SURVEY OF RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

In this section, the Seton Hall Law Review *presents synopses of recent New Jersey cases of interest to practitioners. In so doing, we hope to assist the legal community in keeping abreast of some of the more interesting changes in significant areas of practice.*

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ENVIRONMENTAL LAW—NEW JERSEY SPILL AND COMPENSATION CONTROL ACT—STATUTE OF LIMITATIONS IS TOLLED BY CLAIMANTS' ONGOING NEGOTIATIONS WITH STATE ENVIRONMENTAL AGENCY—*Buonviaggio v. Hillsborough Township Committee*, 122 N.J. 5, 583 A.2d 739 (1991).

In 1984, the United States Environmental Protection Agency (EPA) determined that an area of Hillsborough Township ("Township") may have been affected by subsurface ground water contamination. 122 N.J. at 11-12, 583 A.2d at 742. In the summer of 1984 the EPA informed the community of the possible dangers. Thereafter, the Township decided to extend its public water supply to the affected area. Prior to the clean-up, the Township, as demanded by the EPA, adopted a mandatory ordinance requiring connection to the public water line by all affected residences. *Id.* at 12-13, 583 A.2d at 742.

The New Jersey Department of Environmental Protection (DEP) included the nursery owned by Mildred and Carlo Buonviaggio as part of the affected area. *Id.* at 12, 583 A.2d at 742. The Township gave the Buonviaggios three alternatives. *Id.* at 13, 583 A.2d at 742. The preferred alternative included the sealing the present well and supplying public water usage for their house and an alternative water supply for the nursery. On July 25, 1986, the Township negotiated a right-of-entry agreement with the Buonviaggios allowing connection to the town water supply and sealing of the water well. *Id.* at 13-14, 583 A.2d at 743. The other damages, such as the need for an alternative water supply, were left unresolved.

On June 18, 1987, a contractor entered the Buonviaggio farm to seal the well which would eliminate their supply of water for nursery stock. This prompted the Buonviaggios to submit a claim to the New Jersey Spill Fund for replacement of their irrigation system with an alternative water supply system. *Id.* at 14-15, 583 A.2d at 743. The DEP rejected the claim filed in 1987 concluding that it was more than a year late. The Administrator of the Spill Fund relied on an October 30, 1985, DEP letter informing the Buonviaggios of the mandatory connection ordinance and the right-of-entry agreement executed in 1986.

In an unpublished opinion, the New Jersey Superior Court, Appellate Division concurred with the DEP decision. *Id.* at 15, 583 A.2d at 743. The appellate division determined that the Buonviaggio claim was not timely filed because they should have

reasonably discovered their damages anytime since October 30, 1985, the date of the DEP letter. *Id.*, 583 A.2d at 746. On appeal, the New Jersey Supreme Court reversed and remanded the matter to the DEP. *Id.* at 19, 583 A.2d at 746.

The supreme court's analysis focused on the interpretation of the provision in the New Jersey Spill Compensation and Control Act (the Spill Act), N.J. Stat. Ann. sections 58:10-23.11 to 23.24 (West 1982), requiring claims against the Spill Fund to be filed "not later than one year after the date of discovery of damage." *Buonviaggio*, 122 N.J. at 11, 583 A.2d at 741. Justice O'Hern, writing for the majority, commenced the court's analysis by discussing the history of the Spill Act. *Id.* at 7-11, 583 A.2d at 739-41. The court focused on the Spill Fund purpose of financing the prevention and cleanup of hazardous discharges into New Jersey waters. *Id.* at 8, 583 A.2d at 740. Justice O'Hern also noted that the DEP holds a dual-office function as both administrator of the Spill Fund and remediator of environmental damages. *Id.* at 10, 583 A.2d at 741.

