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In the Zone

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Fox's Bucks County Office Scores Major Victory in Challenge to Agricultural Soils Overlay Restriction in Tinicum Township, PA

By Clair E. Wischusen

The Bucks County office of Fox Rothschild achieved a major victory in a published decision by the Pennsylvania Commonwealth Court, striking down an overly broad agricultural soils overlay restriction in Tinicum Township, Pennsylvania. In the case of *Main Street Development Group, Inc. v. Tinicum Township Board of Supervisors et al.*, — A.3d —, 2011 WL 944375, the Commonwealth Court affirmed the decision of the trial court, invalidating an agricultural soils overlay restriction that limited development of prime farmland and prime agricultural soils throughout the entire township to 25 percent—no matter the size, location or zoning of the property.

The court began its review by noting that zoning ordinances must be consistent with the goals of the comprehensive plan concerning future development. If not, the municipality must amend its zoning ordinance. The court found that even though the Pennsylvania Municipalities Planning Code (MPC) mandates that zoning ordinances protect agriculture and prime agricultural lands, it also requires that zoning ordinances facilitate reasonable development. Thus, the court concluded the MPC requires a balancing between agriculture and development.

The court noted although overlay districts are not defined or mentioned in the MPC, they have become common land use tools in Pennsylvania. The court stated "[t]he purpose of an overlay district is to create specific and targeted provisions that conserve natural resources or realize development objectives **without unduly disturbing the expectations created by the existing zoning ordinance**." (emphasis in original). In other words, overlay districts must supplement existing zoning districts; they cannot supersede them either in fact or practice.

The court found the township's zoning ordinance fails to strike a balance between agricultural uses and development because it requires between 95 and 97 percent of the township to be used for agricultural purposes, due to the combination of the underlying zoning and the overlay restriction. The court further found the overlay restriction unreasonably disturbs expectations created by the existing township zoning ordinance because it effectively creates agricultural districts out of districts with nonagricultural stated purposes, completely changing the expectations under the zoning ordinance for nonagricultural districts.

In conclusion, the court held that because the agricultural soils overlay restriction, combined with the underlying zoning, causes the entire township to become a *de facto* agricultural zone, it disrupts the balance between preserving agriculture and allowing development, as mandated by the MPC, and unreasonably restricts landowners' use of their land. As such, the Commonwealth Court affirmed the decision of the trial court, holding the agricultural overlay restriction is unconstitutional as applied to areas of the township zoned controlled commercial, commercial, limited commercial and planned industrial, and that it violates the MPC.

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Philadelphia Zoning Code Commission Votes To Send Draft Zoning Code to Council

By Carrie B. Nase

For almost two years, the Zoning Code Commission (ZCC) for the City of Philadelphia has been working on preparing a new Zoning Code for the City of Philadelphia. On March 2, 2011, the ZCC voted to adopt the most recent draft of the Zoning Code as the "Draft Preliminary Report." A copy of the Draft Preliminary Report can be obtained at www.zoningmatters.org. At their meeting on April 13, 2011, the ZCC voted to forward the Draft Preliminary Report to Council on May 11, 2011. A new version of the Draft Preliminary Report will be posted on May 1, 2011. Most of the recent changes to the Draft Preliminary Report relate to Chapter 14-300, Administration and Procedures, and involve revisions to clarify ZCC intentions, eliminate redundancies and avoid legal challenges.

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NJ Court "Reassembles Humpty Dumpty"

By Melvyn J. Tarnopol

It is a maxim of real estate law that the buyer under an agreement of sale will be granted the right of specific performance if the seller defaults. This means that rather than having the seller pay damages for its failure to convey property in accordance with its obligations, the seller will be required to convey the property to the buyer. The theory behind this is that each piece of real estate is unique so that money damages will not make a buyer whole. Only the actual piece of real estate will suffice.

A recent case shows the lengths to which a court will go to put the buyer in a position he or she would have been in had the seller complied with its obligations under the agreement of sale.

In *Marioni v. Roxy Garments Delivery Co., Inc., et al.*, Superior Court of New Jersey, Appellate Division, Docket No. A-1492-09T3, Marioni contracted to buy real property in Jersey City from Roxy Garments Delivery Co., Inc. Marioni, an artist, intended to use the property—which had high ceilings and open space and was in close proximity to New York City—as a residence as well as a studio and storage facility for his artwork. However, before Marioni's closing occurred, Roxy breached the contract by selling the same property to 94 Broadway, Inc.

