In the Zone

Fox Rothschild LLP
ATTORNEYS AT LAW

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Declarants of Flexible Communities, Beware of the Deadline To Exercise Your Rights

By Carrie B. Nase-Poust

Under the Pennsylvania Uniform Planned Community Act (PUPCA) and the Pennsylvania Uniform Condominium Act (PUCA), a flexible community is one that includes additional real estate, convertible real estate, and/or withdrawable real estate. Under the PUPCA and PUCA, a Declarant had seven years from the date the Declaration was recorded to add additional real estate, convert convertible real estate and/or withdraw withdrawable real estate.

Initially, it appeared as though the Pennsylvania Permit Extension Act would extend this deadline. The Permit Extension Act extends the expiration date of certain permits, and appears to apply to the time in which additional real estate can be added, convertible real estate can be converted and/or withdrawable real estate can be withdrawn. Section 1603-I(a) of the Permit Extension Act provides as follows:

"(a) Automatic suspension--The expiration date of an approval by a government agency that is granted for or in effect during the extension period, whether obtained before or after the beginning of the extension period, shall be automatically suspended during the extension period."

The term "approval" is defined under the Permit Extension Act as "any governmental agency approval, agreement, permit, including a building permit or construction permit, or other authorization or decision to . . . (ii) relating to or affecting development, granted pursuant to a statute, regulation or ordinance adopted by a municipality, including the following: (C) 68 Pa.C.S. Pt. II Subpt. B (relating to condominiums)... (E) 68 Pa.C.S. Pt. II Subpt. D (relating to planned communities)". In addition, the term "development" is defined under the Permit Extension Act to include "the right to convert convertible real estate or withdraw withdrawable real estate pursuant to 68 Pa.C.S. Pt. II Subpt. B (relating to condominiums) or D (relating to planned communities)." The extension period is the period beginning after December 31, 2008, and ending before July 2, 2016.

However, the Pennsylvania Commonwealth Court recently held in the case of *Logan Greens Community Association, Inc. v. Church Reserve, LLC* that the Permit Extension Act does not apply to flexible communities. In this case, Church Reserve recorded the Declaration of Logan Greens, a Planned Community which described Lot 53 as withdrawable real estate and convertible real estate. Lot 53 was later subdivided into five new parcels, including Lot 54, which remained withdrawable and/or convertible real estate. Church Reserve did not withdraw Lot 54 within the 7-year period set forth in the PUPCA, nor did they execute a deed conveying Lot 54 to the Association. The Association brought an action to quiet title in the court of common pleas asserting its interest in title to Lot 54. Church Reserve filed preliminary objections claiming that the Permit Extension Act tolled the running of the conversion/withdrawal period.

The Pennsylvania Commonwealth Court determined that the Permit Extension Act specifically suspends the expiration date of a "government agency approval." The right to add additional real estate, convert convertible real estate and withdraw withdrawable real estate are permitted under the PUPCA and PUCA without the need to obtain governmental approval. Therefore, the Pennsylvania Commonwealth Court held that since there was no "government agency decision" involved, the Permit Extension Act does not apply.

Even though the Court has held that the Permit Extension Act does not apply to flexible communities, the time limit to add additional real estate, convert convertible real estate and withdraw withdrawable real estate has been extended under the PUPCA and PUCA. Both Acts have recently been amended to extend the time limit not to exceed the later of:

(A) Ten years after the recording of the declaration; or

(B) in the case of a preliminary plat calling for the installation of improvements in sections, 120 days after municipal approval or denial of each particular section's final plat which was filed prior to the deadline approved or modified by the municipal governing body pursuant to Section 508(4)(v) of the [Pennsylvania Municipalities Planning Code], or, in the event of an appeal from the municipal approval or denial of such final plat, 120 days after a final judgment on appeal.

