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Public Access Redux

Department of Environmental Protection goes back to the drawing board

New proposed rules concerning public access to the state's tidal waterways.

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In April 2011, the Department of Environmental Protection (DEP) proposed rules concerning public access to the state's tidal waterways. 43 N.J.R. 772(a). But after contentious public hearings and receiving 132 comments, the department decided not to proceed with its original proposal. For a discussion of that proposal, see L. Goldshore, "Public Access to N.J.'s Shoreline," 204 *N.J.L.J.* 199 (April 18, 2011).

In its place, on March 19, DEP "proposed substantial changes [that] include several changes to provide clarity and ensure consistent application of procedures and standards, and to reflect public comment on the proposal." 44 N.J.R. 614(a). Public hearings on the new proposal are scheduled for April 18 and the record for the submission of comments will remain open until May 18.

But striking an acceptable compromise by merely tweaking the proposed rule has proven to be an elusive goal. The fishing, open beach and urban waterfront advocates view public access in absolute terms and object to any rules that get in the way. As a result, the new proposal has already been met with a rising tide of opposition. That blowback will assure that it will take several more months before the new rules are adopted and that they will not be fully implemented until the 2013 season.

The 2007 Rule

The current round is not the first time that DEP has attempted to directly address the competing demands concerning public access. In *Borough of Avalon v. N.J. Dep't of Env'tl. Prot.*, the Appellate Division found that the department's 2007 public access rule had overreached respecting the obligations imposed on municipalities. 403 N.J. Super 590 (App. Div. 2008), certif. den., 199 N.J. 133 (2009). The court invalidated provisions that regulated nighttime access to tidal waterways and imposed conditions on receipt of shore protection funding.

Marina owners objected to public access based on concern with the protection of boat owners' property and potential liability. They convinced the legislature to impose a moratorium on the implementation of marina-related rules, the Public Access and Marina Safety Task Force Act, so that the matter could be reviewed and a more reasonable and equitable approach could be formulated. N.J.S.A. 13:19-38 et seq.

2012 Proposal

The current proposal refined and clarified some of the wording in the 2011 version but the fundamental concepts remained unchanged. The rule amends and supplements the Coastal Zone Management Rules — pertaining to use and development of coastal resources. N.J.A.C. 7:7E-1.1 et seq. It also makes conforming changes to the Coastal Permit Program Rules — specifying standards for coastal general permits and permits-by rule. N.J.A.C. 7:7-1.1 et seq.

The department's explanation of the differences between the 2011 and 2012 drafts advised that:

[the] changes include providing increased transparency and public participation in both the Department and municipal review process of Municipal Public Access Plans; restoring to the rules provisions requiring that public access incorporate, to the maximum extent practicable, fishing access and associated amenities, including parking that accommodates nighttime fishing; providing a new paragraph to address public access requirements for public highways; specifying a standard formula to calculate a payment amount for linear projects when a Municipal Public Access Plan requires a monetary contribution to be used to provide new or enhanced public access; and establishing a process by which the Department can revoke a Municipal Public Access Plan for good cause.

The major substantive standard is defined in N.J.A.C. 7:7E-8.11(a), where "public access to the waterfront" is defined as:

[T]he ability of the public to pass physically and visually to, from, and along tidal waterways and their shores and to use such shores, waterfronts and waters for activities such as navigation, fishing, and recreational activities including, but not limited to, swimming, sunbathing, surfing, sport diving, bird watching, walking, and boating. Public accessways and public access areas include streets, paths, trails, walkways, easements, paper streets, dune walkovers/walkways, piers and other rights-of way.

The rule encourages municipalities to prepare and submit Municipal Public Access Plans (MPAP) for DEP approval. N.J.A.C. 7:7E-8.11(c). According to a March 19 DEP press release, the department will facilitate the planning process by: "work[ing] closely with towns and cities to craft access plans that make local sense and protect the rights and needs of residents and businesses, instead of imposing one-size-fits-all, state-dictated access rules."

The proposal specifies the MPAP's elements: a statement describing the overall goal, a statement of consistency with the master plan, a public access needs assessment, a digital map and inventory, and an implementation strategy. An aspect of that strategy which is likely to be controversial, particularly during difficult economic times, would authorize the establishment of a Public Access Fund derived from monetary contributions to be provided in lieu of on-site public access. Fund proceeds could only be used for the development and enhancement of public access and municipal programs designed to ensure access. Special rules apply for MPAPs along the Hudson River. N.J.A.C. 7:7E-48.

In compliant towns, coastal permit applications will be required to conform with the MPAP's public access requirements. N.J.A.C. 7:7E-8.11(k). In noncompliant towns, satisfaction with the public access objectives will require project specific access plans and case-by-case reviews intended to be more time-consuming, expensive and have uncertain results. N.J.A.C. 7: 7E-8.11(n).

Recalcitrant municipalities face additional sanctions that are somewhat more oblique than those imposed by the 2007 rules that were invalidated. According to the DEP's 2011 summary statement: "Municipalities that do not have such plans may be ineligible for any Green Acres loans or grants for any purpose within the municipality. Additionally, municipalities without plans may rank lower for shore protection funding projects and would not be eligible for certain general permits." See N.J.A.C. 7:7-7.6, municipalities that have not adopted a MPAP within three years will not qualify for a coastal general permit for beach and dune maintenance activities. N.J.A.C. 7:7-7.6.

The proposal includes special public access provisions for homeland security facilities, ports, public highways and marinas.

Public Remains Unconvinced

According to DEP Commissioner Bob Martin: "[p]roviding ample access to our ocean beaches, bays and rivers is a fundamental right for all residents of New Jersey, and the driving force behind these rules." As for the changes between the 2011 and 2012 proposals, the Commissioner noted that: "[w]e heard the suggestions and concerns expressed by many of our residents during a very robust public comment over the past year and have responded by making changes to the proposed rules, especially recognizing the needs of the fishing community in New Jersey."

But representatives of those residents remained unconvinced that their basic concerns have been addressed. This lack of enthusiasm was reflected in comments made by Tim Dillingham, executive director of the American Littoral Society, a group devoted to shore-related issues: "They [DEP] made some minor changes, but didn't fix the fundamental problems. Efforts to increase public access to the shore will still face an uphill fight; towns will be in charge; less access will be provided by coastal development; and some towns will be empowered to be more exclusionary." philly.com, March 20, 2012.

The regulatory process assures that the differences of opinion will not be quickly resolved. Prior to close of the public comment period on May 18, DEP is likely to receive substantial public comments that require responses. While he

ould not be more specific, Ray Cantor, chief advisor to the DEP Commissioner, noted: "at the earliest, publication of the final rule [in the *New Jersey Register*] and its adoption will not occur before sometime around Labor Day."

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