Marioni immediately sued for specific performance when he learned of the closing with Broadway. However, the court failed to grant Marioni specific performance right away because it did not find the facts adequate at that time to order specific performance by the seller. Instead, the court ordered a trial on money damages. The litigation to establish damages continued for two years, until the Superior Court decided Marioni was, indeed, entitled to specific performance.

During that two-year period, however, Broadway had fitted the space for tenants, entered into leases and otherwise exercised control over the space. The renovations included drop ceilings and wall partitions, which would be of no use to Marioni.

The court held Marioni was entitled to specific performance, requiring Broadway to convey the property to Marioni because Broadway was not a bona fide purchaser for value. Had Broadway been a bona fide purchaser for value, it would have been entitled to keep the property since it would have been an innocent party without knowledge of the contract between Marioni and Roxy. The court, however, found Broadway had actual knowledge of the existence of the Marioni contract and thus was not entitled to protection and had to give up the property. As a result, Broadway was in the position of a "constructive trustee" for Marioni, which meant it should receive no "entrepreneurial profit" as a result of its interim wrongful possession of and dominion over the property. Therefore, Marioni, not Broadway, would benefit from the increase in the property's value over the two years.

The complexity, then, was how to deal with the monies that Broadway had spent at the property over the two-year period. The court referred to this as having to "reassemble Humpty Dumpty."

In determining the price Marioni would have to pay Broadway for the property in accordance with his right of specific performance, the court started with the original contract price of $170,000 that Marioni was to have paid to Roxy. Now that Marioni was entitled to specific performance, he would pay that amount to Broadway instead, and Broadway would be required to deliver the property to Marioni. The goal of the court was to place the parties, to the extent possible, in the same positions they would have occupied had the Marioni-Roxy contract been performed as originally required.

To compute the purchase price, the court took the $170,000 and increased it by an annual amount of six percent for the interest to which Broadway was entitled on the money it paid to Roxy. This increased the purchase price by $85,617.13. The price was then increased by Broadway's expenditures for the building improvements in the amount of $395,883. From this, $50,000 was deducted—the cost of Marioni removing the drop ceilings and partitions. The price was then increased by the insurance, taxes and mortgage interest Broadway had incurred during the two-year period (which Marioni would have incurred had he owned the property), resulting in a gross adjusted contract price of $672,518.59. However, since Broadway had received rents during the two-year period and was not entitled to profit from its actions, those rents—$487,500—were credited to Marioni, resulting in a contract price of $185,018.59.

Finally, the Superior Court remanded the case for determining whether Marioni should be entitled to a further credit for his storage costs of his artwork during the two-year period.

This case is an excellent example of how complicated it is to "reassemble Humpty Dumpty." However, such complications, in the absence of "undue hardship" in light of the "evolving circumstances," did not deter the court from taking on that task in this case. Potential buyers should proceed with caution when they become aware the seller may have possibly already contracted to sell the property. In addition, a spurned buyer should not give up hope of acquiring a property even if the seller has disposed of it.

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PA Commonwealth Court Consistent in Finding Billboard Erection Is Not Land Development

By Andrew W. Bonekemper

In January 2008, I wrote about *Upper Southampton Twp. v. Upper Southampton Twp. ZHB (Appeal of Clear Channel Outdoor)*, in which the Pennsylvania Supreme Court held the erection of a billboard did not constitute land development. In that article, I expressed some cynicism that the court's holding would just force municipalities to find creative ways to deny outdoor advertisers' applications. To some extent, that appears to have happened in many municipalities. The good news for developers is that the Commonwealth Court is holding firm against the imposition of land development regulations against outdoor advertising.

Just recently, on March 23, 2011, the Commonwealth Court again found the application of land development regulations against a billboard erection impermissible. In *Anter Associates v. ZHB of Concord Twp.*, the township's zoning hearing board denied the application for the erection of a billboard based on its failure to adhere to four specific provisions in the zoning ordinance. After dismissing the board's first basis for denying the application as inapplicable, the court addressed the applicant's failure to comply with provisions requiring an historical resource study and landscape buffering. The court held neither of the code provisions could be made applicable to the billboard erection because they were development requirements, and under *Appeal of Clear Channel Outdoor*, erection of a billboard is not land development.