While recognizing the DEP's difficult position, the court rejected the argument that the statute began to run with the dating of the DEP's October 1985 letter. *Id.* at 15, 583 A.2d at 744. The court observed that subsequent to that letter all parties involved continued to work together toward a solution. *Id.* at 15-16, 583 A.2d at 744. The court held that "early negotiations concerning an environmental responsibility do not necessarily indicate the 'discovery of damages' that triggers the Spill Fund's statute of limitations." *Id.* at 16, 583 A.2d at 744. Rather, Justice O'Hern stated, the statute of limitations would have been triggered when the Buonviaggios were "officially assured" that negotiations broke down and that the damages were fixed. *Id.* at 16, 19, 583 A.2d at 744, 746. Based on this reasoning, the majority concluded the statute was not tolled until the DEP determined that it would not remedy the "damage with available resources and that a claim against the Spill Fund would have to be made." *Id.* at 19, 583 A.2d at 745.

Justice O'Hern admonished the DEP for failing to "make clear to members of the public whether and when assertion of a claim against the Spill Fund is required despite ongoing negotiations." *Id.* at 17, 583 A.2d at 745. Further, the justice reasoned that allowing the claim would advance the legislative and public policy goals for a "swift and sure [governmental] response to environmental contamination." *Id.* at 7, 17, 583 A.2d at 740, 745.

Rather than requiring the Buonviaggios to sue the polluter, this solution allows the DEP to recover Spill Fund expenditures from the polluter in its own suit and therefore save "limited environmental and judicial resources." *Id.* at 18, 19, 583 A.2d at 745. Justice O'Hern determined that the Buonviaggios "lacked clear instructions or regulations" as to when claims must be filed. *Id.* at 19, 583 A.2d at 746. Consequently, the court remanded the case to the DEP for proceedings consistent with the Spill Act. *Id.*

In dissent, Justice Clifford, joined by Justice Pollock, declared the majority's conclusion that the Buonviaggios did not discover their damages until the DEP's final determination as to its remedial action made "little sense." *Id.* at 21, 583 A.2d at 747 (Clifford, J., dissenting). Justice Clifford argued that the Buonviaggios discovered their damages in October, 1985, when they were informed of the local ordinance requiring connection to public water lines and prohibiting the usage of their well. *Id.* at 20, 583 A.2d at 746 (Clifford, J., dissenting). The justice concluded, therefore, that the Buonviaggio claim was time-barred. *Id.* at 20, 22, 583 A.2d at 746-47 (Clifford, J., dissenting).

The New Jersey Supreme Court decision in *Buonviaggio*, attempts to resolve the dispute regarding the interpretation of the Spill Act's limitations provisions. The liberal interpretation afforded by the court to the "discovery of damages" is encouraging to Spill Fund claimants, and in accord with New Jersey's environmentally aware climate. Unless, the DEP adopts regulations guiding claimants when to file their claims, however, this fact-specific decision will not offer real assistance.

Justice Clifford's dissent, although less sympathetic to the claimants, is consistent with traditional interpretations of the "discovery of damages" provision. Furthermore, without limitations, claimants would be allowed unreasonable delays in filing their claims and the resources of the Spill Fund would likely be exhausted. The *Buonviaggio* decision would then serve to defeat rather than bolster the social remedial purposes of the New Jersey Spill Act.

Florina A. Moldovan

ENVIRONMENTAL LAW—GREEN ACRES ACT—SALES OF MUNICIPAL LANDS HELD FOR COMMERCIAL DEVELOPMENT ARE SUBJECT TO PRIOR STATE APPROVAL IF THE LANDS WERE ACTUALLY USED FOR PUBLIC RECREATION OR CONSERVATIONAL PURPOSES AT THE TIME OF RECEIPT OF GREEN ACRES ACT FUNDS — *Cedar Cove, Inc. v. Stanzione*, 122 N.J. 202, 584 A.2d 784 (1991).

