfields Covenant Program. This program provides certain liability protections under the state cleanup law on a case by case basis as an incentive to the remediation of contaminated properties and their redevelopment in a manner that provides significant benefits to the Commonwealth such as jobs, affordable housing, or open space.

Landlocked Tidelands Case: Petition for Rehearing Denied by SJC

On February 12, 2007, the Massachusetts Supreme Judicial Court ("SJC") invalidated a regulatory exemption promulgated by the Department of Environmental Protection ("DEP") under G.L.c.91 ("Chapter 91"), the waterways statute, relative to "landlocked tidelands". *Moot v. Department of Environmental Protection*, 448 Mass. 340 (2007). On November 16, 2007 John Moot and Efekta Schools, Inc, two plaintiffs in the landlocked tidelands case, filed a petition for rehearing with the SJC. The SJC denied the petition for rehearing without expressing a view on the substantive merits of the plaintiffs' claims on December 19, 2007 stating that the plaintiffs were free to raise their issue by appropriate motion to the Superior Court.

SJC Rules HAC Cannot Compel a Grant of Town Easement as Condition of Comprehensive Permit

The Supreme Judicial Court has held that G.L. c. 40B, §§ 20-23, does not empower the Housing Appeals Committee "to order the conveyance of an easement over land abutting the project site of a proposed affordable housing development" as a condition on a grant of a Comprehensive Permit.

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Comprehensive Permit Appeal Procedures Clarified by SJC

The Supreme Judicial Court has held that a developer's appeal to the Housing Appeals Committee of a Comprehensive Permit under Chapter 40B does not preclude a separate abutter appeal to Superior Court or Land Court under G.L. c. 40B, § 21. The Court also set out the procedural path for parties and courts to follow in the case of such dueling appeals.

Lender Prohibited from Foreclosing Without Notice to Attorney General

In a recent decision, Massachusetts Superior Court Judge Ralph D. Gants enjoined Fremont Investment & Loan ("Fremont"), a California based lender, from foreclosing any of its 2,200 loans in Massachusetts without providing notice to the Commonwealth through the Attorney General's office. What makes this ruling important is that it was issued without evidence of fraud by Fremont. The court held that despite the lack of fraud, the characteristics of Fremont's mortgage loans made them presumptively unfair and therefore in violation of G.L.c.93A.

Recent Case and Amended DHCD Regulations Address Date for Calculating Affordable Housing Stock

The "defining characteristic" of the Chapter 40B framework is that each municipality is required to devote 10 percent of its housing stock to low and or moderate income housing. *Taylor v. Housing Appeals Committee*, SJC-10048 (Cowin, J., April 11, 2008).

An Act Protecting and Preserving Home Ownership

On May 1, 2008 section 11 of Chapter 206 of the Acts of 2007 ("Section 11"), the so-called mortgage foreclosure prevention act, took effect. Section 11 amends General Law chapter 244 by inserting section 35A providing a right to cure for mortgagors of owner-occupied residential property with four or less separate households. Pursuant to Section 11, the mortgagee may not begin foreclosure proceedings or otherwise enforce the mortgage due to the mortgagor's failure to make payments under the mortgage or note unless at least 90 days written notice has been given to the mortgagor. During the 90 days, the mortgagor shall have a right to cure the default by full payment of the amounts due without acceleration of the mortgage maturity date. The right to cure a default under Section 11 is only allowed once during any five year period regardless of the mortgage holder.

This is one of the many provisions of the mortgage foreclosure prevention act that will take effect throughout 2008.

National Developments

Office Locations:

Washington, DC

Texas

New York

New Jersey

Massachusetts

Maryland

California

Federal Court Vacates EPA's Definition of "Navigable Waters" Under SPCC Rule

On March 31, the United States District Court for the District of Columbia vacated EPA's definition of "navigable waters" in the Spill Prevention, Control, and Countermeasure regulations ("SPCC Rule"), 40 C.F.R. § 112. The regulations require certain oil processing facilities to prepare a plan to prevent oil spills and provide countermeasures to address discharges of oil into "navigable waters."

EPA and Army Corps Issue Final Rule on Wetlands/Stream Mitigation

On April 10, 2008, EPA and the U.S. Army Corps of Engineers announced a final joint rule governing compensatory mitigation of impacts to wetlands, streams, and other aquatic resources authorized under the Clean Water Act permitting program.

Los Angeles Green Building Law Applies to Private Developers

On April 22, 2008, Los Angeles Mayor Antonio Villaragosa signed into law the Private Sector Green Building Plan, one of the nation's first green building laws requiring private property owners to build green. The Ordinance is one element of the "Green LA Plan," which calls for Los Angeles to reduce its carbon footprint by 35 percent below 1990 levels by 2030. Los Angeles estimates that the Private Sector Green Building Plan will reduce carbon emissions by 80,000 tons by 2012.

Updated: Ninth Circuit Court of Appeals Hold that the Federal Clean Air Act Preempts California's Emissions Standards for Auxiliary Diesel Ship Engines

On February 27, 2008, the United States Court of Appeals for the Ninth Circuit issued a decision in *Pacific Merchant Shipping Association v. Goldstene*, holding that California's Marine Vessel Rules (Cal. Code Regs. tit. 13, § 2299.1) are preempted by the Federal Clean Air Act ("CAA").

"The Defender": The Environmental Forum Profiles Benjamin Wilson

Beveridge & Diamond's managing principal, Ben Wilson, is profiled in the May/June issue of The Environmental Forum, The Policy Journal of Environmental Law Institute.

Previous Issues of the Massachusetts Environmental, Land Use and Real Estate Alert