That is the good news for developers. The bad news is the denial of the application was still affirmed by the Commonwealth Court. The fourth basis on which the zoning hearing board denied the application was a requirement that an engineer certify a billboard will meet all applicable township building codes and standards. The court held the developer failed to meet that requirement. Thus, based on an issue involving compliance with the building code, the court found the zoning hearing board properly denied the special exception.

The upshot of the case is that Pennsylvania courts seem unwilling to retreat on the position that land development requirements are entirely inapplicable to billboard construction. However, the case leaves some room for municipalities to continue antagonizing outdoor advertisers in the zoning process by using regulations with marginal relations to the actual use of the land as outdoor advertising space.

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Legislative Update in Pennsylvania

By David H. Comer

- House Bill No. 1047 proposes to amend the Pennsylvania Municipalities Planning Code (MPC) by providing a governing body with the authority to appoint by resolution at least one but no more than three residents of the municipality to serve as alternate members to the planning commission. The proposal also grants the chairman of the planning commission authority to designate alternate members of the commission to substitute for any absent member or any member who has recused him or herself or has been disqualified by the governing body.
- House Bill No. 823 proposes to amend the MPC by adding a Section 508.1, which would require a municipality to notify in writing, on a monthly basis, the superintendent of a school district in which a plan for a residential development was finally approved by the municipality during the preceding month. The notice to the superintendent would be required to include the location of the development, the number and types of units to be included and the expected construction schedule. The proposal also would add a Section 711 to the MPC, which would impose a requirement similar to the aforementioned notice requirement on a municipality when a planned residential development is finally approved by the municipality during the preceding month.
- House Bill No. 784 proposes to add significant language to the MPC in conjunction with validity challenges filed pursuant to Section 916.1 of the MPC. The proposed changes would require all challenges submitted to either the governing body or zoning hearing board to include detailed information addressing, among other things, infrastructure required by the proposal and a description and quantification of the identified need for the use and/or housing types specified in the proposed remedy to the challenged ordinance. The proposal also adds procedural steps for certain challenges as well as time limitations following a successful challenge.
- Senate Bill No. 838 proposes to amend the MPC by changing Section 1004-A to read: "(b) The zoning hearing board may not intervene or otherwise become a party in a land use appeal."

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Courts Still Struggling With Reach of Clean Water Act

By Robert W. Gundlach, Jr.

On January 25, 2011, the Fourth Circuit Court of Appeals handed down a decision examining the jurisdictional extent of the federal Clean Water Act. In *Precon Development v. U.S. Army Corps of Engineers*, No. 09-2239, the Appeals Court applied Supreme Court Justice Anthony Kennedy's approach as established in his concurring opinion in *Rapanos v. United States*, 547 US 715 (2006), to determine when wetlands not adjacent to a navigable water are subject to review by the U.S. Army Corps of Engineers. Going beyond other circuit courts, the Fourth Circuit required a higher standard of evidence to establish a "significant nexus" and found the Corps did not build a sufficient record to establish its jurisdiction under the Clean Water Act.

Under the *Rapanos* plurality opinion, wetlands should only fall within Clean Water Act jurisdiction when they are adjacent to a "relatively permanent body of water connected to traditional interstate navigable waters" and have a "continuous surface connection with that water." However, Justice Kennedy's concurring *Rapanos* opinion laid out an alternate test. When the Corps of Engineers "seeks to regulate wetlands based on adjacency to nonnavigable tributaries," it must establish that a "significant nexus" exists "between the wetlands in question and navigable waters in the traditional sense." Thus, if the wetlands are not adjacent to a navigable waterway, there must be a case-by-case determination of jurisdiction focusing on this nexus.

At issue in *Precon* was whether the Corps had jurisdiction over 4.8 acres of wetlands adjacent to a drainage ditch and located seven miles upstream from the nearest river.