In This Issue:

Author

Carrie B. Nase-Poust
215.299.2030
cnase-poust@foxrothschild.com

Pennsylvania Supreme Court Holds That "Parties to the Hearing" Cannot Continue a Challenge to an Ordinance Where the "Party Appellant" Withdraws the Challenge

By Clair E. Wischusen

In *Stuckley v. Zoning Hearing Board of Newtown Twp.*, --- A.3d ---, 2013 WL 5825059 (Pa.), the Pennsylvania Supreme Court addressed the issue of whether parties to an appeal can continue a challenge to a zoning ordinance once the original challenger has withdrawn. The Court held that because "parties to the hearing" are distinct from "party appellants," unless the former have taken steps to become party appellants, they cannot continue the challenge.

The ordinance at issue was amended so as to accommodate a major development project by Toll Brothers. Leo Holt, a property owner affected by this amendment, appealed to the zoning hearing board (the Board), alleging substantive and procedural defects. As a result, Holt became a "party appellant" pursuant to Section 913.3 of the Pennsylvania Municipalities Planning Code (MPC), 53 P.S. § 10913.3. At the first hearing on Holt's appeal several neighbors appeared and were designated "parties to the hearing" pursuant to Section 908(3) of the MPC. 53 P.S. § 10908(3). Ultimately Holt withdrew his challenge before a decision was rendered by the zoning hearing board and the proceedings were terminated.

Thereafter, the township repealed the subject ordinance and enacted a new ordinance to cure any procedural defects. The new ordinance mirrored the ordinance Holt had challenged and the neighbors sought to continue Holt's challenge. The neighbors filed a writ of mandamus with the trial court to compel the Board to either continue hearings or render a final decision on Holt's challenge. The trial court declined to compel the Board to continue hearings, but ordered the Board to make written filings on Holt's challenge, which it did. The Board found that the neighbors did not have the right to continue the challenge because the MPC distinguishes "party appellants" from "parties to the hearing" and the only "party appellant" had withdrawn. The Board noted that none of the neighbors seeking to continue the challenge had filed an application as required by the MPC – in order to pursue the action, a party must be "aggrieved" and file the required written application with reasons for the challenge. *See* 53 P.S. § 10916.1.

The neighbors appealed to the trial court and Toll Brothers intervened. The trial court reversed the findings of the Board, finding no distinction between party appellants and parties to the hearing, and ordered the Board to permit the neighbors to continue Holt's challenge. Toll Brothers appealed to the Commonwealth Court but subsequently filed an application to dismiss the appeal and vacate the order as moot on the grounds that the ordinance challenged by Holt had been repealed and the new ordinance had never been specifically challenged. The Commonwealth Court affirmed the trial court's decision, finding that the MPC does not specifically state that rights of parties to the hearing are contingent on the existence of the party appellant remaining in the action. The Court also found that the repeal and reenactment of the subsequent ordinance, which was substantially the same as the original ordinance, did not render the challenge moot. Toll Brothers appealed to the Pennsylvania Supreme Court which granted allowance of appeal.

The Pennsylvania Supreme Court agreed that repeal of the ordinance did not render the challenge moot because it was reenacted in substantially the same form. The Court found that had Holt wanted to continue his challenge after the ordinance was repealed and reenacted he could have done so. However, the question was whether the neighbors, as parties to the hearing rather than party appellants, could continue Holt's challenge to the reenacted ordinance. The Court found the answer to be no.

The Court reached this decision based upon distinctions between "parties to the appeal" and "parties to the hearing." The Court held that the former must be aggrieved by the ordinance; the latter need only be "affected by the application" (namely, the aggrieved party's challenge). The Court concluded that the latter therefore cannot exist without the former. The former must file a written appeal, state specific reasons for the challenge, and may be required to provide documentation; the latter need file no reasons for their interest or document how they are "affected."

