

Transfer of Stormwater Permits from Developers to Community Associations: Why 'Just Say No' No Longer Works

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For the past several years, the North Carolina Department of Environment and Natural Resources ("DENR") has had a policy of transferring stormwater permits from the permittee/developer ("Developer") to a community association ("Association") only when the Association agreed to accept responsibility for ownership and maintenance of the stormwater management facilities (e.g., ponds, weirs, swales, etc.) serving the development. The acceptance was valid only when the Association signed the Ownership Transfer Form required by DENR. In many cases, the Association refused to sign the Form and accept responsibility for the stormwater management facilities due to the costs of bringing the facilities into compliance with the stormwater permit and maintaining them thereafter. Such impasses between Developers of condominium or other multi-owner developments and Associations often led either to the Developer continuing to have the economic burden of maintenance and repair or to no one accepting responsibility, leaving an uninterested or defunct Developer as the permittee and often resulting in deterioration of the facilities and possible environmental harm to receiving waters.

To address the situation, the 2011 Session of the North Carolina General Assembly enacted House Bill 750 (Session Law 2011-256). House Bill 750 requires DENR to transfer a stormwater permit to an Association upon the request of the Developer if three conditions are met:

1. The common areas of the development related to the operation and maintenance of the stormwater management system must have been conveyed by the Developer to the Association in accordance with the community's Declaration of Restrictive Covenants;
2. At least 50% of the units or lots in the development must have been conveyed to unit or lot owners other than the Developer; and,
3. The stormwater management system must be in substantial compliance with the terms of the stormwater permit issued by DENR to the Developer.

To satisfy these conditions, the Developer must provide DENR with documentation that the common areas related to the stormwater management system have been conveyed to the Association and that at least 50% of the units or lots in the development have been sold to third-party purchasers. In order to demonstrate substantial compliance with the stormwater permit, the Developer may either retain an engineer to certify substantial compliance or invite DENR to carry out an inspection of the stormwater management facilities serving the development.

While these conditions are not new and were part of DENR's policy prior to enactment of House Bill 750, the big change is that DENR now is required to transfer the stormwater permit if these conditions are met even without acceptance by the Association. Before House Bill 750, DENR had the discretion to refuse to transfer a stormwater permit if the Association, for whatever reason, declined to accept responsibility for ownership and

maintenance of the development's stormwater management system even if the community's Declaration provided, as it should, that the Association could not refuse a deed for the land upon which the facilities were located or refuse to accept transfer of the permit.

In summary, "Just Say No" won't work for Associations anymore, and Developers now have an enforceable method for release from continuing responsibility for maintenance of stormwater management facilities and related liability under the stormwater permit for developments from which they moved on long ago.

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For further information regarding the issues described above, please contact Frank H. Sheffield, Jr.

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