Applying Kennedy's test, the court found that the Corps failed to establish the wetlands had a "significant nexus" to a traditionally "navigable waterway." Neither Justice Kennedy nor the Corps have provided much guidance on precisely how to establish this nexus. Indeed, the Corps argued its arrival in determining a significant nexus was a factual conclusion based upon observational data. However, the Fourth Circuit disagreed and held the determination was not adequately supported by sufficient physical evidence to support the Corps' conclusion.

In fact, the court observed the Corps' own *Rapanos* Guidance Document cautions "[a]s the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a traditional navigable water."

In conducting its own detailed analysis of nexus, the court opted to evaluate not only the 4.8 acres at issue but also the 166 acres of wetlands contained in the entire development as well as 448 acres of "similarly situated" wetlands between the project site and the downstream navigable water.

In a broad sense, stakeholders should be concerned over the impact of evaluating such "similarly situated" wetlands within and surrounding their own projects as well as the implications of the court granting little deference to the Corps' conclusions on the significant nexus issue.

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FHFA Announces New Appraisal Standards

By Kimberly A. Freimuth

New standards for appraisals were recently announced by the Federal Housing Finance Agency (FHFA) and will take effect September 1, 2011. The Uniform Appraisal Dataset (UAD) was created to improve the quality and consistency of appraisals on mortgages for Fannie Mae and Freddie Mac.

The FHFA developed the UAD, which defines all fields required for an appraisal submission for specific appraisal forms and standardizes definitions and responses for a key subset of fields, to improve the quality and consistency of appraisal data on loans delivered to the government-sponsored enterprises (GSEs).

The UAD standardizes certain data points to support consistent appraisal reporting, regardless of geographic location of the property or any localized reporting conventions, by addressing vague or disparate data currently included on some appraisal reports.

The UAD only applies to single-family residential properties and condos (not multifamily units or manufactured homes). At this time, the UAD requirements do not apply to Housing and Urban Development (HUD) or Veterans Administration (VA) loans.

The GSEs are also developing the Uniform Collateral Data Portal (UCDP), which is a single portal for the electronic submission of appraisal data. Lenders will be required to use UCDP to deliver electronic appraisal data that conforms to the UAD

before the delivery date of the mortgage loan to Fannie Mae or Freddie Mac. This requirement applies to all conventional mortgage loans for which an appraisal report is required.

Through the UAD and UCDP, lenders will have a GSE-consistent approach and understanding of appraisal definitions and requirements and a common submission portal for submitting appraisal data. This critical appraisal data standardization effort will provide lenders with greater confidence in loan quality by offering enhanced appraisal data quality and integrity regarding the collateral valuation of their loans.

For appraisals with an effective date (date of inspection is the effective date of the appraisal) on or after September 1, 2011, specific appraisal report forms must be completed in compliance with the UAD for conventional mortgage loans sold to Fannie Mae or Freddie Mac.

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Republicans Unveil Fannie and Freddie Reform Plan

By Herbert K. Sudfeld, Jr.

On March 29, 2011, House Financial Services Committee Republicans unveiled their plan to reform government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac. As part of the first round of legislation to reform the GSEs, Financial Services Committee Republicans will introduce the following eight bills. The Financial Services Subcommittee on Capital Markets and Government-Sponsored Enterprises will hold a legislative hearing on the eight bills in early April.

