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REAL ESTATE LAW

By KEVIN J MOORE

Historic Due Diligence Is Now a Necessity

Stricter enforcement of regulations governing nexus between historic properties and freshwater wetlands

Over the past two years, though it maintains otherwise, the New Jersey Department of Environmental Protection has dramatically increased its enforcement of the regulations that govern the nexus between the preservation of historic properties and the filling of freshwater wetlands. The DEP has also taken a much more aggressive approach in interpreting these regulations. As a result, the DEP has issued numerous notices of violation under circumstances where a developer could be forgiven for thinking it had not done anything illegal. Indeed, just this month the DEP issued an Enforcement Advisory on this subject. See Compliance Advisory Enforcement Alert, New Jersey Department of Environmental Protection, Compliance and Enforcement, Issued February 2006, #2006-3 Disclosure of a Potentially Historic Resource/Ruin is Required on Application Submittals for Freshwater Wetlands Permits, www.nj.gov/dep/enforcement/advisories/2006-3.pdf.

Moore is a member of the real estate practice group at Sills Cummis Epstein & Gross of Newark.

Accordingly, an applicant for a freshwater wetlands permit, for an authorization under a general wetlands permit or for a transition area waiver must disclose, in its application to the DEP, the presence, on its property, of a site that, in the DEP's opinion, might meet one of the four criteria for listing on the National or State Registers of Historic Places. See N.J.A.C. 7:7A-10.2 (b) 7. Additionally, if the applicant or its consultants become aware of such a site after the applicant has filed its permit application, but before the DEP has issued the permit, the applicant must immediately notify the DEP. See N.J.A.C. 7:7A-7.2(b) 9 (governing individual wetlands permits) and N.J.A.C. 7:7A-4.3 (b) 5 (governing authorizations under general permits). Finally, if the permittee under such a permit or its consultants learn of a potentially historic site after the DEP has issued the permit, the permittee cannot undertake any work authorized by the permit, or if it has already started such work, must immediately stop it. *Id.* The permittee must then immediately notify the DEP of the presence of the potentially historic site and proceed only as instructed by the DEP. *Id.*

These requirements apply even if

the site is not listed on either of the National or State Registers of Historic Places. These requirements also apply even if the site does not have a certificate or other indication of eligibility for listing on either of the registers. The DEP takes the position that these requirements apply if, in the opinion of the State Historic Preservation Office (SHPO) of the DEP, the site meets any one of the four criteria for listing on the registers. The criteria are identical for both of the registers and provide that a property is eligible for listing on the registers if: it is associated with events that have made a significant contribution to the broad patterns of our history (Criterion A); it is associated with the lives of persons significant in our past (Criterion B); it embodies the distinctive characteristics of a type, period or method of construction, or represents the work of a master, or possesses high artistic values, or represents a significant and distinguishable entity whose components may lack individual distinction (Criterion C); or may be likely to yield, information important in pre-history or history (Criterion D). See N.J.A.C. 7:4-2.3; 36 C.F.R. 60.4

To determine if a site is eligible for listing on the registers, SHPO is to apply these criteria in accordance with the guidelines issued by the National Park Service from time to time in the following or similar documents: "How to Apply the National Register Criteria for Evaluation" (National Register Bulletin No. 15), and "Guidelines for Completing National Register of Historic Places Forms" (National Register Bulletin Number 16) or subsequent amendments thereto, incorporated herein by reference and available from the Historic Preservation Office, PO Box 404, Trenton, New Jersey

08625-0404 or from the Web site (www.state.nj.us/dep/hpo) or the National Park Service Web site (www.nps.gov). Id. However, the application of these criteria to a site is as much an art as a science and qualified professionals often differ as to whether a site meets one or more of the criteria. Not surprisingly, SHPO tends towards findings of eligibility.

The aforementioned disclosure requirements also apply even if the potentially historic site is not located in the area covered by the wetlands permit and even if the work authorized by the wetlands permit does not impact the potentially historic site. Further, so long as the potentially historic site and the work authorized under the wetlands permit are part of the same project, these requirements apply even if the potentially historic site and the work authorized under the wetlands permit are on different lots.

For example, assume that a developer is constructing a 300-unit housing development on a 200-acre tract of land. This tract contains the ruins of a portion of the foundation of a 200-year-old house on the extreme northeastern portion of the tract and a small section of freshwater wetlands on the extreme southwestern portion of the tract. These ruins are not listed on the National or State Registers of Historic Places, nor do they have certificates of eligibility for listing on the registers. The only reference to the ruins is a reference in a site survey done by the County Historical Society.

Assume further that the developer fills a portion of these wetlands under a DEP issued freshwater wetlands permit, but has yet to disturb the portion of the tract containing the ruins. If at any point from the filing of the application for the wetlands permit through the performance of work authorized under the issued permit, the developer or its consultants knew or learned of the presence of the foundation and failed to notify the DEP and cease all work under the

permit, the DEP will take the position that the developer has violated the Freshwater Wetlands Protection Act and the conditions of its permit. The DEP will issue the developer a notice of violation and will likely fine the developer. Moreover, the DEP may also suspend or revoke the permit.

Even if the developer complies with all these disclosure requirements, the outcome is not necessarily happy from the developer's point of view. It must go through a detailed and expensive cultural resource analysis process and negotiation with SHPO to determine if the potentially historic site is indeed eligible for listing. If SHPO concludes that the property is eligible for listing, the developer must then go through a detailed mitigation approval process. SHPO required mitigation can range from cataloguing artifacts to the preservation of the resource and a significant portion of the property around it. To successfully navigate this process, the developer must retain a cultural resource consultant or consultants and pay for field work, excavation and records searches.

Therefore, to avoid these kinds of issues or at the least to be aware of them when acquiring a property, it is essential to include the steps set forth below in any due diligence process. Moreover, all of these steps should be carefully documented to defend any subsequent enforcement action. Finally, this process should not be confined to New Jersey properties, as similar requirements exist with respect to wetlands permits issued by the Army Corps of Engineers pursuant to the 404 Program. See 33 C.F.R. 325, Appendix C

To engage in an effective historic and archeological due diligence process, a party considering the acquisition of a piece of property should retain a cultural resource consultant, with at least a master's degree in archaeology and should then make sure that the consultant follows and careful-

ly documents all of the following steps:

1) Review the SHPO and Federal Advisory Council on Historic Preservation Web sites for properties listed on either the National or State Registers of Historic Properties and for properties that have certificates of eligibility or similar documentation indicating they are eligible for listing on the registers.

Review these Web sites for any data concerning the property.

2) Arrange for an appointment with the SHPO staff member responsible for the portion of the state containing the subject property, and interview this person extensively about the property and the surrounding area. Carefully document the interview.

3) Review the SHPO library and records. Again, ask the SHPO staff member if all of the relevant materials are there or if any of them are out of the office. Carefully document your review of all the records.

4) Review all of the records of the county and municipal historical societies.

5) Interview the appropriate members of these societies. Find out who the local historian or knowledgeable person is and interview this person as well.

6) If the municipality has a historical commission, speak with its members.

7) If one exists, review the historic preservation element of the municipal master plan.

8) Review the municipal zoning map, ordinances and any proposed amendments to them to ascertain if the property is, or is about to be, in a historic district or is, or is about to be, deemed a historic site.

9) If a contract purchaser of a property undertakes this process during its due diligence review, it should be able to ascertain if it has no historic or archaeological issues or if it has a potential issue which requires further action. ■