

Environmental Permits

Homeowners, Condo Associations Should Be Aware, Plan

By Hans Heussy

Is your property part of a condominium, homeowners association or subdivision? If so, you should educate yourself as to what permits were issued to the developer when the project was initially constructed and who is currently responsible for complying with their terms. Unfortunately, in many cases it may be you and your fellow property owners. Most such permits are issued to the developer when the project is initially approved by the necessary state and local regulatory bodies.

However, under most permits, Declarations of Condominium, or Homeowner Association Agreements, the obligations of the permits pass to the associations or condominium owners or homeowners once most or all of the properties are sold and, once that happens, the associations or condominium owners or homeowners are responsible for ongoing compliance.

Unfortunately, the associations and owners are often ignorant of any ongoing compliance requirements and, if the associations or owners fail to stay current with those obligations, they can suffer very severe consequences, including substantial fines and engineering expenses.

If a permit lapses or is terminated, it may not be easy to renew or reinstate, as the association may very well have to comply with current, more stringent requirements.

A perfect example of this involves a condominium complex in southern Vermont.

After years of paying little atten-

tion to the minor improvements that were being made to various units, the association became concerned that some of those improvements may have been in violation of its Act 250 permit (Vermont's far reaching program for regulating development).

The bulk of the improvements involved deck expansions and the installation of hot tubs. A careful review of the almost 20-year-old permit revealed that the installation of hot tubs had been expressly forbidden. This prohibition was buried in a many page-long permit.

The underlying reason for the prohibition, the constrained ability of the local electric utility to supply adequate service, had long since ceased to exist and, when contacted, the local utility expressed a willingness to delete the provision.

So no problem right? Wrong!

The association self-reported the violation and applied for a permit amendment with the utility's support.

The state said thank you very much, and because you self-reported, your fine will be a little less than it would have been otherwise. But the association was still fined thousands of dollars for the violation and incurred the legal expense of obtaining the amended permit.

An even more dangerous example of this kind of latent liability is the stormwater permit.

Stormwater treatment systems direct and channel runoff from roofs, driveways and other impervious surfaces. Stormwater is often collected in detention basins or ponds, from which it is slowly released to the

environment. Often these basins or ponds are neglected or overlooked as just a part of the landscape.

Accordingly, you may have such a system on your property and have no idea it exists.

As noted above, in a multi-lot or multi-unit development, the developer often designs and installs the stormwater treatment system. These systems are approved in a complex permit process.

The permits themselves often require some form of inspection, testing and reporting and may require regular annual, or less frequent actions to avoid a violation or the permit's termination.

Old stormwater systems were often very rudimentary and inexpensive. Modern stormwater systems can be very complex and expensive.

If an older permit lapses, the property owners may have to comply with the new standards at very substantial expense.

This is a good reason for every such association to have its property managers gather all of the project's permits into a comprehensive file and review what ongoing actions the association needs to take to keep in compliance.

This small effort on the front end can save an association many thousands of dollars in the long run.

This is becoming more important than ever, now that title searches have begun to include more extensive permit review.

If during the scope of a search of the records, including a review of the land records or other records, there is a reference to a permit, like

a stormwater permit, being required or issued, then the title examiner has a duty to investigate further to determine whether the permit was issued and whether it can be determined from the public records whether the property is in compliance.

This is because under existing law and regulations, the state may enjoin use of the property, mandate remedies, and/or impose fines up to \$50,000 per day per violation.

Such penalties may be a substantial impairment in the value of the property affecting the marketability of title.

In other words, a finding of non-compliance could make it impossible or at least extremely difficult to sell a property in the development until the violation is addressed, which could take months, if not years.

There are some exceptions to the pertinent statutes and this area of the law is complicated and has changed

a lot in a short period of time.

Your property's location can significantly impact the situation, for example, if your property is located near an "impaired waters" (waters deemed to have reached or exceeded their carrying capacity for certain pollutants), it may be subject to heightened regulation.

Other factors that are important are when the project was built and whether there has been a subsequent expansion or further development of the property.

Finally, if a property is located within the Lake Champlain Basin, existing permits will not be automatically renewed. Instead, property owners may have to upgrade their stormwater treatment systems to meet more modern standards and get additional permits, all of which may come at great expense.

In sum, every homeowners or condominium association should be familiar with their environmental per-

mits and understand what actions are required to remain in compliance.

If the association has any doubts as to whether its permits remain valid, or whether they are in compliance with their permits, they should quickly engage legal and/or engineering assistance.

Long term planning, for example the establishment of a capital reserve for any necessary upgrades, can dramatically soften the blow of a potential mandate to upgrade a stormwater treatment system.

Careful planning and self-reporting can also reduce, if not eliminate, potential fines.

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