The Court reasoned that while parties to the hearing cannot be denied the ability to provide input, providing input is not the same as a challenge any more than being a witness makes one a litigant. The status of party to a hearing merely allows one to be heard. As the Court explained, "[i]t gives them a voice, not a vote." The Court found that to hold otherwise would preclude any meaningful ability to settle such cases. For example, if Holt and the township reached a settlement resolving the challenge, it could not be implemented if the neighbors could prolong the litigation.

The Court held that the trial court erred when it ordered the Board to issue findings on the challenge after it had been withdrawn and that the Commonwealth Court's order must be reversed. In a concurring opinion, Justice Saylor cautioned that the statutory term "parties to the hearing" is troublesome in that it has the potential to mislead participants into believing they have attained "party" status, when, in fact, without further action on their part, their role is much more limited. Justice Saylor cited a need for clarifying amendments to the MPC and, in the meantime, called on zoning hearing boards to make the limitations associated with the status of "parties to the hearing" plain to those who attain this status so they may further protect their interests as necessary.

Author

Clair E. Wischusen
215.918.3559
cwischusen@foxrothschild.com

Commonwealth Court of PA Addresses Validity Challenges

By Michael Kornacki

In November 2013, the Commonwealth Court of Pennsylvania issued a decision in *Steven and Deb Boyer v. Board of Supervisors, Franklin Township, et al.*, a case that addressed the denial of a land use challenge and curative amendment. The Court's decision once again demonstrates the difficulties in challenging the denial of the land use appeal.

Steven and Deb Boyer (the Boyers) and Ted and Linda Grove (the Groves) were each land owners in Franklin Township. In 2011, the Boyers filed an application pursuant to the Pennsylvania Municipalities Planning Code (the MPC) substantively challenging the validity of the Steep Slope Conservation Overlay (SSCO) of the Franklin Township zoning ordinance. The SSCO applied to all areas of the township that contained areas of 15 percent or greater slope, including plateaus surrounded by the slopes. In their application to the Board of Supervisors of Franklin Township challenging the validity of the SSCO, the Boyers alleged that the SSCO failed to bear a reasonable relationship to the police powers of the municipality, were not reasonable and lacked a rational basis, and constituted a taking without justification or compensation. The Boyers proposed a curative amendment providing that the SSCO provisions should apply to lands within the township that contained areas of 25 percent or greater slopes excluding the plateaus surrounding by the slopes. The Groves participated in the proceeding as an aggrieved party.

The Board rejected the substantive validity challenge and curative amendment. The Board found that the areas covered by the SSCO are subject to landslides, that the regulations were supported by the York County Comprehensive Plan and the Northern York County Regional Comprehensive Plan, that the soils in the SSCO are highly erosive, that best practices for erosion control do not work on slopes greater than 15 percent in the township, and that there are serious concerns for the life, property and safety of residents due to the inability of emergency vehicles to navigate the steep slopes. Based on those and other fact findings, the Board reasoned that the SSCO was rational, not arbitrary and not unreasonable. The Boyers appealed to the trial court, and the Groves and Ronald and Kathleen Gingrich intervened as land owners within the SSCO. The Groves filed a motion for an evidentiary hearing, making a variety of allegations that the evidentiary record at the Board hearing was incomplete. The trial court denied the land use appeal on the basis of res judicata – the court found that the Boyers had previously lost an action contesting a Zoning Hearing Board refusal to grant them a validity variance involving the same property in the SSCO. The court determined that the prior variance action involved the same landowners, the Township's Zoning Hearing Board and the same two intervenors as well as the Township. The court basically determined that the actions were the same, although in slightly different form, and that the prior refusal was thus binding upon the Boyers in the current substantive validity challenge.

The Boyers and the Groves appealed to the Commonwealth Court and the two appeals were consolidated. After each of the appellants filed statements of matters complained of on appeal, the trial court issued opinions on the two underlying matters. First, the trial court added further support for its decision to deny the request for an evidentiary hearing. In the second opinion relating to the denial of the land use appeal, the trial court relied not only on the doctrine of res judicata, but also reached a decision on the substantive merits of the appeal. The court determined that the Boyers did not demonstrate that the SSCO was "unreasonable and bore no rational relationship to any legitimate zoning interest."