In 1935, the South Toms River borough (Borough) acquired title to a four-lot parcel of land, now known as Mathis Plaza. 122 N.J. at 207, 584 A.2d at 786. Two of the lots were subsequently developed and used for commercial purposes. The other two lots, lots one and three, remained undeveloped despite the Borough's efforts during the 1960s and 1970s to lease and commercially develop them. *Id.* at 208, 584 A.2d at 787. In 1974, the Borough resolved to put Mathis Plaza to its "highest and best use" as a commercial development and required that potential lessors erect improvements with a minimum value of $1,000,000. *Id.* at 223, 584 A.2d at 794-95. To promote the development, the Borough enacted various municipal land use plans and a 1977 zoning map designating the Mathis Plaza parcel as part of a "Special Economic Development" zone. *Id.* at 208, 584 A.2d at 787. At a time prior, the Borough had received docking fees for a pier on lot three which was sporadically used for fishing and boat docking. *Id.* at 208, 584 A.2d at 787. A war memorial was also placed upon lot three, and the area was briefly used for Memorial Day activities, but the lot was not maintained and the memorial was removed prior to 1978. *Id.* at 208, 225, 584 A.2d at 787, 795.

In 1978, the Borough requested and received $27,500 in Green Acres Land Acquisition and Recreation Opportunities Act (Green Acres Act) funds to create a baseball park on municipal property. *Id.* at 207, 584 A.2d at 786. In its grant application, the Borough did not list Mathis Plaza in the required inventory of municipal property held for recreation or conservation. *Id.* at 208, 584 A.2d at 787. In 1984, the Borough advertised for bids on Mathis Plaza and accepted a sole bid from Alphonse Stanzione (Stanzione). *Id.* at 206, 584 A.2d at 786. Cedar Cove, Inc. (Cedar Cove), which had submitted an untimely bid for the property, brought suit against Stanzione and the Borough. *Id.* Cedar Cove challenged the sale on the grounds that, *inter alia*, the Borough had violated New Jersey law by failing to obtain state ap-

proval of property sale which was held by a municipality for conservation or recreational purposes at the time of receipt of Green Acres Act funds. *Id.* (citing N.J. STAT. ANN. § 13:8A-47b (West 1979)).

The trial court ruled that although the Borough had intended to utilize Mathis Plaza for commercial purposes, the actual recreational use of lot three at the time the Borough received the Green Acres Act funds placed Mathis Plaza within the ambit of the Green Acres Act section 47b restriction on alienation. *Id.* at 209, 584 A.2d at 787. The New Jersey Superior Court, Appellate Division, agreed with the trial court that actual recreational use of the land had occurred, but reversed on the grounds that such incidental use was insufficient to invoke the restriction. *Id.* The New Jersey Supreme Court granted Cedar Cove's request for certification, and reversed. *Id.* at 206, 218, 584 A.2d at 786, 792 (citation omitted).

The court held that the actual recreational or conservation use of the property, with Borough approval or authorization, at the time of receipt of Green Acres funds rendered the property "held by" the Borough for purposes of the section 47b restraint on alienation. *Id.* at 217-18, 584 A.2d at 792. Hence, the court ruled, any transfer of Mathis Plaza for other than recreation or conservation purposes required state approval. *Id.* at 218, 584 A.2d at 792.

Writing for the majority, Justice Handler began the analysis by reviewing the evolution of the Green Acres Act. *Id.* The court observed that the New Jersey legislature enacted the Green Acres Act to facilitate the promotion of recreation and conservation of property by providing state funding to municipalities to assist in the purchase and development of recreational property. *Id.* at 205, 584 A.2d at 785. The original provisions of the Act, Justice Handler noted, restrained municipalities from transferring properties which were acquired with state funds unless state approval for the transfer was given. *Id.* The majority added that an inventory of existing property held for recreation or conservation purposes must be submitted by the municipality when applying for Green Acres grants. *Id.* at 208, 584 A.2d at 787. The justice noted Green Acres Act was amended in 1975 and extended the requirement of state approval for the transfer of any property "held by" the municipality for recreation or conservation purposes at the time the municipality received Green Acres funds, regardless of whether the property had been acquired with state

funds. *Id.* at 205, 584 A.2d at 785. The 1975 Green Acres Act amendment, Justice Handler asserted, supported the inference that the legislature desired to preclude municipalities from converting existing lands to more profitable uses, while simultaneously using state funds to acquire or develop new properties for conservation or recreational purposes. *Id.* at 211, 584 A.2d 788-89. The court maintained that the evolution of the Green Acres Act manifested the legislature's intent to both increase the amount of land devoted to conservation or recreational use and to encourage the preservation of existing properties. *Id.* at 213-14, 584 A.2d at 789-90.