- **Equity in Government Compensation Act.** Rep. Spencer Bachus (R-AL), chairman of the House Financial Services Committee, is the lead sponsor of legislation to establish a compensation system for employees of Fannie Mae and Freddie Mac that is consistent with other federal government employees.
- **GSE Mission Improvement Act.** Rep. Ed Royce (R-CA) is the lead sponsor of legislation that abolishes the GSEs' affordable housing goals, which were purported to be a central cause behind the collapse of the GSEs.
- **Fannie Mae and Freddie Mac Accountability and Transparency for Taxpayers Act.** Rep. Judy Biggert's (R-IL) bill ramps up oversight of Fannie Mae and Freddie Mac by establishing in statute an Inspector General (IG) within FHFA and providing the IG with additional law enforcement and personnel hiring authority. The bill also requires the GSE Inspector General to submit regular reports to Congress outlining taxpayer liabilities, investment decisions and management details of Fannie Mae and Freddie Mac.
- **GSE Subsidy Elimination Act.** Rep. Randy Neugebauer's (R-TX) bill directs the FHFA to phase in an increase of the guarantee-fees over two years so Fannie Mae and Freddie Mac price their guarantees as if they were held to the same capital standards as private banks or financial institutions.
- **GSE Portfolio Reduction Act.** Rep. Jeb Hensarling's (R-TX) bill accelerates and formalizes the reductions in the size of the GSEs' portfolios by setting annual limits on the maximum size of each GSE's retained portfolio and ratcheting the limits down over five years until they have reached a sustainable level.
- **GSE Risk and Activities Limitation Act.** Rep. David Schweikert's (R-AZ) bill prohibits Fannie Mae and Freddie Mac from engaging in any new activities or businesses. Currently, the FHFA is preventing the entities from engaging in new activities. Schweikert's legislation codifies that current practice and prevents taxpayers from taking on additional risk by prohibiting GSEs' spread into other areas.
- **GSE Debt Issuance Approval Act.** Rep. Steve Pearce's (R-NM) bill requires the Department of Treasury to formally sign off on any new debt issuance by the GSEs.
- **GSE Credit Risk Equitable Treatment Act.** Rep. Scott Garrett's (R-NJ) legislation prohibits the exemption of GSE securities from the risk-retention requirements of Dodd-Frank. If enacted, the bill will make clear that Fannie Mae and Freddie Mac will be held to the same standards as any other secondary mortgage market participants. Under Dodd-Frank, Fannie and Freddie could still be able to purchase a mortgage from a financial institution that falls outside of the Qualified Residential Mortgage (QRM) definition and issue asset-backed securities backed by non-QRM assets. Garrett's bill would clarify that a GSE loan purchase or asset-backed security issuance would not affect the status of the underlying assets. If the GSEs purchase a non-QRM loan, all lender risk-retention requirements will still apply, and if the GSEs issue a non-QRM security, all securitization risk retention rules will still apply.

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Derelict Owners Beware: Municipalities Armed With New Prosecution Tools

By Andrew D. Santana

On April 25, 2011, municipalities throughout Pennsylvania will be armed with new tools to prosecute property owners who neglect the real estate they own in Pennsylvania. The Neighborhood Blight Reclamation and Revitalization Act, approved on October 27, 2010, by then-Governor Ed Rendell, becomes effective this month. The Act grants municipalities two primary tools to prosecute derelict owners of real estate in Pennsylvania and force owners to correct serious code violations and public nuisances.

The first tool is the right to commence legal action against the owner. This right is in addition to all other rights municipalities currently have against owners. If a serious violation of any state law or building code exists and that violation poses an imminent threat to the health and safety of the dwelling occupant, occupants in the surrounding structures or a passerby, or the property is a public nuisance due to its physical condition or use, as determined under common law or as declared by an appropriate official within the municipality, then the municipality in which the property is located may commence an action against the owner for those violations. Before an action can be brought, the municipality must notify the owner of such violation or public nuisance. If the owner fails to take a substantial step to correct this violation within six months, the municipality may commence the action against the owner.

A significant aspect of this new right of action is that a judgment may be entered as a lien against all of the assets of the owner, not just the subject real estate. These other assets may include bank accounts, other real estate and other assets that otherwise cannot be reached by municipalities. This is a significant departure from prior law, under which owners could take comfort in the fact that the sole remedy of a municipality in a case such as this would be placing a lien on the property.

Additionally, municipalities are also empowered under the Act to recover all penalties and costs incurred by the municipality to correct the violation. Therefore, to the extent the municipality incurs any costs to remedy a violation (e.g., installing windows and doors, correcting faulty mechanical systems, etc.), the municipality will be entitled to obtain a judgment against the owner in the amount of such costs. This is also a significant departure from prior law. More importantly, in the event the municipality does take corrective measures, the owner will have no control over the cost and quality of the work performed. Owners may therefore be forced to pay premium prices for substandard work.

The second primary tool granted to municipalities under this Act is the power to reject applications for municipal permits, including building permits and zoning approvals, if the applicant owns property in **any** municipality, and with regard to any such property, if any of the following conditions exist: (1) there is a final and unappealable tax, water, sewer or refuse collection delinquency, or (2) there is a serious code violation for which the owner has failed to take a substantial step to remedy the problem within six months of notice of such violation.