On appeal, the Boyers and Groves raised four issues:

1. That the trial court abused its discretion in denying the evidentiary hearing;
2. That the court erred in relying on res judicata;
3. That substantial evidence did not support the Board's various findings of fact; and
4. That the court erred in denying the land use appeal when it concluded that the SSCO comported with the police powers of the Township as set forth in the MPC.

In addressing the first issue, the Commonwealth Court determined that the Groves did not demonstrate the need for an evidentiary hearing. The Groves offered testimony and cross examined opposing witnesses. Because the Groves fully participated in the hearing, the Commonwealth Court determined that the record was fully developed and the trial court acted within its discretion in denying the evidentiary hearing.

Next, the Commonwealth Court determined that the Groves and Boyers were correct in asserting that the trial court was mistaken in applying the doctrine of res judicata. The Commonwealth Court noted that a validity variance is different from a substantive validity challenge, because the proof elements are different in the two challenges. Accordingly, the claims were distinct and the trial court was incorrect in relying upon res judicata as a basis for denying the substantive validity challenge.

Third, the Commonwealth Court noted that the appellants seemed to be alleging that various findings of fact made by the Board were not supported by substantial evidence. The appellants did not appear to attack any particular finding of fact, but made a general allegation that "the ordinance was not enacted to advance public health, safety and welfare." Additionally, the Court noted that "substantial evidence means such relevant evidence as a reasonable person might consider sufficient to support a conclusion." The Court went on to analyze the various findings of fact made by the Board and determined that, among other things, the Township provided testimony from Township engineers and the Township's emergency management coordinator that demonstrated that building in the area of slopes of 15 percent or greater resulted in erosion and sediment issues that could not be controlled by best practices for erosion and sediment control and storm water management, and that building in such areas posed life and property safety issues. The Commonwealth Court thus determined that the record demonstrated there was substantial evidence to support the findings made by the Board.

Finally, the Commonwealth Court noted that zoning ordinances, "enjoy

a presumption of constitutionality and validity" and that "a challenger must show that the ordinance totally excludes an otherwise legitimate use or is unduly restrictive" in order to support a substantive validity challenge. A challenger can meet this burden by showing that the ordinance is *de jure* exclusionary (meaning the ordinance bars a legitimate use on its face) or is *de facto* exclusionary (meaning the ordinance permits a use on its face, but through its application has the effect of barring the use throughout the municipality). The Court determined that the appellants failed to meet their burden. First, the Court noted that prohibiting single-family homes within the SSCO, does not mean that the ordinance is exclusionary, because such homes can be constructed in other zoning districts within the Township. As a result, the only remaining issue is whether the "ordinance is unduly restrictive without a substantial relationship to public health, safety and welfare." The Court determined that while the ordinance is restrictive, the ordinance does serve the Township's police powers. The evidence developed at the hearing demonstrated that the ordinance was adopted to protect the public health, safety and welfare. As a result, there was no error in denying the land use appeal.

The Boyer case demonstrates the difficulties in challenging zoning ordinances in Pennsylvania. Generally, the determinations of municipalities will not be disturbed where an evidentiary record is properly developed and demonstrates that the ordinance is rational and serves the interests or the municipality in protecting the public health, safety and welfare.

Author

Michael J. Kornacki
215.299.2895
mkornacki@foxrothschild.com

New Castle County, Delaware Enacts Affordable Housing Moratorium

By J. Breck Smith

With the support of the County Executive, New Castle County Council overwhelmingly passed on January 28, 2014, an ordinance providing for a 180 day stay, extendable for an additional 90 days, of acceptance of land development applications incorporating the workforce housing incentives contained in the county's Unified Development Code. The purpose of the ordinance, Substitute No. 1 to Ordinance No. 13-089, is to provide the county a period of time to review the existing workforce housing provisions and to revise and supplement as needed in order to craft provisions that can achieve better affordable housing results and home ownership opportunities.

