

DIMENSIONS

PERMIT TRANSFER APPROVAL – DON'T CLOSE WITHOUT IT!

By Steven M. Dalton, Esq.

Economists and financial consultants have projected an improving and stronger real estate market in 2014 through 2015 based on various factors including increased new home construction activity. With a recovering economy and improving market conditions, increased land transaction activity should follow suit. It is critical to ensure that development approvals remain valid in connection with the land transfer process, particularly with the sunset of the Permit Extension Act looming.

Often overlooked in the due diligence process until the last minute or entirely is the requirement to obtain approval from the New Jersey Department of Environmental Protection (“DEP”) or other government agencies for transfer of certain permits. While many approvals run with the land, some approvals such as DEP wetland and flood hazard approvals do not, and require that DEP approval be obtained in connection with the transfer of the property or in connection with the transfer of the permit to a third party or a newly created corporate entity that will complete the authorized project. Given the commonly held belief that approvals transfer with the land, it is not uncommon for land transfers to occur without the interested parties securing necessary consent authorizations. When this occurs, the results may include the technical invalidation of the approvals as to the new owner, as only the original permittee may conduct the permitted activities; increased risk exposure of a stop work order or an enforcement action if a person other than the original permittee undertakes the permitted activities; and, ultimately, post-closing scrambling (and related disputes) to secure after the fact transfer authorization from DEP. To avoid these pitfalls, interested parties should critically analyze their permits to determine whether transfer approval is

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required based on the specific terms of the permit or by the rules or regulations by which the permit was issued.

When such approval is required, appropriate action should be taken prior to closing or permit transfer to obtain DEP authorization for transfer of approvals. Interested parties or those representing them should: identify all project or property approvals obtained; determine what DEP approvals by their terms or by applicable regulations require transfer authorization; and submit appropriate applications to DEP. The applications often can be submitted in letter format together with certain required materials, including a DEP checklist, application form and, of course, an application fee. Because the transfers are considered to be minor modifications, public notice of the applications are not required. In the context of an application to modify approvals to reflect a transfer to a contract purchaser, the landowner / permittee must provide appropriate certifications as to its ownership of the property, the interest of the contract purchaser and whether it owns adjacent parcels, and the contract purchaser's agreement and consent to accept the approval and to adhere to

the conditions of the subject approvals. Confirmation must also be provided in the application process that, except for the identified property owner and permittee, no other changes to the conditions of the permit are necessary. The applicant must also demonstrate that the approval for which transfer authorization is sought remains valid. This may require information regarding application of the Permit Extension Act. The application process also invites the possibility of compliance review by DEP. Accordingly, interested parties who intend to submit a request for permit transfer authorization to DEP should carefully review and confirm permit validity and condition compliance before the submission is made to avoid inadvertently triggering an enforcement action.

Note that DEP will not issue transfer approval for emergency permits or approvals based upon a hardship exception. In the unlikely scenario that a parcel is conveyed at roughly the same time as issuance of an emergency approval, a new approval would need to be obtained.

Unfortunately, despite best efforts and intentions, deals often die during the due diligence process or prior to closing. Property owners and permittees are often concerned that if permit transfer authorization is obtained prior to closing, and the transaction is then terminated without closing, they will have lost their permit rights by transfer of approvals and/or will need to submit a subsequent application to be renamed as the permittee. Contract purchasers are often concerned that they will be assuming obligations before actually acquiring title to the property. In the flood hazard context, DEP has expressly addressed this concern and practical dilemma, as permit transfer authorization from DEP only becomes

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DON'T JUST "AGREE TO AGREE" ON OFF-TRACT IMPROVEMENTS

By Craig M. Gianetti

With numerous towns throughout the state having capacity issues with existing sanitary sewer and water infrastructure, issues related to off-tract improvements have become an increasingly common theme with both residential and commercial projects. In late 2013, there was an unpublished Appellate Division decision concerning illegal exactions and off-tract improvements: *520 Victor Street Condominium Association, et al. v. Raymond Plaza, et al.* The decision seemed like a straight forward illegal exaction case; however, it may have opened the door for objectors to challenge certain approvals with off-tract improvements on procedural grounds.

In *520 Victor Street*, the defendant-developer was before the Saddle Brook Zoning Board for site plan and variance approval for a multistory residential building, to which plaintiff was objecting. During the presentation, there was discussion of the existing sanitary sewer problems within the town. At the hearing, reference was made to a prior report prepared by the Board Engineer citing the town's capacity problem and recommending certain upgrades town-wide at an estimated cost between \$250,000 to \$350,000. The developer offered, as part of any site plan approval, to contribute \$200,000 towards fixing the town's problems. The Board came back and requested \$400,000 without any analysis of how much was really needed, and the developer agreed. The contribution became a condition of approval.

The plaintiff challenged the approval and on appeal the Appellate Division held that the \$400,000 was an illegal exaction because it did not comport with N.J.S.A. 40:55D-42 in determining that the improvements were necessitated by the proposed development. Since the contribution was a condition of

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approval that was so intertwined with the approval, the Appellate Division held that the condition could not be excised. The approval was invalidated and the matter remanded to the Board.

What is interesting in that case is that the Appellate Division also struck down the approval for not comporting to the town's ordinance concerning off-tract improvements. As many towns have, the Saddle Brook zoning ordinance provides that when off-tract improvements are determined necessary, the Board shall (1) determine the total cost of the improvements, (2) determine the proportionate share of the cost to the applicant and other property owners, and (3) notify the governing body of the Board's recommendation of the estimated cost. None of that was done in this case.

Based upon a reading of this case, even if the Board had properly determined that the off-tract improvements were necessitated by the project, the approval could have possibly still been invalidated because the Board never made the specific findings and calculations required by the ordinance. This case should provide caution for developers dealing with off-tract improvements (especially when objectors are involved). As mentioned above, Saddle Brook's ordinance concerning off-tract improvements is not uncommon. However, it is also a common practice for a developer to agree with a board that it will be responsible for its fair share of off-tract improvements and the actual calculations for total cost and pro-rata share are determined as

part of resolution compliance and dealt with in the developer's agreement with the town.

If the town's ordinance requires the board to make findings of the cost of off-tract improvements and the developer's pro-rata share, then it makes sense for those issues to be specifically addressed during the planning board process as opposed to later in connection with a developer's agreement; otherwise, the door is left open for an objector to challenge the approval.

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effective upon closing. Accordingly, if closing never occurs, notwithstanding DEP's approval of the transfer, the transfer is not effective.

In the grand scheme of environmental permitting, obtaining DEP authorization for transfer of approvals is not particularly daunting. Difficulties arise when the issue is neglected. With some careful thought, attention and effort, preferably before the day of closing, transfer approval can be secured without project interruption and potential problems for landowners and developers can be avoided.

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