

Bayberry Mills: Playing Golf With A Handicap

Bayberry Mills (also known, in this case, as The Homestead) proposed to build a golf course and residential development adjacent to the Crystal River in Glen Arbor, Michigan. The site was adjacent to the Sleeping Bear Dunes National Lakeshore and the development proposal, as one might expect, generated substantial adverse public interest and U.S. EPA scrutiny.

Because the proposed development would involve placement of fill material in wetlands, the developer sought a permit from the Michigan Department of Environmental Quality (MDEQ) and from the federal Department of the Army, Corps of Engineers (COE), under various provisions of Michigan's Natural Resources and Environmental Protection Act and the federal Clean Water Act (CWA). Although the MDEQ has been given authority to administer the relevant CWA permit program in Michigan by the U.S. EPA and COE, the U.S. EPA and COE have retained certain oversight authority and the COE has retained jurisdiction over wetlands, and regulated activities involving wetlands, adjacent to the Great Lakes and their connecting waterways. Because, in this instance, the proposed development was adjacent to the National Lakeshore, both state and federal permits were required for the regulated activities the developer proposed.

MDEQ granted a permit for the project after several years of discussion, public input and debate. However, in reaction to adverse comments by so-called public interest groups and the U.S. EPA, the COE District Engineer found that there were, in this case, overriding factors of the public interest relating to preservation of special aquatic sites and, after consideration of such factors, denied a CWA permit for the developer's proposal. The District Engineer asserted that "...the site's significance to interstate tourism and to migratory birds (were) but two examples of significant interstate importance" that outweighed other factors and, therefore, the District Engineer determined that "the project (was) contrary to the overall public interest and (that) a permit must be denied."

Information had been prepared and submitted by the developer in the form of an Environmental Assessment ("EA") as required by the COE. The developer had identified a "preferred" alternative as well as several other hypothetical development alternatives. The developer supported the "preferred" alternative as the best alternative, all things, including environmental impacts, being considered. The COE District

Engineer disagreed and also determined that none of the various development possibilities presented by the developer in the EA were acceptable. Going even further, the District Engineer also asserted that, if the developer utilized the one alternative identified by the developer that would allow some limited development on a portion of the property without the need for a CWA permit, the developer would thereafter be unable to obtain any CWA permit for any development at the remainder of the property.

The District Engineer then proposed a development scheme for the property that he felt could be done and would be permitted. Interestingly, the District Engineer's development proposal had not been proposed by the developer, would require the developer to permanently forgo development of a large portion of the site (over 47 acres) and would require additional reduction of wetland impacts at, and avoidance of use of portions of, the remainder of the site. Needless to say, the developer appealed the District Engineer's decision. On December 4, 2000, the COE Division Engineer, after reviewing the information on appeal, agreed that there were significant overriding issues and national concern sufficient to support the District Engineer's decision to override the State MDEQ permit decision. However, the Division Engineer remanded the matter back to the District Engineer to consider information deemed to be "new" in connection with the case.

The Division Engineer determined that the District Engineer may be able to suggest other project designs or mitigation options. According to the Division Engineer, this might be possible especially if the District Engineers gave further consideration to one particular previously rejected development proposal the developer had postulated in the EA. According to the Division Engineer, the record wasn't clear as to whether the District Engineer rejected that proposal by mistakenly relying on comments received from the public that did not, in fact, relate to that particular proposal.

As yet, no tee times are available.

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