

LAW UPDATE

► Message from the Co-Chairs

Opportunities and Pitfalls

The gentrification of areas such as Williamsburg and Long Island City has been brought about by New York City's goal to convert industrial areas to neighborhoods in an environmentally sound way. In this issue, we review New York City's "E" designation of properties, as well as zoning relief property owners may need to unexpectedly pursue in order to preserve the value of their properties. If either of us can be of service, or you have questions about any real estate issue, please feel free to contact us at 516-663-6600.



Eric C. Rubenstein, Esq. **Benjamin Weinstock, Esq.**

► Inside Update

- 3 "E"-Z Does It!!! – Development in Special NYC Environmental Zones
- 3 Recent RMF Real Estate Transactions

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Third-Party Changes to Land May Require Owners to Seek Zoning Relief

by Eric C. Rubenstein

Recent New York cases should raise concern among property owners, as well as prospective purchasers, developers and lessees, after courts recognized that one may be compelled to seek zoning relief stemming from the acts of others. While it is well settled that a purchaser of land does not, as a matter of law, attain an inalienable right to the zoning designation of the property at the time of acquisition, similarly, a property owner is not immune to the environmental reclassification of its land by governmental authorities, potentially frustrating the ability to utilize or develop the land for an intended purpose. In *Pland Place Realty Corp. v. Hauber*, NYLJ p. 21, col. 3, May 14, 2007 (S.C. Richmond Co.), the court held that questions of fact existed, precluding the defendants' application for summary judgment, in connection with plaintiff's claim for lost profits due to the inability to subdivide its property into eight building lots.

In this case, the plaintiff owned vacant land located in Staten Island, New York. The defendants, who were homeowners, owned residential property adjacent to the plaintiff's lot. Both plaintiff's property and the defendants' land were proximate to designated wetlands, as mapped by the New York State Department of Environmental Conservation (DEC). Some time prior to 2006, the DEC remapped the wetlands, extending a delineated wetland buffer through the plaintiff's lot.

The plaintiff alleged that the "character" of its land was detrimentally altered as a result of the defendants' discharge of "grey water" from dishwashers and washing machines, and that the existing sewage-system leaching field on defendants' property leaked, flowing down-gradient onto its land, all leading to the reclassification of plaintiff's land as wetlands. The defendants alleged that the plaintiff's land is

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Top Ten Highest Property Taxes by County in New York and New Jersey

County	State	Median Property Taxes	Median Home Value
Hunterdon	NJ	\$7,999	\$475,300
Nassau	NY	\$7,706	\$506,800
Westchester	NY	\$7,626	\$581,600
Somerset	NJ	\$7,318	\$457,000
Bergen	NJ	\$7,237	\$493,400
Essex	NJ	\$7,148	\$409,300
Rockland	NY	\$7,041	\$502,300
Morris	NJ	\$6,852	\$488,900
Union	NJ	\$6,703	\$419,000
Passaic	NJ	\$6,663	\$406,300

courtesy of forbes.com

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Eric C. Rubenstein, Esq.

topographically lower than their property and, as such, they cannot be liable to the plaintiff for possible pecuniary loss due to the DEC’s mapping of the wetland buffer through plaintiff’s land.

Additionally, the plaintiff asserted claims against the defendants for negligence, trespass and nuisance, and unlawful ejection under

Section 853 of the New York State Real Property Actions and Proceedings Law. While plaintiff’s damage claims have yet to be decided, the court’s denial of summary judgment acknowledges the DEC’s officially mapped wetland buffer running through plaintiff’s land.

The impact of the court’s decision is significant: first, the court implicitly recognized the reclassification of the plaintiff’s land as wetlands, thereby limiting the ability to develop the land; second, defendants may be liable to the plaintiff for lost development opportunity and diminishment in the value of the land; third, use of the defendants’ property, through previously approved structures or facilities, such as an on-site septic system, that suffer latent problems may lead to liability; and, fourth, the court’s recognition of the wetland buffer may foreclose plaintiff’s ability to legally challenge such a designation.