Justice Handler continued by reviewing the statutory language of the Green Acres Act and professed that the "plain language" of the act clearly encompassed Mathis Plaza. *Id.* at 210, 584 A.2d at 788. The majority reasoned that the Borough fulfilled the statutory requirement that the property be "held by" the Borough, as that provision had been interpreted to mean municipal possession, ownership, and control. *Id.* (citation omitted). The critical issue, the majority asserted, was whether the Borough held Mathis Plaza "for such purposes" as recreation or conservation. *Id.*

The justice then reviewed section 47b and concluded that the provision fulfilled the Green Acres Act purposes of increasing the land devoted to conservation and recreation, while preserving those lands already devoted to such use. *Id.* at 211-12, 584 A.2d at 788-89. Additionally, Justice Handler recounted the statutory definition for recreation and conservation purposes and concluded that any municipal property which was used for camping, fishing, boating, and similar public recreational uses at the time of receipt of a Green Acres grant would be required to obtain state approval prior to its transfer. *Id.* (citing N.J. STAT. ANN. § 13:8A-37(f) (West 1979)). While the majority found that Mathis Plaza had been "held for such purposes," the court conceded that the statute was subject to differing interpretations and concluded that further statutory interpretation was required. *Id.* at 210-11, 584 A.2d at 788.

The majority continued by asserting that its interpretation of the statute could be supplemented by analyzing how the responsible state agency had implemented the statute. *Id.* at 212, 584 A.2d at 789. The justice posited that the language used by the Department of Environmental Protection (DEP) in its grant allocation agreements was "roughly synonymous" with the statutory

provision. *Id.* Hence, Justice Handler determined that the court's position was in accordance with how the DEP had interpreted the restraint provision. *Id.*

Justice Handler rejected Stanzione's argument that an official declaration by the municipality to dedicate the land for the purposes of recreation or conservation was necessary to render the sale subject to state approval. *Id.* at 214, 584 A.2d at 790. The court found no justification for such a position in the statute, its legislative history, nor the DEP's interpretation of the statute. *Id.* Further, the majority explained that such an interpretation would impede the legislative goal to increase the land allocated for conservation or recreation purposes. *Id.* The focus on the actual use of the property, the justice stated, was the correct interpretation of the legislative and administrative intent. *Id.* Thus, the court concluded, even an official declaration that a particular property be dedicated to non-conservation or non-recreational purposes would not obviate the requirement for state approval of the sale. *Id.* at 214, 584 A.2d at 790. The majority emphasized that the property's actual use at the time of receipt of Green Acres funds, and not the Borough's designation of the land's use, was the dispositive factor. *Id.*

Justice Handler dismissed the appellate court's concerns about the potential impact of a broad reading of the statute, deeming them too attenuated to prevent an interpretation that would further the state's interest in protecting and preserving conservation and recreational properties. *Id.* at 215, 584 A.2d at 790. The majority claimed that the appellate court's concern for non-compliance with Green Acres grant application procedures, especially the inventory list, was ill-placed because neither the DEP nor the legislature intended that the inventory list be wholly controlling. *Id.* at 215, 584 A.2d at 790-91. The majority attested that the DEP could not place much reliance upon the inventories of existing recreation and conservation property which municipalities submitted with the grant application simply because the DEP could not possibly verify the accuracy of the information. *Id.* at 215, 584 A.2d at 790-91. Thus, Justice Handler asserted, to place absolute reliance upon the municipality's designation of its property and to preclude challenges to omissions or errors on the inventory list would frustrate the purposes of the statute. *Id.*, 584 A.2d at 791. The lower court's concern that municipalities would be discouraged from applying for Green Acres funds was also remote, Justice Handler asserted, be-

cause the number of applications currently exceed the program's monetary resources. *Id.* at 216, 584 A.2d at 791.