Originally enacted in 2008 to address a perceived lack of new construction of low or moderately priced housing within the county, New Castle County's workforce housing provisions established a voluntary mechanism by which developers could opt to set aside 20 percent of a project's dwelling units for housing priced for low income and / or moderate income households and make a designated contribution to the county Housing Trust Fund, in return for various development incentives including a dwelling unit density bonus of up to 100 percent, site development and building standards relief and application fee waivers.

To date, the county's workforce housing provisions have not been successful. Although the program was met with interest in its early stages, according to a county Land Use Department report, no land development applications have been submitted incorporating workforce housing incentives since 2011. A variety of factors are believed to be at play. Since the peak in 2007, real estate market forces have resulted in a material retraction of median home values. Another factor has been the ample availability in the current market of rental units. Additionally, various flaws in New Castle County's program have been cited, including qualifying applicants, tracking the workforce units and their resale and certain code provisions being subject to differing interpretations. Since the adoption of the county's workforce housing provisions, a total of 18 workforce housing plans have been submitted proposing in the aggregate 735 workforce dwelling units. However, over half of these units will not be built because the plan submissions expired by operation of law. At the time of adoption of this moratorium, a total of 341 workforce units are currently designated on recorded development plans, with approximately 131 of such units being apartment units, and a total of 31 units have received certificates of occupancy of which 29 are rental units. In the six years since passage of the program, the current workforce housing provisions have produced only two owned dwelling units. According to a county attorney, during this same period, the program was originally estimated to generate approximately $550,000 to the Housing Trust Fund, but instead to date has contributed just $272 to such fund.

Since mention of the possibility of adoption of a moratorium was announced this past Fall, five workforce housing plan submissions were recently filed with the county. An attorney for New Castle County has stated that each of the five plan submissions will be reviewed by the Land Use Department. If and when such plans are determined to have met all requirements of a workforce housing plan submission, thereafter the county Law Department will determine if such applications were received in time and are vested under the workforce program, existing prior to the moratorium. The moratorium does not stay the processing and review of existing workforce housing submissions, which will continue to be processed under the provisions applicable at the time of submission of such plans.

Author

J. Breck Smith
302.622.4208
jsmith@foxrothschild.com

Beware of Notices From the Bureau for Historic Preservation

By Robert Gundlach and Lauren Taylor

Oh no! Now what? After spending two years resolving your zoning issues and spending over $100,000 to prepare your subdivision/land development plans, you received a notice from the Pennsylvania Bureau for Historic Preservation (the Bureau). The Bureau wants you to complete a historical or archeological survey of your property. The Planning Module approval, the NPDES permit, the PennDOT HOP and the DEP general permits were bad enough, but now another hurdle? Maybe not. Your project might be exempt from the Bureau's requirements.

The Bureau (which is a part of the Pennsylvania Historical and Museum Commission) reviews projects in accordance with Section 106 of the National Historic Preservation Act of 1966 and the regulations of the Advisory Council on Historic Preservation, and under the authority of the Environmental Rights Amendment of the Pennsylvania Constitution and the Pennsylvania History Code. These requirements include consideration of projects' potential effects upon both historic and archeological resources.

Because the federal and state legal mandates apply to federal and state agencies, the Bureau does not have the authority to require an applicant to complete an archeological survey or historical study if there is no federal involvement in or state funding of the project. In addition, numerous Pennsylvania Department of Environmental Protection (DEP) permits are exempt from the requirements of the cultural resource mandates, including the NPDES General Permit for Storm Water Discharges Associated with Construction Activities, NPDES Permit for Sewage Discharge, and General Water Quality Management Permits. You can access the list of exempt DEP permits, which was prepared by the DEP and Bureau, by clicking here.

