Ruling in Orchard Hill Building Warrants Additional Due Diligence for Developers of Farmland

Jan 02, 2018

Categories:

Publications

Authors:

Stephen N. Haughey

Developers love farm properties. Their often-vast expanses of graded, cleared land can save significant time and money in site development work, allowing a developer to begin construction sooner to meet market conditions. However, a recent decision from the Northern District in Illinois demonstrates that such affection comes with a cost, coupled perhaps with a heaping spoonful of extra due diligence.

Lurking beneath the crop fields may be a jurisdictional wetland yearning to get out, impacted by the timing of the developer's plans. Many farms in the U.S. contain wetlands previously graded and converted to agricultural use. Under federal law, such conversion is exempted from the dredge and fill permitting requirements of the Clean Water Act if it occurred before December 23, 1985, and certain other conditions are met. While prudent developers check historical aerial photos to confirm long-term agricultural use of farmland, the case of *Orchard Hill Building Company v. U.S. Army Corps*, 2017 WL 4150728 (ND Ill. 2017), demonstrates that proper due diligence does not end at the closing.

In that case, a 100-acre farmland was purchased in 1995, with the developer dividing the property into two phases of development, the first starting in 1996 to construct 168 townhomes on the south end, and the second starting in 2006 to construct 169 single family homes on the north end. The property had been farmed consistently, well before 1986. However, after the closing, due to a combination of drainage improvements made for the townhomes and a lack of continued farming, a large wetland emerged on the north end between 1996 and 2006.

Using the Army Corps' broad significant nexus guidance, the Corps asserted jurisdiction over the wetlands, finding that they significantly affected the chemical, physical and biological integrity of the Little Calumet River, a stream separated from the wetlands

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

by a drainage ditch, storm sewer pipe, three open water detention ponds, and Midlothian Creek. When the developer asserted the exemption for prior converted farmland, the Court ruled that, based on guidance used by the Corps and EPA, the exemption had been abandoned, because five consecutive years had passed since the property was farmed.

Purchasers of farmland for development must be diligent in documenting the historical nature of the agricultural use of the property. If conversion of jurisdictional wetlands to cropland occurred after 1985, there is no exemption, and a developer that becomes the new owner could arguably be jointly liable along with the farmer for continuing an unpermitted filling/grading of the wetland.

Even if the conversion to farmland occurred before 1986, a developer's plans should consider the potential risk of new or reemerging wetlands appearing somewhere on the site through a combination of the passage of time, cessation of farming activities, and perhaps new drainage improvements. If development of a large parcel will be phased over many years, a prudent developer may want to take steps to ensure continued farming of the undeveloped portion of the site through some type of lease. If a future section of planned development has certain physical traits, such as poor drainage, the developer may want to consider undertaking drainage improvements on that part of the site now, to ensure that wetlands do not emerge while other phases of development are underway. And drainage improvements undertaken on one portion of a site must be evaluated in the context of their potential impact on drainage in other portions of the site where development may be delayed for many years.

For more information about the exemption for prior converted farmland, consult the National Resource Conservation Service's (NRCS) guidance or the Army Corps' Regulatory Guidance Letter.

The benefits of purchasing farmland for development are considerable. But they must be weighed against the extra scoops of due diligence that come with it, both before and after closing. A potential exemption for prior converted farmland must not only be carefully documented before closing, but also carefully preserved

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

afterwards.

Steve Haughey is a member of Frost Brown Todd's Environmental Practice Group. For more information, please contact Mr. Haughey or another member of the firm's EPG.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons