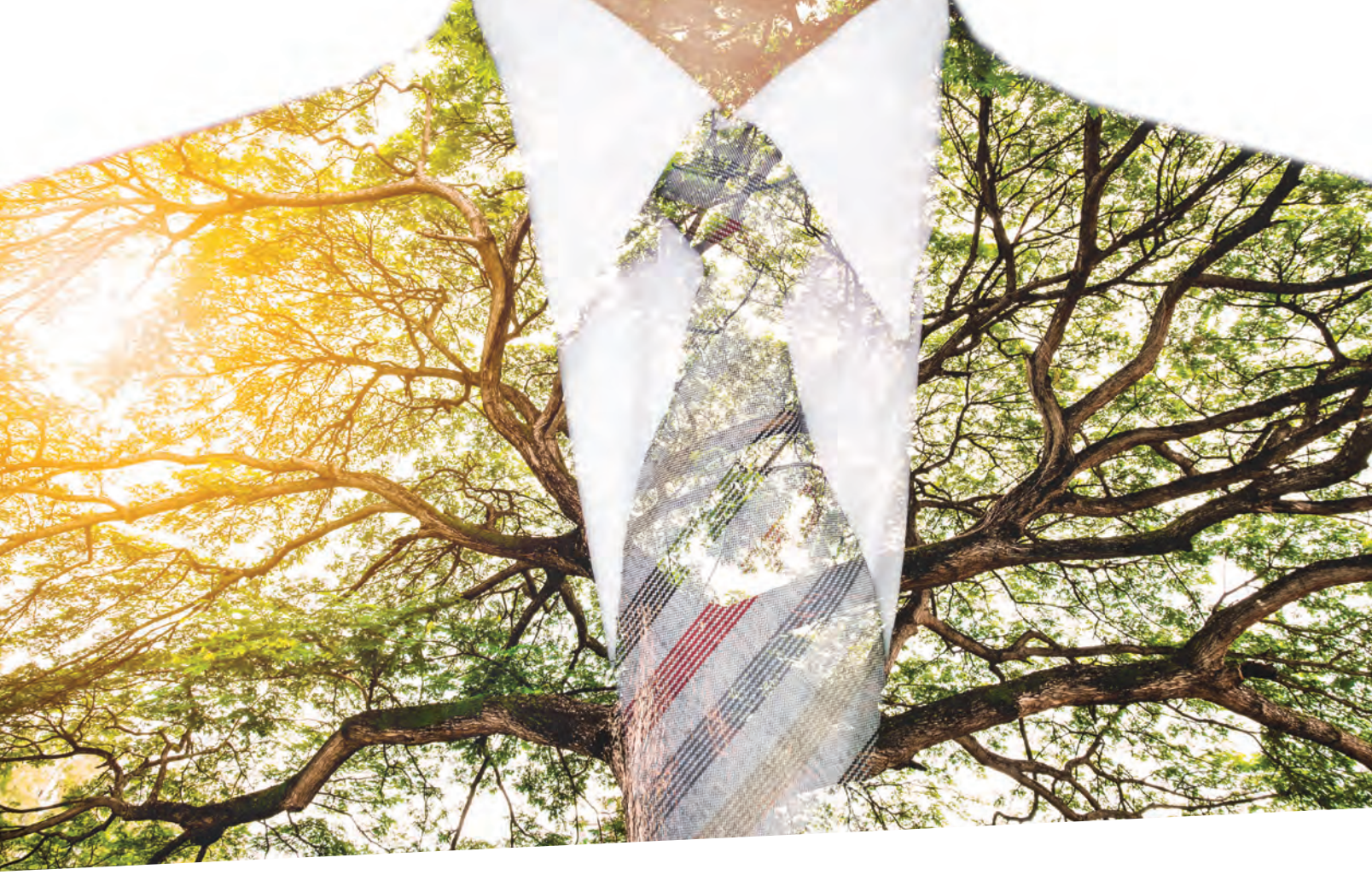

PLANNING FOR ENVIRONMENTAL HURDLES

Attorneys play a critical role in avoiding potential pitfalls

BY MICHAEL RUTTER, ESQ. AND CHRISTINE ROY, ESQ.

It takes a deep understanding of environmental regulations and property restrictions to successfully plan and develop today's infrastructure projects. The potential pitfalls are not always readily apparent and can add costly delays to the project schedule. It is particularly challenging when the properties impacted are preserved farmland or are encumbered with Green Acres restrictions, conservation easements or other environmental constraints.