If there is federal involvement or state funding of the project or the project requires a DEP permit that is not exempt from the cultural resource mandates, then the Bureau has the authority to require an agency to conduct an archaeological or architectural survey; however, the agency may transfer its responsibilities to the applicant. For instance, applicants for federal permits may be required to provide information regarding the project directly to the Bureau and to complete the step of identifying historical properties in consultation with the Bureau.

The DEP has prepared a document titled "Implementation of the History Code: Policy and Procedures," which became effective in March 2002 (the DEP Guidance Document). The DEP Guidance Document does not have the weight of an adjudication or regulation. Rather, it was created merely to establish procedures for DEP plan approvals and permit reviews in order to provide the Bureau with the opportunity to review activities undertaken with DEP's approval for their possible impact on significant historical and archaeological resources.

The DEP Guidance Document provides that DEP will include a Cultural Resource Notice form with its permit or plan approval application packages to project applicants during the Planning Module process. The Cultural Resource Notice requires that certain information be supplied to the Bureau and DEP, including the name of the specific DEP permit or approval requested, any anticipated federal permits and any government funding sources. The project applicant is then responsible for completing the Cultural Resource Notice and sending it to the Bureau by certified mail, return receipt requested. Once the applicant receives the return receipt, the applicant attaches it to the Cultural Resource Notice and submits the information to DEP as part of the permit or plan approval application.

When the Bureau receives the Cultural Resource Notice from the project applicant, it may determine that (1) the proposed activity affects a structure that is an historic resource listed on the National Register of Historic Places, or (2) it considers a structure on the site of the proposed activity to be eligible for listing on the National Register of Historic Places. In making this judgment, the Bureau uses criteria of the National Register of Historic Places determinants of significance. It is the Bureau's responsibility to make its determination and, where the applicant's proposed activity could impact a historic structure, work with the applicant in the creation of a mitigation plan to protect the structure.

Thus, federal and state agencies must meet their responsibilities under the various federal and state legal mandates by working with the Bureau in identifying all cultural resources that may be affected by their actions, determining the National Register eligibility of those resources that will be affected, and considering ways to mitigate or avoid the effects of their action on National Register properties. If your project has federal involvement or state funding or requires a DEP permit that is not on the list of exempt permits, then the Bureau can require you to undertake certain mitigation efforts.

Authors

Robert W. Gundlach, Jr.
215.918.3636
rgundlach@foxrothschild.com

Lauren W. Taylor
215.918.3625
lwtaylor@foxrothschild.com

Commonwealth Court Affirms Limitation on Natural Expansion

By Jennifer J. Hanlin

The Commonwealth Court recently issued a pair of related opinions that addressed a developer's ability to construct a landfill on a parcel straddling two municipalities. The case reported by the court, *Tri-County Landfill, Inc., v. Pine Township Zoning Hearing Bd.*[1], (*Tri-County I*), featured several holdings of interest to a wider audience[2]. Because the trial court did not take any additional evidence, the Zoning Hearing Board (ZHB) was the finder of fact, and the Commonwealth Court (the Court) reviewed the ZHB's decision using an abuse of discretion/error of law standard. First, the Court rejected the developer's argument that the proposed use was a natural expansion of the pre-existing nonconforming use. Second, the Court held that the ordinance unambiguously classified a modern landfill as a "structure" subject to the township-wide 40 foot height limit. Third, the Court found that the applicant did not carry its burden of proving that it was entitled to a variance for the height of the proposed structure based on economic hardship when the property's current use was profitable. Finally, the Court held that Tri-County was not entitled to a variance by estoppel or laches because the use for which zoning relief was requested – the construction of a 140 foot tall landfill – was quite different from the use made of the property over the previous 20 years – that of a waste transfer station. This article will review the Court's opinion in *Tri-County I*. The unreported decision, *Tri-County Landfill, Inc. v. Liberty Township Bd. of Supervisors* (*Tri-County II*) will be discussed in a future issue of In the Zone. Due to the extraordinarily complex factual background spanning four decades, this article will review the facts of the case cursorily.

