

STATE AGRICULTURE DEVELOPMENT COMMITTEE

PRE-PROPOSAL FOR NEW RULE

**APPRAISING AND COST-SHARING ON PROPERTIES ENCUMBERED BY A
CONSERVATION EASEMENT OR DEVELOPMENT RESTRICTION**

March 27, 2009

I. PURPOSE:

This pre-proposal addresses SADC review of applications for the sale of a development easement on property already restricted pursuant to a recorded conservation easement or a recorded instrument limiting or prohibiting further development.

II. AUTHORITY:

N.J.S.A. 4:1C-5e., -7a. and -31

N.J.A.C. 2:76-10.1

III. BACKGROUND:

Properties that are pending before the SADC for preservation are, on occasion, already burdened by recorded conservation easements or other recorded restrictions on further development of the property. These restrictions can have a profound effect on the appraised value of the development easement, as well as raise questions about compatibility of those restrictions with the SADC's deed of easement.

In general, the conservation easements and "no-further-subdivision" or other development restrictions are imposed by local land use boards as a condition of subdivision approval pursuant to municipal ordinances. In some cases, landowners voluntarily agree to the imposition of a conservation easement in conjunction with subdivision approval in order to obtain that approval.

The conservation easement and no-further-subdivision restrictions are normally set forth in the deed(s) recorded by the landowner following minor subdivision approval. The property owners, as grantors, convey by the recorded subdivision deeds the new and remainder lots to themselves as grantees. Accordingly, despite the fact that the restrictive covenants contained in a conservation easement are typically dedicated and granted for the benefit of the general public and run with the land, the subdivision deeds are in the name of the private property owner only, and the municipality from which subdivision approval was obtained is not the grantee (holder) of the easement.

To the extent a portion of a particular property is undevelopable due to a prohibition against further subdivision or imposition of a conservation easement, the affected landowner and local government entity may attempt to rescind a lawfully-imposed restriction for the sole purpose of “restoring” value to the property in order to receive SADC cost-share grant funds. Many counties, municipalities and landowners, unaware of applicable statutes and case law in this area, mistakenly believe that no-further-subdivision restrictions or conservation easements may be rescinded simply by action of the local governing body and/or land use board upon application of the property owner.

The wise expenditure of public funds requires the SADC to adopt a rule to address when, and to what extent, it should entertain an application for a state cost-share to assist in the preservation of land that is already subject, in whole or in part, to development restrictions and/or to restrictions prohibiting certain agricultural uses.

The purpose of this pre-proposal is to prohibit the removal/rescinding of a conservation easement or development restriction conveyed for the benefit of the general public once an application for the sale of a development easement has been submitted to the SADC or the applicant to the SADC for cost-share funding (county, municipality or non-profit agency). The policy set forth below recognizes that some recorded conservation easements are not dedicated to the public – but rather reserve purely private rights such as access easements – and that release of these privately held restrictions will be considered on a case-by-case basis.

A. Conservation Easements

Conservation easements generally restrict land to certain non-intensive uses to protect natural resources such as watersheds, wetlands and other critical or sensitive vegetative and animal habitats. Typical restrictions prohibit, within the defined easement area: the destruction or removal of vegetation; the excavation of topsoil or other earthen materials; the erection of buildings or other structures; the installation of roads for motorized vehicles; the dumping or placement of soil; and any activities or uses detrimental to drainage, flood control, water conservation, erosion control, soil conservation and the overall preservation of the property.

Many recorded conservation easements also specify that the restrictions are dedicated to, or are intended to benefit, the general public through the protection of natural resources and scenic beauty. The conditions set forth in conservation easements are essentially restrictive covenants that run with the land and are binding on all current and future property owners. Sometimes these conservation easements restrict or prohibit certain kinds of agricultural activities such as construction of greenhouses, conducting certain animal/livestock activities, and application of herbicides or pesticides on some, or all, of the property.

B. Restrictions on Future Development

Development restrictions generally limit or prohibit further subdivision of a property. Recent examples of these restrictions include creation of a “viewshed area” on a farm that prohibited all structures within 200 feet of a major road; prohibition on any additional residential development after issuance of a variance; and placement of a prohibition on additional development for a period of eight years after a landowner opted to create an agricultural subdivision.

IV. APPLICABLE STATUTE AND CASE LAW:

- A. *The “New Jersey Conservation Restriction and Historic Preservation Restriction Act,” P.L. 1979, c.378 (N.J.S.A. 13:8B-1, et seq.)*, effective February 5, 1980, authorizes the DEP Commissioner, a local government entity or a charitable conservancy to acquire a conservation or historic preservation restriction by gift, purchase, devise or condemnation (in the case of the state or local government unit).

The statute permits the release of a conservation or historic preservation restriction provided a public hearing is held after advance notice is published in a newspaper of general circulation in the municipality in which the land is located. The hearing is to be held “by the governing body holding the restriction, or if held by a charitable conservancy, by the governing body of the municipality in which the land is situated.” N.J.S.A. 13:8B-5. In addition to the local public hearing, “no conservation restriction acquired pursuant to this act shall be released without the approval of the Commissioner of Environmental Protection.” N.J.S.A. 13:8B-6.

- B. *In Soussa v. Denville Township Planning Board, 238 N.J.Super. 66 (App.Div.1990)*, the court considered a “no further subdivision” provision in a recorded deed by which private property owners conveyed new and remainder lots to themselves as a result of subdivision approval. The deed restriction against further division of the property was imposed in reliance on the local land use board’s approval resolution, which stated that the covenant was required so “that there be adequate protection afforded the township and the general public.” Eleven years after obtaining approval, the property owners applied to the planning board for rescission of the no-further-subdivision prohibition.