Interestingly, the court’s decision does not mention any claim, proceeding or action against the parties for alleged violation(s), whether past or ongoing, of state or local environmental rules and regulations.

The character of land can also be altered, environmentally, as the result of permissible action. Private development or municipal improvements undertaken in accordance with valid permits and government approved development plans can also change the character of property by creating environmental conditions that did not exist prior to such action. As a result, an unwitting property owner may be put

to significant unanticipated expense when seeking to improve his land as the result of permissible development or municipal improvement undertaken for the public good.

In *Indian Head Family, LLC v. Board of Zoning Appeals of the Town of Smithtown*, ___ Misc. 3d ___ (S.C. Suffolk, 2005) the petitioner sought to develop a 3.4 acre parcel, located in the hamlet of Kings Park, Town of Smithtown, New York, with a 24,000 square-foot catering facility. Petitioner was required to seek, among other things, a variance to alter environmentally sensitive land having steep slopes greater than 15%. Steep slopes did not naturally occur on the petitioner’s land and were created from the construction of Indian Head Road, a four-lane public thoroughfare abutting the land.

Regardless of the origin of the environmentally sensitive land, the Town of Smithtown claimed, and the court implicitly held, that the petitioner was required to seek variance relief to alter the steep slopes on its property. Here, the construction of a public roadway caused a change in the environmental classification of petitioner’s land, leading to the need to seek zoning relief.

Whether an owner, potential purchaser or lessee, *Pland Place Realty Corp.* and *Indian Head Family, LLC* underscore the need to consider environmental and, concomitantly, zoning issues as essential factors when conducting due diligence in a land transaction. Guidance from legal counsel, environmental consultants, planning experts, engineers and surveyors will help gain an understanding of known existing and potential environmental considerations associated with the transaction. While the risk factors of land development are numerous, failure to account for known and potential environmental considerations through proper professional guidance and inquiry will likely result in the frustration and loss of development rights, substantially lowering the value of land or rendering it essentially valueless.

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America’s Most Expensive Zip Codes

Rank	Zip Code	Location	County	State	2006 Median Sale Price
1	07620	Alpine	Bergen	NJ	\$3,400,000
1	33109	Miami Beach	Miami-Dade	FL	\$3,400,000
3	92067	Rancho Santa Fe	San Diego	CA	\$2,585,000
4	89413	Glenbrook	Douglas	NV	\$2,325,000
5	11930	Amagansett	Suffolk	NY	\$2,220,000
6	11976	Water Mill	Suffolk	NY	\$2,150,000
7	93108	Santa Barbara	Santa Barbara	CA	\$2,137,500
8	10577	Purchase	Westchester	NY	\$1,940,000
9	94957	Ross	Marin	CA	\$1,875,000
10	02535	Chilmark	Dukes	MA	\$1,856,250

courtesy of forbes.com

“E”-Z Does It!!! – Development in Special NYC Environmental Zones

by Erik H. Rosanes



Erik H. Rosanes, Esq.

Developers need to be wary that certain New York City properties with past uses involving hazardous materials may have an “E” designation on the NYC zoning maps. That “E” designation may result in substantial unexpected expenses due to heightened environmental scrutiny as a condition for the issuance of a building permit.

The “E” designation was created to foster the conversion of industrial areas such as Williamsburg and Long Island City into residential communities. However, NYC wanted to ensure that contaminated sites would not become residential areas without comprehensive environmental remediation, where necessary.

To achieve this, the recently adopted Zoning Resolution § 11-15 prohibits the New York City Department of Buildings (DOB) from issuing a building permit on any property with an “E” designation if the building permit would allow: (1) any development; (2) an enlargement, extension or change of use involving a residential or community facility use; or (3) an enlargement that disturbs the soil on the lot, unless the DOB receives a report from the New York City Department of Environmental Protection (DEP) stating that DEP has no objection to the work or that certain environmental requirements have been met. This DEP report takes two forms: (1) a Notice of No Objection and (2) a Notice to Proceed (provided a Notice of Satisfaction is subsequently issued for the completed work).