Again, this also is a significant departure from prior law. It is important to note the language includes the word "any" municipality. Therefore, under a plain language interpretation of the Act, a building permit application filed in one municipality may be denied if a serious violation exists in any other Pennsylvania municipality. Practically, it may be difficult for municipalities to track violations outside their borders. However, in the event municipalities are able to communicate effectively, they can essentially stop an owner from continuing to purchase and develop property anywhere in Pennsylvania.

There is some relief for property owners under this Act regarding denial of building permits and zoning approvals: the owners of inherited property must be given an opportunity to correct the deficiencies. However, there is no defined period during which the owners must correct the deficiencies, and it remains unclear how this provision will be applied by local code enforcement officers and zoning officials.

In summary, under the newly enacted Neighborhood Blight Reclamation and Revitalization Act, property owners who fail to comply with local zoning and building safety codes may face actions by municipalities and risk losing assets beyond real estate to satisfy judgments. Additionally, owners are responsible for costs incurred by municipalities to correct any existing violations. Finally, and perhaps most importantly, municipalities can deny permit applications, both building permits and zoning approvals, in the event a serious violation exists in any Pennsylvania municipality

Nonetheless, there are some planning techniques potentially available to address these issues. For example, using multiple entities to hold real estate may insulate certain properties from other properties that constitute serious violations or public nuisances.

On its face, the Act itself seems simple enough, but its practical application will not be so simple. Nevertheless, municipalities throughout Pennsylvania will surely add the rights granted under the Act to their cache of methods to prosecute owners. In an article published in the *Philadelphia Business Journal* in early April 2011, Bridget Collins, Deputy Managing Director of the Philadelphia Department of Licenses and Inspections, was quoted as saying the city will be targeting vacant property owners in certain areas of Philadelphia, including the Port Richmond neighborhood, immediately following the Act's effective date. Within the next several weeks, the city will send letters to owners of vacant properties informing them of the new law and requesting they take action. This will begin the six-month period in

which the owners must take a substantial step to correct the problem. In an effort to make a significant impact quickly, Philadelphia's Department of Licenses and Inspections has hired three temporary staff members to implement and apply this new Act. Additionally, Allentown, Reading and Erie are also planning to use this new Act to force owners to address abandoned and neglected properties.

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Federal Agencies Propose New Risk Retention Rule

By Lauren W. Taylor

Six federal agencies are seeking comment on a proposed rule that would require sponsors of asset-backed securities (ABS) to retain at least five percent of the credit risk of the assets underlying the securities and would not permit sponsors to transfer or hedge that credit risk. In crafting the proposed rule, the agencies sought to ensure the amount of credit risk retained is meaningful so that lenders held a stake in the asset.

The risk retention rule is proposed by the Federal Reserve Board, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, U.S. Securities and Exchange Commission, Federal Housing Finance Agency and Department of Housing and Urban Development. It would provide sponsors with various options for meeting the risk-retention requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

As required by the act, the proposal includes descriptions of loans that would not be subject to these requirements, including asset-backed securities that are collateralized exclusively by residential mortgages that qualify as "qualified residential mortgages" (QRMs). The proposal establishes a definition for QRMs incorporating such criteria as borrower credit history, payment terms and loan-to-value ratio. The objective was to design QRMs that ensure the mortgages are of very high credit quality.

The rule would mandate potential borrowers place a 20 percent down payment for QRMs.

Borrowers who cannot afford to put 20 percent down on a home and are unable to obtain FHA financing will be expected to pay a premium of two percentage points for a loan in the private market to offset the increased risk to lenders. This would disqualify about five million potential home buyers, resulting in 250,000 fewer home sales and 50,000 fewer new homes being built per year, according to NAHB economists.

The Dodd-Frank law currently exempts FHA and VA loans from the risk retention requirement, and the proposed risk retention rules will not apply to Fannie Mae and Freddie Mac while they remain in conservatorship.

The agencies request comments on the proposed rule by June 10, 2011.

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EPA Seeks Public Comment on New Safe Drinking Water Act Contaminants

By Clair E. Wischusen

As part of the requirements of the Safe Drinking Water Act, 42 U.S.C. Section 300f, to implement protections of drinking water for communities across the country, the Environmental Protection Agency is proposing 30 currently unregulated contaminants for monitoring in water systems. It has submitted this proposal for public comment.