The majority dismissed the lower court's finding that a municipality would be forced to bar the casual public use of recreational land in order to preserve the land as non-recreational or non-conservational. *Id.* at 216-17, 584 A.2d at 791. The court reasoned that the facts of the case did not support a finding that there was casual public use. *Id.* While the statute could not be construed as applicable in instances where the public use was casual and without the permission or knowledge of the municipality, the justice found that the Borough had actively and openly supported the recreational use of Mathis Plaza. *Id.* at 217, 584 A.2d at 791.

The court decreed that where commercial development of municipal property remained wholly executory when the Green Acres funds were received, then the actual recreational or conservation use of the property at that time, with the Borough's approval, rendered the property "held by" the Borough for purposes of section 47b restraint on alienation. *Id.* at 217-18, 584 A.2d at 792. Relevant factors in the "actual use" analysis, Justice Handler expounded, included the municipality's knowledge, support, or encouragement of the public use and whether the municipality had taken official action to enable the property to be used for recreation or conservation purposes. *Id.* at 217, 584 A.2d at 792. Hence, the court ruled, the transfer of Mathis Plaza to Stanzione was subject to section 47b of the Green Acres Act and was invalid because state approval of the transfer was not obtained. *Id.* at 218, 584 A.2d at 792.

Justice Garibaldi, in a lengthy dissent, criticized the majority for exceeding the legislature's intent and for creating an unreasonable restraint on alienation. *Id.* at 219-20, 227-28, 584 A.2d at 792, 796-97 (Garibaldi, J., dissenting). Justice Garibaldi reasoned that the majority would find that a municipality held property for conservational or recreational purposes whenever the property had been used for those purposes with the authorization or condonation of the municipality. *Id.* at 219, 584 A.2d at 793 (Garibaldi, J., dissenting). The dissent concluded that the statute, the legislative history, and the public policy surrounding the Green Acres Act indicated the intent of section 47b was not to restrict the alienability of municipal lands which were held primarily for commercial development when Green Acres funds were received, despite the occasional public use of the land for

recreational purposes. *Id.* at 221, 584 A.2d at 792 (Garibaldi, J., dissenting).

The justice began the analysis by asserting that a legislature was presumed to be knowledgeable of administrative practices and regulations utilized to implement statutory directives. *Id.* at 221, 584 A.2d at 793 (Garibaldi, J., dissenting)(citations omitted). But in enacting the 1975 amendments, the dissent observed, the legislature rejected the language utilized by the DEP in the administration of the program, "[land] *used* for recreational purposes," in favor of the more restrictive "[land] *held by* local units for recreation and conservation purposes." *Id.* (emphasis in original). The different language was significant, Justice Garibaldi argued, because it manifested the legislature's intent to replace the concept of use with that of possession and ownership. *Id.* Additionally, the justice expounded, the grant agreement between the DEP and the Borough, restricting alienation of lands "owned, dedicated or maintained" for conservation or recreation purposes, further supported the finding that more than infrequent recreational use was required to invoke the section 47b restriction on alienation. *Id.* at 222, 584 A.2d at 794 (Garibaldi, J., dissenting).

The dissent asserted that the proper analysis for determining when property was "held" for recreational or conservational purposes required ascertaining the municipality's intentions. *Id.* at 202, 222, 584 A.2d at 794 (Garibaldi, J., dissenting). Justice Garibaldi maintained that the Borough's zoning and land use plans, which designated the land as a commercial area, in conjunction with the Borough's attempts to lease the property for its "highest and best use" as a commercial development, overwhelmingly supported the finding that the Borough did not hold Mathis Plaza for recreational or conservational use when the Green Acres funds were received in 1978. *Id.* at 223-24, 584 A.2d at 795-96 (Garibaldi, J., dissenting). Further, the dissent found it nonsensical that the Borough would hold Mathis Plaza as recreational lands and forego the potential multi-million dollar income from the property in return for a mere $27,500 Green Acres grant. *Id.* at 223, 584 A.2d at 795 (Garibaldi, J., dissenting). Justice Garibaldi pointed out that even the parties conceded the Borough had, in good faith, not listed Mathis Plaza on the Green Acres inventory list of recreational lands because the Borough did not consider Mathis Plaza to be recreation or conservation land. *Id.* at 224, 584 A.2d at 795 (Garibaldi, J., dissent-

ing). The dissent concluded that the overwhelming evidence of the Borough's intent to develop Mathis Plaza as a commercial area, despite the intermittent and sporadic recreational use, removed Mathis Plaza from the section 47b restraint on alienation of recreation or conservation lands without state approval. *Id.* at 224-25, 584 A.2d at 795-96 (Garibaldi, J., dissenting).

