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CELEBRATING 55 YEARS

Legal changes in the environmental aspects of real estate affect use, value, transfer and liability

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New laws this year, in the form of court decisions, agency regulations, and state statutes, affect the use, value, transfer and liability of real estate. Many more are pending.

On the hazardous waste front, decisions from both the Mass. Supreme Judicial Court and U.S. Supreme Court teach lessons on recovering costs on account of releases of oil or hazardous material.

In its bank case the SJC held that attorneys' fees incurred to respond to releases of hazardous materials are recoverable under the Mass. Superfund (21E) as "response" costs, just like costs for licensed site professionals or other environmental consultants. The attorneys' fees for the litigation itself, however, were not recovered as "response" costs, but rather awarded under separate provisions. It is critical to differentiate the types of recoverable costs, track them carefully, and justify them.

In its Burlington Northern case, the Supreme Court dealt with the relative liability of parties under the Federal Superfund (CERCLA), ruling that "apportionment" is proper if there is proven a reasonable basis for determining the contributions to a single harm. The railroad's liability was only nine percent, based on factors such as the relevant area the railroad controlled, the time the railroad was present, and the nature of the railroad's contribution to the waste.

By the way, in its Eskanian decision, the Appeals Court stated the obvious but important principle that DEP is not required under 21E to give notice to owners and operators each time they fail to file a document at each phase of environmental cleanup efforts. Further, the role of the Licensed Site Professional (LSP) is to advise and guide cleanup efforts as a quasi-governmental worker; hiring the LSP does not symbolize that the response action is concluded or that the responsible party is no longer strictly liable.

On the taxation front, the Land Conservation Incentives Act will take effect January 1, 2011. Landowners will receive a state income tax credit if they donate conservation land to a municipality, Commonwealth or certain private nonprofit corporations working on land conservation. Land donated must be qualifying conservation land and the tax credit is valued at 50% of the fair market value of the gifted land.

On the tidelands and waterways front, the SJC ruled, in the case known as Moot II, that curative amendments to Chapter 91 did not illegally exceed the Legislature's authority by extinguishing and relinquishing public trust rights in landlocked tidelands. The net result is that MassDEP's long-standing landlocked tidelands license exemption has been reinstated, but a Chapter 91 license may trigger a benefit statement and analysis called a Public Benefit Review. While this PBR mechanism is only for projects requiring an ENF or EIR under MEPA, and therefore does not cover

all landlocked tideland projects, it preserves enough DEP oversight of public rights sufficient to satisfy the SJC.

On the oceanfront, Massachusetts made news promulgating the nation's first ocean management plan at the end of 2009. It sets guidelines to manage, review and permit uses of state waters. As the Ocean Plan has the force of law under the Mass. Oceans Act, it goes beyond "ocean spatial planning" to be "ocean spatial management." Specifically, the Plan, like the Act, governs state coastal waters at least 0.3 nautical miles seaward of mean high water (excluding most developed harbor and port areas) out to the three-mile limit of state legal control.

Within that water area, the Ocean Plan creates management categories: Prohibited, Multi-Use, and Wind Energy Area. This promotes offshore renewable energy development by opening up access to the wind and other sources, formerly prohibited in most state waters.

On the energy front, in its Hoosac Wind decision, the Supreme Judicial Court upheld MassDEP's approach to permitting open-bottom culverts for stream crossings. This case was before the SJC on an important land-based wind power project of 20 turbines to generate 30 megawatts on two Berkshire ridges in Florida and Monroe, which approved and supported the project. Hoosac Wind in 2003 filed its permit applications for this inland project (not to be confused with Cape Wind).

It took this long for the state Wetland Protection Act permit to be litigated through MassDEP and the trial and appeal courts. The roads constructed to the turbine locations meet the MassDEP standards by adopting open-bottom stream-crossing culverts to avoid altering the banks of ten of twelve streams (the other two crossings also meet MassDEP's performance standards). This newer, preferred technique is treated as a Buffer Zone project.

Incidentally, wind energy siting legislation has passed both houses of the Legislature. There is progress toward the state mapping good wind locations, following predictable procedures, issuing clear criteria, creating municipal wind energy permitting boards, and reviewing them with some limited state override, all in the interest of more expeditious, less contentious, and better siting and construction of wind turbines.

Meanwhile, there are many more changes coming that will affect real estate in Massachusetts.

On the wildlife front, the state has proposed changes to the Mass. Endangered Species Act (MESA) regulations. Among them are a public comment process for updates to the Priority Habitat maps delineating rare and endangered species habitat; a more comprehensive approach to conserving species of special concern through development of statewide conservation plans; and more regulatory flexibility to project proponents through expanded grandfathering and exemptions, and by providing performance standards.

On the climate front is the far-reaching draft plan of the Climate Protection and Green Economy Advisory Committee to meet the 2020 and 2050 goals of the Global Warming Solutions Act. The most aggressive option, which garnered wide support, is adoption of the 2020 target to reduce GHG emissions by 25% below 1990 levels. The comment period for the draft implementation plan for the first phase (a cost effective approach) closed July 15th 2010. The official 2020 target and the plan for achieving that target are required to be established January 1st 2011.

On the land conservation front, the long-pending Public Lands Preservation bill (PLPA), which would trigger more scrutiny and justification for Article 97 transfers and use changes, was reported favorably from the Joint Committee on Environment, Natural Resources and Agriculture and referred to the House Committee on Ways and Means. PLPA would require that in order to change the use of Article 97 land it must be shown that there is no feasible alternative and whether replacement

land of equivalent acreage, market value and natural resource value is to be supplied in its place.

Finally, on the zoning and subdivision front, in surprising progress after going nowhere for several years, a Comprehensive Land Use Reform and Partnerships Act (CLURPA) was reported favorably from the Municipalities and Regional Government Committee. CLURPA would address the pitfalls of land use planning in Massachusetts by, among other things, amending sections of the subdivision control law and the zoning act, creating Chapter 40U giving incentives to communities opting to plan according to the Commonwealth's Sustainable Development Principles, and rewrite our master planning statutes.

There are three different approaches that real estate people tend to take during this era of many changes: they choose to make things happen, watch things happen, or just wonder afterward "what the heck happened!"

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