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## Conservation easements can be extracted from property owners despite relationship to the permit

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A December 2004 decision by the New York state Court of Appeals and a May explanation by the U.S. Supreme Court have significant implications in Nassau County and indeed, throughout the state, regarding conservation easements, site plan conditions and property takings.

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The Smiths owned almost 10 acres along a protected creek in Mendon, which included several environmentally-sensitive parcels and a lake located 5 ft. from a protected agricultural district. It contained certain steep slope areas, and some portions of the property were within an Environmental Protection Overlay District (EPOD). Because of the EPOD, the Smiths' property was restricted in terms of the number of houses that could be constructed on it, and the amount of clearing of the land that was permissible.

In December of 2001, the Smiths

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applied to the town planning board for site plan approval to construct a single-family dwelling in the non-EPOD portion of the property. After several hearings, the board granted the application and conditioned final site plan approval upon the filing of a conservation restriction on any development within the EPOD. The planning board required that a portion of the Smiths' land should also be protected by a restrictive covenant, even though it was unrelated to the site plan application.

The condition prohibited construction of structures, required the Smiths to maintain a restricted area and permitted the town, upon 30 days written notice, to enter the property to safeguard the environmentally-sensitive parcels. The Smiths brought a lawsuit challenging the constitutionality of the condition as a taking.

In a 4-3 opinion, the Court of Appeals rejected the Smiths' claims and held that there was no taking. In so doing, the court reviewed takings law, as well as the reason underlying the seminal cases on the constitutionality of exactions which required an essential nexus between the purpose of the restriction and the application. Having analyzed the imposition of the restriction under the existing law, the court held that since the property was not dedicated to the government, and

because the property right involved is trifling compared to the rights to exclude or alienate, the condition was proper. The court found it to be a critical part of the decision that the Smiths retained the right to exclude others from the entirety of their 10 acre parcel, although the town had the right to enter the property to safeguard environmentally-sensitive parcels.

The court analyzed the Smiths' rights under the EPOD and the imposed conservation restriction. The court said that the EPOD granted wide discretion and permitted some development, including the possibility of a variance. The court said that the restriction would not appreciably diminish the value of the Smiths' property, and they still had economically viable use of it. The court said, "In exchange for their acceptance of the restriction, the Smiths would garner a permit to construct a single family home on their property."

On May 23, the Supreme Court elaborated on its taking cases by explaining the Loretto case, in which state law required a landlord to permit cable companies to install cable facilities in an apartment building without compensation. The court said that this effected a taking because it deprived the owner of all beneficial use of a portion of her property, i.e. where

the cable wire is located. The question must be asked whether Loretto impacts the conservation restriction in Smith because the owners, as part of this condition to site plan approval, had to surrender their right to exclude everyone from the restricted area, thereby exposing themselves to governmental intrusion across the property. Although this is not a permanent physical invasion of the property, the specter of permanent exposure to intrusions by government may very well violate the Loretto standard.

A conservation restriction is not a conveyance. It can be undone, even when the easement proclaims that the land must "remain open in perpetuity and undeveloped," (Newsday, March 20th, p. A-16). As shown in a Newsday story, a 17 year old conservation easement in a local village was extinguished when a developer allegedly paid the municipality \$1 million, plus a future \$192,000 for each condominium unit built. Since the developer wanted to build 60 units, the total payment could be \$12.52 million.

Conservation easements could be extracted from property owners irrespective of the easement's relationship to the permit requested. At some later date, the municipality may decide to release the easements for a price. All of this seems to be legal and also seems to severely undermine the viability of conservation easements as a land use tool. Perhaps the solution is to use them, but also to add more benefitted parties to the restriction to enhance their enforcement.

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