In the first instance, DEP may determine that the work does not present hazardous material contamination concerns and DEP will issue a Notice of No Objection. If a Notice of No Objection is issued by DEP, DOB may issue a building permit without further review by DEP.

Otherwise, DEP may determine that remediation work is necessary due to hazardous material contamination. In these cases, the DEP report is obtained through a two-step process, under which, two required items must be obtained from DEP, (1) a Notice to Proceed and (2) a Notice of Satisfaction.

RECENT RMF REAL ESTATE TRANSACTIONS

Partner David P. Leno reports on a sampling of recent deals completed by Ruskin Moscou Faltischek’s Real Estate Department:

- Represent seller (and now new owner) of One and Two Jericho Plaza, Jericho, New York, which encompasses over 700,000 square feet of office space. The \$200 million plus sales price was the highest per square foot price in Long Island history.
- Represent CANON USA in connection with the acquisition and development of its new 475,000 square foot world headquarters to be located in Melville, New York, including the enactment of a new zoning code amendment.
- Represent the nation’s largest retail pharmacy, CVS/Caremark, in connection with obtaining municipal approvals for new CVS stores located in Southampton, Freeport, East Rockaway, Mineola, Lynbrook, Coram and Central Islip.
- Represent seller of Queens gasoline station and resolve related environmental issues for the development of the site for a multi-family residential project.
- Negotiated and drafted numerous office and retail leases for new owner of Sunrise Business Center (f/k/a Great River Technology Center) consisting of over 300,000+ square feet of office and retail space.
- Negotiated and drafted numerous office and retail leases for owner of Jericho Atrium consisting of approximately 145,000 sq. ft. of office and retail space.
- Represent owner of major bus companies in the transfer of commercial and industrial properties into a real estate investment trust (REIT) and complete a \$72 million financing with ING Capital, secured in part by four leases on New York City properties.

In order to issue a Notice to Proceed, DEP will first review a developer’s building permit application and may require a professional engineer or registered architect to submit modified plans that address items identified as environmental concerns. Once DEP is satisfied that a developer’s plans adequately address the environmental concerns, these plans become the basis of the building permit application. DEP will then approve the modified building permit application and issue a Notice to Proceed. The Notice to Proceed will state that the application now meets the environmental requirements related to the “E”-designation, provided the work is completed in accordance with the approved plans. Once a developer files a Notice to Proceed and a copy of the approved plans with the DOB, as part of the building permit application, DOB may issue a building permit, conditioned on DEP’s approval of the completed work.

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About the Firm

Founded in 1968, Ruskin Moscou Faltischek P.C. has emerged as Long Island’s preeminent law firm. As specialized as we are diverse, we have built cornerstone groups in all of the major practice areas of law, and service a diverse and sophisticated clientele. With superior knowledge of the law, polished business acumen and proven credentials, Ruskin Moscou Faltischek has earned a reputation for excellence and success. It is this ongoing achievement that makes us an acknowledged leader among our peers and the preferred choice among business leaders.

The strength of Ruskin Moscou Faltischek’s resources greatly enhances what we can accomplish for our clients – to not only solve problems, but to create opportunities. We take pride in going beyond what is expected from most law firms. The invaluable contacts and relationships we have nurtured in the business community and our multidisciplinary approach heighten our value-added services.

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DEP will then review the work actually performed pursuant to a Notice to Proceed to confirm that all environmental requirements related to the “E” designation have been satisfied. If so, DEP will issue a Notice of Satisfaction. Once a Notice of Satisfaction is filed with the DOB, the requirement for a report from DEP, pursuant to Zoning Resolution § 11-15, is deemed satisfied.

To manage the increased cost of this process, developers should be careful to limit changes to a project once DEP has approved a set of plans. Developers who receive a Notice of No Objection or a Notice to Proceed, and who wish to amend their plans, must return to DEP and receive approval of the amended plans in order to proceed. Likewise, developers should also be careful to ensure that all work is performed in accordance with the approved plans. If the work is not completed in accordance with the approved plans, or if a Notice of Satisfaction is not issued, DOB is required to revoke the building permit, pursuant to the NYC Administrative Code §§ 27-200 and 27-201.

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