



Statement on Waiver of Department Rules

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Attn: DEP Docket Number 12-09-08/734
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Dear Mr. Brower:

Please accept these comments on the proposed Waiver of Department Rules, N.J.A.C. 7:1B, on behalf of New Jersey Future. New Jersey Future was founded to achieve smart growth statewide: growth that drives our economy, protects New Jersey's open lands and natural resources, strengthens our communities, makes it easier to get around, and increases our housing choices. Although we support the provision of regulatory flexibility in certain situations, we are concerned that the waiver rule, as proposed, will have unintended consequences that threaten our goals. We recommend an alternative approach.

The proposed standards for the granting of waivers are too broad and vaguely defined to work as intended and will lead to the following unfortunate outcomes:

- Create an unmanageable system. As a practical matter, implementation of the waiver rule will place such a large demand on staff resources at the DEP, that it will jeopardize the ability of any developer with a complex project, regardless of its worthiness, to get through the permit process. The promise of a waiver coupled with the broad and relatively undefined standards in the proposed rule will likely entice every potential developer who might be able to get a project approved under this new provision to apply, creating a myriad of applications. DEP staff will necessarily need to invest tremendous resources in establishing standards for their review, perhaps on a case-by-case basis. Lawsuits will further burden staff.
- Increase unpredictability in the real estate market. Because the standards for the waivers are not well-defined, there is no clarity about what will get approved. This uncertainty will increase risk in the real estate market, reduce the predictability developers need and hamper economic development.
- Undermine the state's ability to implement a cohesive "state strategic plan." As envisioned by the administration, the forthcoming state strategic plan is intended to provide an overarching framework for land use regulations, but this rule provides no

connection to it. The rule may allow any project to advance, regardless of whether it supports or contradicts the plan. It also raises fears about whether “bad” projects will be approved that undermine the quality of our communities as places to live and work. This is critical in New Jersey, the nation’s most developed state, as it works to retain and attract employers.

New Jersey Future does recognize, however, the difficulty of obtaining the permits needed for complex development projects, especially in the redevelopment context. We believe that you can move forward with a modified waiver rule, that: 1) dramatically tightens up the eligibility requirements, and 2) begins as a one-year pilot program, allowing the department to learn the lessons needed to craft a more finely-tuned permanent waiver rule.

Narrowing Project Eligibility for Participation in the Waiver Program

The department should craft significantly tighter eligibility parameters for waivers as part of the rule proposal, for all of the reasons cited above. In thinking about how to ensure better environmental protection and economic growth outcomes, the department would be well-informed by the recent permit efficiency task force’s recommendations for “priorities for permit processing.” These recommendations earned the support of an unlikely coalition of environmentalists, developers and planners including New Jersey Future executive director Peter Kasabach. According to the final report issued in 2009, special regulatory treatment would only be provided to projects that demonstrate four basic characteristics:

1. **Project viability**, such as control of the site by the developer, and for projects needing wastewater, a location in an updated sewer service area and adequate water and wastewater capacity.
2. **No net environmental degradation**, ensured by requiring that the development footprint does not impact natural resources. (Some specified, minor impacts are allowed, provided the project improves the environmental condition of the impacted resource.)
3. **An improvement to the environment or public health and safety**, according to one of four site performance criteria, and
4. **Advancing at least one state priority**, such as through a location in an urban area or redevelopment area, or provision of locally-approved public benefits.

Projects that demonstrate these characteristics would then receive prioritized, coordinated review. By limiting the projects that could be eligible for such priority treatment, the department could more realistically promise timely answers.

In addition to requiring that waiver applications demonstrate characteristics such as project viability, no environmental harm, environmental improvements, and advancing a state priority, the DEP could impose additional screening requirements. For example, the waiver program could support and help implement the forthcoming “state strategic plan” (recommendations expected in June 2011) by limiting eligible applicants to locations in “smart growth areas” as defined in that plan and other regional plans.

Using a Pilot Program to Fine-Tune Permanent Waiver Parameters

DEP could best manage its risks by replacing the current rule proposal with a one-year pilot program that combines tight eligibility requirements as suggested above with heightened performance standards ensuring that each project delivers demonstrable environmental and economic benefits. Such a program would allow DEP staff to build the experience needed to

craft a more robust, permanent waiver program. It would also help staff to identify specific changes to other permitting rules needed to provide adequate flexibility. It will also be necessary to enhance public transparency measures to help build trust in the waiver process.

A better-defined waiver program as outlined above offers many advantages to the proposed approach. It would:

- Focus the waiver program on advancing sustainable economic growth as envisioned by the Governor's emerging State Strategic Planning effort and "state strategic plan."
- Dramatically reduce the number of waiver applications in order to prevent a burden on staff at DEP and the Attorney General's office that will likely lead to permit "gridlock" that stymies all complex projects.
- Enhance, rather than degrade, predictability in the real estate market, by clarifying in the rule itself the types of projects for which waivers will be seriously entertained.
- Provide DEP with the opportunity to "learn by doing" about which changes should be made to related permit rules as well as how to craft a successful permanent waiver program based on experience.
- Demonstrate a clear commitment by DEP to deliver better regulatory outcomes.
- Enjoy more support, given the consensus established by the previous permit efficiency task force.

Thank you for your consideration of these comments. [Peter Kasabach](#), New Jersey Future executive director and I would be happy to discuss these ideas with you further. Please don't hesitate to contact either of us at 609-393-0008.