The Most Challenging Parcels

In over 30 years of advising clients on projects in New Jersey, our firm, Rutter & Roy, has found that identifying Green Acres-restricted land is one of the major challenges our clients encounter. These parcels can be extremely difficult to identify, especially if they are unfunded parcels not listed on a local unit's Recreation and Open Space Inventory, a master list of Green Acres-encumbered properties in each municipality.

New Jersey created the Green Acres Program in 1961, a program that would not only leave a legacy for the state but also become a national model for open space preservation. The program was created to meet the state's ever-increasing recreation and conservation needs in the midst of sprawling growth.

Under New Jersey's Department of Environmental Protection (NJDEP), it has preserved more than 680,000 acres of open space.

From the outset, we presume that if the land is municipally owned, it's Green Acres-restricted land. Many publicly owned properties are not, but after handling a large number of diversions under the 2006 Green Acres Rules, we understand that the answer often is not black and white. Despite our decades of experience with environmental and development regulations, we often come up against situations and issues that we've never seen before.

A Complex and Lengthy Process

We tell clients that it's important to identify property restrictions as early as possible because those can lead to significant project delays. The jurisdictional review process alone can take six months to a year, as the participants wrestle with identification and determining whether they fall under other federal funding programs such as Land & Water Conservation. We also check to see whether properties are subject to a Deed of Easement conveying the non-agricultural development rights to a county, town or the State Agriculture Development Committee, making them preserved farms.

In New Jersey, the Green Acres diversion process can be complex and time-consuming. If there are surface impacts to conservation restrictions, these must be approved by the Commissioner of the NJDEP after holding a public hearing. If any of the properties are Green Acres restricted, this will trigger an onerous approval process, including the need to hold two public hearings, submitting an application to NJDEP and ultimate approval from the Commissioner of the NJDEP and New Jersey's State House Commission. The diversion process could take well over a year to complete, but it is always preferable to a condemnation. The rules are intentionally strict to discourage companies from obtaining a diversion on protected lands. Legal professionals who understand these kinds of property restrictions are essential to companies navigating the statutory and regulatory process.

On a recent project, a client proposed to open trench through a heavily forested property owned by the New Jersey Turnpike Authority. Under New Jersey's No Net Loss Reforestation Act, the deforestation of a half-acre or more on property owned by a State agency or authority requires the preparation of a

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reforestation plan, the holding of a public hearing 180 days prior to the proposed work and significant compensation. By identifying the issue early in the planning process, the client was able to revise its plans and do a horizontal directional drill that worked to avoid triggering the statute.

Involving the Legal Team Early in the Process

Attorneys can play an important role in ensuring the success of any project—as long as they are involved early on in the process. Acquiring rights across property subject to a conservation restriction can have a significant impact on the schedule, and the legal team will know the procedures for obtaining the necessary property rights in the shortest amount of time. The schedule must allow for adequate time up front to acquire necessary environmental permits/approvals and the land acquisition schedule.

An experienced legal team can be invaluable in making jurisdictional determinations, identifying publicly owned lands, detecting regulatory triggers and planning for appeals. They are familiar with the process and regulatory timeframes associated with each permit, as well as common missteps that could impact the schedule. Although our clients will often acquire permits and approvals directly with local authorities, legal action can be a viable option when approvals are not granted.

Anticipating appeals has become a necessity in recent years. It used to be that requests for re-hearings, and subsequent appeals, focused on the certificates of public convenience and necessity issued by the Federal Energy Regulatory Commission (FERC). But now, even before an application is made to FERC, you must anticipate appeals of state environmental permits.

> **"The diversion process could take well over a year to complete, but it is always preferable to a condemnation."**

Permit applications should be treated as legal documents, and involving the legal team in reviewing environmental permit applications will work to ensure that they are not vulnerable to appeal. An experienced legal team can "scrub" the permits to ensure that the regulatory standards applicable to that particular permit are addressed, as well as issues identified by the NJDEP in past projects.

In Summary

The fact is that there is no typical project because each one has its own set of challenges and environmental issues. The key to minimizing major issues and avoiding potential delays is proper project planning. Getting the legal team involved early on in the planning phase will allow them to identify fatal flaws or issues which may cause delay to the start of construction. If restrictions and the potential impacts are identified up front, it may even be possible to revise the plans and avoid these restricted properties, thereby saving the client time and money. ✪

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