Noting that in some instances a municipality's intentions may be ambiguous and evidence may be lacking as to the municipality's commercial development intent at the time a Green Acres grant is received, Justice Garibaldi proposed that the correct inquiry in such cases requires discerning the municipality's "primary purpose" for holding the property. *Id.* 122 N.J. at 225, 584 A.2d at 796 (Garibaldi, J., dissenting). The "primary purpose" analysis would be fact specific, the dissent asserted, and would require evaluation of the municipality's official actions regarding the property, including the property's zoning and land use plan designation, as well as the property's designation in any Green Acres inventory listing. *Id.* at 226, 584 A.2d at 796 (Garibaldi, J., dissenting). Other factors to be considered, Justice Garibaldi enumerated, include the municipality's attempts to commercially develop the property, in addition to the nature and extent of the public's recreational use of the land. *Id.* Conceding that a "primary purpose" analysis was not a "bright line" test, the dissent posited that such an analysis would further the Green Acres Act policies of expanding the lands available for recreational and conservational use, while allowing casual and sporadic public recreational activity on the municipal land. *Id.*

Identifying flaws in the majority's reasoning, the dissent asserted that while there existed a general rule against restraints on the alienation of real property, courts previously acknowledged that exceptions to the general rule would be upheld if the restraints were reasonable. *Id.* at 226-27, 584 A.2d at 796 (Garibaldi, J., dissenting) (citations omitted). The majority's broad ruling unreasonably restrained the alienability of all four lots of Mathis Plaza, the justice asserted, when two of the lots had always been used for commercial use and the remaining two lots had been held by the Borough for commercial development. *Id.* at 227, 584 A.2d at 796-97 (Garibaldi, J., dissenting). The justice further criticized the majority for promulgating a "vague and unarticulated" standard and for failing to specify the actions required by municipalities to ensure that property held for commercial development would not be deemed recreational or

conservation properties because of occasional public recreational use. *Id.* at 227-28, 584 A.2d at 797 (Garibaldi, J., dissenting). Justice Garibaldi observed that many municipalities need money and, given the current weak economy, were holding properties for future economic development. *Id.* at 227, 584 A.2d at 797 (Garibaldi, J., dissenting). The majority's decision, the dissent posited, required that those municipalities contemplating Green Acres grants preclude *any* use of municipal land held for future commercial use or suffer an economic loss by transferring the property for less than its future value prior to applying for Green Acres funds. *Id.* (emphasis added). Those alternatives, Justice Garibaldi lamented, frustrate the purposes of the Green Acres Act and result in a net loss to the community. *Id.*

In its expansive holding in *Cedar Cove, Inc. v. Stanzione*, the New Jersey Supreme Court has done much to strike fear deep in the hearts of those town council members whose municipalities have received Green Acres funds. In promulgating its "actual use" interpretation of N.J. STAT. ANN. § 13:8A-47b (West 1979), the court ruled that *any* municipal property which was "actually used" by the public for recreational or conservation purposes at the time the municipality received *any* Green Acres funding is now subject to what is essentially a state veto power on the transfer or sale of the property. True to its professed mission, the court has inexorably furthered the Green Acres Act's purpose of expanding the amounts of real property dedicated to recreation and conservation.

The court's advancement of the Green Acres program, however, has been at the expense of those people who were meant to benefit from the Green Acres Act. The court has, with a single stroke of the pen, potentially removed from a municipality's assets the most valuable and plentiful asset the municipality may own; its real property. Thus municipalities which have received Green Acres funds may now be faced with the startling realization that some of the valuable real estate which the township had been holding for commercial development, but on which was allowed casual public use, is now subject to state approval prior to the property's sale. Given the DEP's response in *Cedar Cove*, it is evident that the state's approval of a sale may not always be forthcoming. Additionally, the burden of compensating the municipalities for the lost revenue will fall on the supposed beneficiaries of the Green Acres Act, namely the public.