The comment period will allow the public and other stakeholders to provide input on the selection of new contaminants for monitoring and will help determine the best path forward as the EPA seeks to collect data that will inform future decisions about how best to protect drinking water.

Under the authority of the Safe Drinking Water Act, the EPA currently regulates more than 90 contaminants in drinking water. To keep drinking water standards current with emerging science, the Safe Drinking Water Act requires the EPA to identify up to 30 unregulated contaminants for monitoring every five years. This current proposal is the third Unregulated Contaminant Monitoring Regulation and includes requirements to monitor for two viruses and 28 chemical contaminants that could be present in drinking water and do not currently have health-based standards.

The EPA is accepting public comment on the proposed list of 30 contaminants until May 2, 2011. Following the public comment period, the EPA will consider the input before the list is scheduled to be finalized in 2012, with sampling to be conducted from 2013 to 2015. Sampling will take place at all systems serving more than 10,000 people and at a representative sampling of systems serving less than 10,000 people.

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Pennsylvania Explores P3s for Transportation Projects

By Robert W. Gundlach, Jr.

The Pennsylvania Department of Transportation is currently faced with a $3.5 billion annual shortfall in funding for highway and mass transit projects, as revealed in by the Transportation Advisory Commission 2010 funding study.

During his testimony (watch video) before the state Senate, Acting Secretary of Transportation Barry Schoch addressed the shortfall and offered ideas on how the Corbett administration may finance the problem. One option for financing major transportation projects may involve public-private partnerships (P3s) in which the Commonwealth would lease state resources to a private company. Schoch said the use of such partnerships could be used for the construction of new roads or adding capacity to existing highways.

The idea already has support in the state legislature. House Transportation Committee Chairman Rick Geist (R-Blair) has introduced House Bill 3, which would enable Pennsylvania to enter into transportation-specific partnerships as a tool to help meet growing infrastructure needs. His legislation has received the approval of the House Transportation Committee.

P3s are contractual arrangements in which the private sector teams with government to accelerate the maintenance, improvement and expansion of roads, bridges and other infrastructure, such as ports, airports, transit systems and parking facilities. Under a P3, the public entity maintains ownership of the asset or facility but contracts with a private entity to develop, construct, manage, operate or finance a given project.

Pennsylvania's infrastructure includes 5,646 structurally deficient state-owned bridges, the most of any state in the nation. It includes 7,000 miles, or about 18 percent, of state-maintained roads in "very poor condition."

Currently, 28 states and Puerto Rico have enacted laws authorizing the implementation of public-private partnerships. P3s are endorsed by the U.S. Department of Transportation and both the previous administration of Gov. Ed Rendell and current Corbett administration have publicly expressed support of P3s.

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Hearings Held on UCC Reform Bill

By Kimberly A. Freimuth

The Pennsylvania House Labor and Industry Committee held hearings (watch video) on March 23, 2011, to receive testimony on legislation that would amend the state's Uniform Construction Code. The hearing addressed State Representative Donna Oberlander's House Bill 725, which seeks to reform the adoption process of the statewide building code.

Oberlander's bill is distinct from House Bill 377, which primarily seeks to remove the mandate for residential sprinklers in one- and two-family dwellings.

HB 725 would amend the process by which the Commonwealth adopts the triennial releases of the International Construction Codes. The current adoption process subjects new building codes to examination by the Review and Advisory Council prior to subsequent adoption by the Department of Labor and Industry. The Council can make recommendations to exclude certain changes that appear in the latest International Codes.

The legislation would slow down the adoption process by requiring the Council to take up to 15 months to review the new building codes as well as accept public input at hearing around the state. The Council would then submit a detailed report with recommendations for adoption or modification of the new provisions of the code. Essentially, code adoption would change from a "vote out" to a "vote in" treatment of new code provisions by the Council.

The Council's report would explain the reasons for each recommendation by examining the code provision's impact upon health, safety and welfare of the public; its economic reasonableness; the technical feasibility of the provision; and its impact to housing affordability.

HB 725 would also expand the size of the Review and Advisory Council to accommodate representation by consumer-oriented groups. Additionally, code adoption recommendations must gain approval by two-thirds of Council members.

Companion legislation has also been introduced in the Pennsylvania Senate.

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