The court ruled that the public of Denville was the intended third-party beneficiary of the deed restriction and that any action to lift it would necessitate litigation, in the nature of a quiet title action, in which the public interest would need to be represented. Significantly, the court also concluded “that neither the [b]oard nor the governing body of Denville has the power separately or together to eliminate the covenant in the deed.”

V. **PROPOSAL:**

A. **A conservation easement or subdivision restriction exists on the Premises for the benefit of the public and the owner proceeds with the application without amendments.**

The SADC will continue to accept and process applications that have conservation easement/development restrictions in place on them. As such, the appraisal process must take into account the impact on value the restriction has in both the “before” and “after” value.

Further, the SADC will not cost-share on any area encumbered with a conservation easement that restricts agricultural activities or that is in conflict with the farmland preservation deed of easement. However, in such a case, the farmland preservation deed of easement will still be placed over the area subject to the conservation easement, but will be subordinate to it. This procedure allows the farmland preservation easement to occupy priority lien status on the affected property if the conservation easement is ever removed.

Finally, the SADC will review the propriety of including property subject to a conservation easement in an exception area to ensure that its interest in the farmland preservation easement is not adversely affected.

B. **A conservation easement or subdivision restriction exists on the Premises and the owner seeks to have the easement/restriction rescinded after having submitted his/her application for farmland preservation to the SADC or the county/municipality/non-profit agency.**

This includes:

- Easements granted to and/or for the benefit of the general public.
- Easements held in the name of a county, municipality or charitable conservancy pursuant to the “New Jersey Conservation Restriction and Historic Preservation Restriction Act,” N.J.S.A. 13:8B-1, et seq.
- No-further-subdivision prohibitions and similar development restrictions imposed as a result of municipal ordinance requirements or voluntarily by the landowner.

In these cases, the following will apply:

- 1) The SADC will not continue processing an application for property subject to a conservation easement or no-further-subdivision restriction on the Premises. The SADC shall not recognize a landowner’s or governmental body’s attempt to release a conservation easement held by the landowner, a

governmental body, a nonprofit organization, another private individual or the general public, or a no-further-subdivision restriction, for the purpose of positively affecting the valuation of land considered for farmland preservation purposes following the applicant's submission of the application for the sale of a development easement to the county, nonprofit organization or the SADC.

- 2) Conservation easements containing provisions granting both "public" and "private" benefits shall be considered easements dedicated to the public and shall be subject to the requirements contained in this section.
- 3) Any applicant wishing to proceed with an amendment of an application for the purpose of removing a conservation easement or no-further-subdivision restriction is required to withdraw the application and will not be eligible for resubmission of the application until such time that the required process for releasing the conservation easement has been completed to the satisfaction of the SADC.
- 4) Appropriate documentation related to the release of the easement or no-further-subdivision restriction must be provided to the county, nonprofit organization and the SADC for review and determination that the release of the easement or restriction is effective and complete in accordance with appropriate laws (including the New Jersey Conservation Restriction and Historic Preservation Restriction Act where applicable) and procedures.
- 5) The resubmission of the application will be considered a new application with no prior standing or commitment of any prior funding for that acquisition. The new application will be subject to all current statutes, rules, policies and procedures. If the new application is deemed eligible and approved by the SADC, then the entity acquiring the development easement must conduct new appraisals that reflect a current valuation date that is subsequent to the effective date the easement or restriction was lawfully rescinded.

C. A conservation easement exists on the Premises that is held for private purposes.

The SADC will consider, but not guarantee, cost-sharing on any portion of property that is subject to a private conservation easement that is not held for the benefit of the general public.

The SADC will review such privately held easements on a case-by-case basis. The review will include, but not be limited to, how the easement affects the value of the property for development purposes, how the easement affects agricultural uses and structures, and the extent of the property affected by the easement. After concluding its review, the SADC may reject the application, require rescission of

the easement in accordance with applicable law and/or allow the easement to remain in place subject to appropriate adjustment of the per-acre value of the remainder of the property.

If the easement is required to be rescinded, or if the landowner rejects the adjusted per-acre value, then the application will be deemed withdrawn and any resubmission will be considered a new application with no prior standing or commitment of any prior funding for that acquisition and be subject to all rules concerning the resubmission of an application.

D. Appraisal procedures

- 1) All appraisers shall consider the impact of the conservation easement or other development restriction on “before” and “after” values. This policy recognizes that conservation easements adversely impact both the “before” value, by restricting the development potential of the entire property, and the “after” value, by restricting some or all agricultural uses within the easement area. No-further-subdivision limitations adversely impact the “before” value.
- 2) Agency and local government appraisal procedures must also recognize the limited value of property not within the easement area but directly affected by the conservation easement and/or development restriction. For example, many conservation easements prohibit the installation of roads and/or vehicular through-traffic, thus creating little or no development opportunity and the potential for landlocked property.
- 3) Appraisals submitted by counties, municipalities and/or nonprofit organizations in support of farmland preservation applications will be challenged and/or returned if the reports fail to identify or consider recorded conservation easements and development restrictions such as, but not limited to, no-further-subdivision prohibitions.

E. Finding of No Further Development Potential

In the event that the reviewing entity or SADC determines that there is no further development potential pursuant to N.J.A.C. 2:76-6.20, an application shall be rejected.