In October 2010, Tri-County Landfill, Inc., (Tri-County) sought relief from the Pine Township (Township) Zoning Ordinance (Ordinance) to construct a landfill 140 feet in height on the subject property (the Property). The Property, purchased by Edward and Margaret Vogel in 1975, was a 212-acre site spanning two municipalities in Mercer County. The Vogels and their various related entities (including Tri-County) operated either a landfill (1975-1990) or a waste transfer station (1990-present) on the Property beginning in 1975, prior to the adoption of the Ordinance. The Ordinance, adopted in October 1976, zoned the Property R-1 Residential Rural. Landfills and waste transfers stations, as one might expect, were not permitted uses in the R-1 Residential Rural District. Such uses were permitted in the I-Industrial District.

Over the years, Tri-County (or one of its related entities) submitted multiple applications to the Department of Environmental Protection (DEP) for a permit to operate a landfill on the Property. The Court detailed the complex history of the expansion of the landfill from its original 19-acre site on the Property, describing the various phases of applications made by Tri-County to the DEP to operate, and then expand the operation of a landfill. At various points between 1976 and 1990, the Property owners entered into various consent orders with the DEP regarding the operations on the land

After the DEP ultimately ordered Tri-County to close the landfill in 1990, DEP granted Tri-County an emergency solid waste transfer station permit that same year. However, Tri-County never requested a permit for this use, despite the Ordinance's adoption and clear prohibition on siting solid waste transfer stations in the R-1 Residential Rural district without zoning relief.

When Tri-County sought zoning relief in 2010 to construct a new landfill on the Property, it had been close to 20 years since it had last operated a landfill on the Property. The Ordinance in effect in 1990 when Tri-County ceased landfill operations on the Property included a section stating that the cessation of any pre-existing, non-conforming use for more than 30 days was an abandonment of that use (the Ordinance was later amended to change the 30 days to 12 months). The Court rejected Tri-County's argument that the waste transfer station was the same use as the landfill, affirming the ZHB's findings that the Ordinance described landfills and waste transfer stations as different and distinct uses. Additionally, the Court found the impacts that a waste transfer station have on the neighboring community are significantly different in type and scope than those of a 140 ft. tall landfill. The Court also rejected Tri-County's argument that the new landfill was a natural expansion of its prior use due to the abandonment by Tri-County of the landfill use in 1990.

Further, the Court rejected Tri-County's argument that the Ordinance was ambiguous in its definition of "structure.[3]" Tri-County essentially argued that definition was unclear because it did not specifically list "landfill" under the "structure" definition, and in another part of the Ordinance, listed out "building" and "landfill" in a list. Tri-County claimed the doctrine of *ejusdem generis* supported their reading of the Ordinance. The zoning ordinance defined a structure as "a combination of materials forming a construction for occupancy and/or use including among other[s], a building, stadium, gospel tent, circus tent, reviewing stand, platform, staging, observation tower, radio tower, water tank, trestle, pier, wharf, open shed, coal bin, shelter, wall and a sign." The Court declined to read any ambiguity into the term "structure."

Tri-County presented evidence to the ZHB that Township had known about the operation of the waste transfer station since its inception in 1990. The Court rejected the argument that any failure by the Township to require a permit for the waste transfer station somehow invoked the doctrine of laches or estoppel as to the construction of a new, 140 ft. tall landfill. More specifically, Tri-County

[1] *Tri-County Landfill, Inc., v. Pine Township Zoning Hearing Bd.*, No. 176 C.D. 2013, --A.3d --- (Pa. Commw. Ct. 2014)

[2] The Court also affirmed the single judge order on appeal that the intervening objectors could not raise a certain issue decided by the trial court in favor of Tri-County, as the objectors did not cross-appeal, and the objectors did not adequately appeal the single judge's order to strike those sections of their brief.