Justice Garibaldi's proposed "primary purpose" analysis,

while concededly not a "bright line" rule, provides a more equitable result. By focusing on the municipality's primary purpose in holding the land, public use of the land for recreational or conservational purposes may be allowed while the municipality waits to maximize the potential income from the property. Both the municipality and the public gain, the former by attaining a better price for its asset (and reducing the burden on the taxpayer), and the latter by having more land on which to recreate. The legislature's concern for municipal fraud and abuse of the Green Acres program can be controlled just as easily via the dissent's more equitable legal standard than as under the majority's harsh rule.

Granted, the actual ramifications of the *Cedar Cove* decision cannot be ascertained at this early stage. Many municipalities will probably be unaware of the possible complications to their next sale of municipal property until an action is brought on "actual use" grounds to rescind the sale. At a minimum, the court's vague and ambiguous test has muddied the legal waters, and is sure to spur litigation to determine the scope of the "actual use" test. Given a municipality's potential loss of income in these trying economic times ($300,000 in *Cedar Cove*), the supreme court's decision invites a legislative response to its holding.

John W. Verlaque

ENVIRONMENTAL LAW—STRICT LIABILITY—PREDECESSOR IN TITLE STRICTLY LIABLE FOR DAMAGES RESULTING FROM CONTAMINATION ON OWNER'S PROPERTY BASED ON THE ABNORMALLY DANGEROUS ACTIVITY DOCTRINE — *T & E Industries v. Safety Light Corp.*, 123 N.J. 371, 587 A.2d 1249 (1991).

From 1917 to 1926, United States Radium Corporation (USRC) processed radium at an industrial site in Orange, New Jersey. 123 N.J. at 376, 587 A.2d at 1252. The radium processing operation generated a solid radioactive by-product known as "tailings." USRC disposed the tailings on unimproved portions of the site. In 1943, USRC sold the site to Arpin, a plastics manufacturer. *Id.* at 379, 587 A.2d at 1253. The property changed hands several times between 1943 and 1974 when T & E, an elec-

tronic component manufacturer, purchased the site. In 1979, the New Jersey Department of Environmental Protection (DEP) inspected the site and detected radiation in the building and soil beneath the building that exceeded both federal and state standards. Based on recommendations made by the DEP and T & E's own expert, T & E implemented interim remedial measures. *Id.* at 380, 587 A.2d at 1253-54. In 1981, the Environmental Protection Agency (EPA) placed the site on the National Priorities List pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (1988)(CERCLA). *T & E Indus.*, 123 N.J. at 380, 587 A.2d at 1254. Subsequently, T & E ceased its operations at the site due to health risks resulting from the contamination and moved to another site in Orange, New Jersey.

Evidence adduced at trial indicated that as early as 1917 employees at USRC were becoming suspicious of the potential health risks associated with radium. *Id.* at 377, 587 A.2d at 1252. Between 1917 and 1978, when the federal government began to regulate the disposal of tailings, both USRC and the scientific community were accumulating data that indicated the potential health risks associated with radium and its radioactive elements. *Id.* at 376-79, 587 A.2d at 1252-53. Despite its understanding of the health risks posed by radium, however, USRC failed to notify any subsequent owners of its past disposal practices at the site. *Id.* at 382, 587 A. 2d at 1255.

The trial court dismissed the complaint based on the theory that the doctrine of *caveat emptor* barred T & E's recovery. *Id.* at 383, 587 A.2d at 1255. The New Jersey Superior Court, Appellate Division, reversed holding that USRC's disposal activities were, as a matter of law, abnormally dangerous and therefore USRC was strictly liable for damages. *Id.* The New Jersey Supreme Court affirmed the appellate court's decision as modified and remanded the case to the trial court for further proceedings. *Id.* at 402, 587 A.2d 1265.