[3] Important because "structures' are subject to the 40 foot height limitation in all zoning districts.

argued that the Township was aware of the landfill when the Township zoned the parcel R-1 Residential Rural in 1976, and that the Township knew the Applicant was operating a waste transfer station on the Property following the closure of the landfill in 1990. Tri-County argued that the failure of the Township to notify it of the need for a permit for the waste transfer station in 1990 entitled Tri-County to a variance by estoppel, because this failure "reflect[ed] its understanding that landfill operations and the transfer stations exist as the same non-conforming use." After reviewing the requirements for a variance by estoppel[4], the Court rejected Tri-County's argument wholesale based both on the fact that Tri-County could not have acted in reliance on constructing a new landfill when it was not built yet, and Tri-County did not prove that it would suffer "unnecessary hardship" due to the denial of the variance.

The Commonwealth Court also determined that the zoning hearing board and trial court properly denied a request for a dimensional variance in height for the 140 ft. structure proposed for construction. The Commonwealth Court rejected Tri-County's argument that a 40 ft. height restriction in all zoning districts on the construction of buildings taller than 40 ft. was an unconstitutional, *de facto* exclusion of landfills in all zoning districts. Objectors to the proposed 140 ft. landfill presented the testimony of an expert witness who refuted Tri-County's expert's testimony that Tri-County could not operate the proposed landfill in an economically viable manner unless the landfill was built to a height of 140 feet. Thus, Tri-County was not entitled to a variance because of economic hardship. The Court found that the ZHB had committed no error in crediting the objectors' expert's testimony and finding that the landfill could be operated in an economically viable fashion at a height of 40 ft. As the Court noted, Tri-County already currently operated an economically viable transfer station on the Property.

Similarly, the Court sided with the ZHB in finding that Tri-County was also not entitled to a variance from the 40 ft. height restriction, as Tri-County failed to show that a "substantial burden attends all dimensionally compliant uses of the Applicant's property.[5]"

Ultimately, this case demonstrates that property owners and developers rely on the doctrine of natural expansion of a pre-existing, nonconforming use or on the failure of a municipality to enforce its zoning ordinance at their own risk.

Author

Jennifer J. Hanlin
610.458.4985
jhanlin@foxrothschild.com

[4] First, a long period of time must pass during which the municipality fails to enforce a law when the municipality knew or should have known that illegal use was occurring on a property. Second, the land owner must act in good faith and rely upon the validity of the use throughout the proceeding. Third, the land owner has to make substantial expenditures and rely upon his belief that the use is permitted, and finally, the denial of the variance would impose an unnecessary hardship on the Applicant.

[5] Quoting *Twp. of East Caln v. Zoning Hearing Bd. Of East Caln Township,* 915 A.2d 1249, 1254 (Pa. Commw. Ct. 2007).

Transactions

In NJ State Court litigation, and on behalf of a national title insurance underwriter and its insured lending institution, John Grossman succeeded in obtaining a court order creating an equitable mortgage in favor of that lending institution and against a property owner who had not executed the mortgage loan documents.

In NY Federal Court litigation, and on behalf of a national title insurance underwriter and its insured lending institution and property owner, Dan Schnapp, Oksana Wright and John Grossman succeeded in obtaining a court order discharging a prior mortgage of record. The validity of that prior mortgage, recorded in connection with NJ property, was contested in related NJ State Court litigation, which litigation was dismissed on jurisdictional grounds based upon the pendency of the Federal Court litigation.

In a Boys & Girls Club use variance approval, led by Jeff Hall, the application for use, bulk and sign variance and preliminary and final site plan approval together with design waivers for a 37,500 square foot community center, the applicant proposed to repurpose a light manufacturing building and property in disuse for several years. After three meetings, the Lawrence Township Zoning Board of Adjustment approved the application by a 7 to 0 vote, concluding that the applicant had met the criteria for an inherently beneficial use.