Writing for a unanimous court, Justice Clifford initially determined that a property owner can assert a strict liability cause of action against a predecessor in title based on the abnormally dangerous activity doctrine. *Id.* at 384-90, 587 A.2d at 1256-59. The court noted that although the abnormally dangerous activity doctrine arose in a situation involving adjacent property owners, the policy considerations underlying the doctrine support its application to predecessors in title. *Id.* at 386, 587 A.2d at 1257.

The policy considerations identified by the court include the reasoning that "enterprise[s] should bear the costs of accidents attributable to highly dangerous [or unusual activities]" and that the enterprise is in "a better position to administer the unusual risk by passing it on to the public." *Id.* at 387, 587 A.2d at 1257 (quoting W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 78, at 551 (5th ed. 1984)).

The court then held that the doctrine of *caveat emptor* should not act to bar T & E's cause of action. *Id.* at 387, 587 A.2d at 1257. Although *caveat emptor* is still a valid doctrine in New Jersey, the court noted that several exceptions to the rule have developed. *Id.* at 387-88, 587 A.2d at 1257. Relying on an enterprise liability rationale, the court held that an exception to the doctrine of *caveat emptor* exists when a seller "has engaged in an abnormally-dangerous [sic] activity and disposed of the by-products of that activity onto the property [and then] markets the land." *Id.* at 389, 587 A.2d at 1258. In addition, the court noted that the risk of damages arising from an abnormally dangerous activity can be assumed by the buyer. *Id.* at 390, 587 A.2d at 1258. According to the court, however, the use of an "as is" contract such as the one in the case at hand does not satisfy the court's requirement that the buyer knowingly and voluntarily assume the risk. *Id.* at 390, 587 A.2d at 1259.

Upon approving the application of the abnormally dangerous activity doctrine to this case, the court established certain elements that identify such an activity. *Id.* The court noted that the determination of whether an activity is abnormally dangerous must be applied on a case-by-case basis. *Id.* at 391, 587 A.2d at 1259. To determine whether an activity is abnormally-dangerous, the court relied on the six factors set forth in the RESTATEMENT (SECOND) OF TORTS § 520 (1977). *Id.* at 390, 587 A.2d at 1259. In applying these factors, the court held that "despite the usefulness of radium, defendant's processing, handling, and disposal of that substance under the facts of this case constituted an abnormally-dangerous [sic] activity." *Id.* at 394, 587 A.2d at 1261. In addition, the court noted that it was not necessary to determine whether knowledge was an element in determining an enterpriser's liability. *Id.* at 392, 587 A.2d at 1260. The court avoided this issue by holding that if knowledge is a requirement, USRC had constructive knowledge of the inherently dangerous nature of its activities. *Id.* at 392-95, 587 A.2d at 1260-61.

The court granted a declaratory judgment holding the defendant liable for necessary cleanup costs as they are incurred. *Id.* at 398, 587 A.2d at 1263. In addition, the court held that T & E was entitled to recover damages for all "losses or injuries proximately caused by a defendant's acts." *Id.* at 399, 587 A.2d at 1263. Therefore, T & E was entitled to compensation for all losses caused by the defendant's disposal of radium contaminated tailings. *Id.* The court limited the damages, however, by expressly precluding recovery for the value of the time T & E's president spent managing the contamination problem. *Id.* at 399-400, 587 A.2d at 1263-64.

The *T & E* decision clarifies the doctrines of *caveat emptor* and abnormally dangerous activities by requiring a case-by-case analysis of specifically enumerated factors. As a result, the court has espoused an equitable method for assessing damages for contamination caused by a distant predecessor in title. The holding, however, is limited because the use of a hazardous or toxic substance does not make the activity abnormally dangerous as a matter of law. In addition, by reserving the issue of knowledge, the court has left unresolved the question of whether or not a defendant without actual or constructive knowledge can be held strictly liable under the abnormally dangerous activity doctrine. Therefore, the court has left the door open to further challenges to the abnormally dangerous activity doctrine in relation to hazardous waste sites.

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