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In the Zone

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Court Stems the Tide for at Least One Foreclosing Lender in New Jersey

By John L. Grossman

These indeed are difficult times for foreclosing lenders and servicers in New Jersey. On Dec. 20, 2010, the New Jersey Supreme Court adopted certain emergent amendments to the New Jersey Rules of Court as they relate to good faith filings in residential mortgage foreclosure actions. On that same day, the Acting Administrative Director of the Courts entered an administrative order against a variety of residential mortgage foreclosure plaintiffs, requiring them to show cause before the Superior Court as to why the processing of uncontested residential mortgage foreclosure actions that have been filed should not be suspended and, in other instances, to demonstrate affirmatively there are no irregularities in their handling of foreclosure proceedings.

The irregularities relate to the practice identified as pervasive "robo-signing." During an extensive investigation that resulted in these orders, and by way of example, employees of various lenders and servicers admitted to having executed detached signature pages to certifications filed in support of default requests and to routinely notarizing documents in bulk on a daily basis outside of the signer's presence. Although residential mortgage foreclosure counsel, and the lenders themselves, are now subject to higher standards of care, one court has recently given some good news to one lender identified in the investigation.

On Jan. 7, 2011, Judge Mary Thurber of the Superior Court of New Jersey, Chancery Division, Bergen County, rendered an unpublished decision in *Bank of America, N.A., et al. v. Alvarado* (BER-F-47941-08), holding the foreclosing lender was not required to possess the original note evidencing the underlying loan obligation at the time the complaint was filed. This decision is contrary to decisions of other judges in the Superior Court, notably one decision by Judge William C. Todd, III, Chancery Division, Atlantic County.

In *Bank of America*, the plaintiff instituted its foreclosure action based upon the defendant's default of her residential mortgage loan, initially granted by Washington Mutual Bank. The defendant did not dispute the execution of the loan documents or the fact of her default. Her defense was premised upon the claim the lender did not establish its possession of the original note at the time the complaint was filed.

The loan went through a series of assignments, ultimately landing with Bank of America. During the litigation, the plaintiff submitted an affidavit, executed apparently during the time when Washington Mutual retained the loan, attesting to the fact the note had been lost. Having considered the requirements of the Uniform Commercial Code and the common law dealing with assignments, the court, for equitable reasons, decided Bank of America was entitled to enforce the note obligation. To hold otherwise under the circumstances presented, according to Judge Thurber, would lead to the defendant's receipt of a windfall. Under the doctrine of unjust enrichment, which is well-established in New Jersey, the court reasoned it would be inequitable to permit the defendant, who had not paid her obligations under the note, to preclude enforcement of that obligation by the plaintiff.

The *Alvarado* decision constitutes persuasive, but not binding, authority. Accordingly, judges of similar courts are not required to follow the *Alvarado* decision.

In a lengthy, also unpublished, opinion in *Bank of New York v. Raftogianis, et al.*, Chancery Division, Atlantic County (ATL-F-7356-09), decided Jan. 29, 2010, Judge Todd held the failure of foreclosure counsel to produce evidence the plaintiff possessed the original note at the time of the filing of the complaint required a dismissal of the action; that dismissal was without prejudice, entitling the plaintiff to refile once possession of the original note could be evidenced. Although plaintiff's counsel presented the original note at the time of oral argument and in advance of trial, the court nevertheless held this was insufficient.

The *Raftogianis* case presented a complex set of factual circumstances, which included the involvement of Mortgage Electronic Registration Systems (MERS) in the process. Securitization issues were also present. Judge Todd did state his opinion was not intended to address issues arising when an original negotiable note is lost or the question of whether an action to foreclose can be properly brought in the name of the servicer, rather than in the name of the entity for which the loan is being serviced.

Based on the above, the original note defense remains viable in New Jersey, but not before all judges under all circumstances.

For more information, please contact John L. Grossman at 609.572.2322 or jgrossman@foxrothschild.com.

New Jersey Case of the Month: Developers Cannot Necessarily Rely on Strict Application of Time Limitations for Appeals

By Jack Plackter

In the case of *Hopewell Valley Citizens' Group, Inc. v. Berwind Property Group Development Co.* (A-83-09), the New Jersey Supreme Court, with Justice Virginia Long writing for the court, considered the issue of whether an objector to a planning board's grant of site plan approval is entitled, in the "interest of justice," to an enlargement of time under the Civil Practice Rules. These rules require an interested party to file an appeal of a planning board approval within 45 days from the date of publication of the notice of decision.

The decision reached by the court proposes that developers can no longer rely on the time limitations for appeals to be strictly applied where an objector has not slept on its rights if the time limitation violation was based upon a mistake on which the objector reasonably relied.

At the heart of this matter is a 359.8 acre parcel of real property located on Carter Road in Hopewell Township. On Nov. 15, 2006, Berwind Property Group Development Co., L.P. (BPG), the property's owner, filed an application for preliminary site plan approval that was deemed complete in late 2007. BPG proposed eight buildings for the property as well as the addition of a daycare center, parking, interior roads and a new wastewater treatment plant. Thirteen public hearings on the application were held between January and May 2008 at which witnesses appeared and members of the public voiced their concerns over BPG's proposed development. Among those concerns were the environmental impact of clear-cutting numerous mature trees that are habitat for endangered species; stream encroachment; and the inadequacy of waste and stormwater facilities.

In spite of the testimony of the public, the planning board approved the preliminary site plan on May 29, 2008. The approval was memorialized in a resolution adopted Sept. 25, 2008. On Sept. 27, 2008, BPG caused a notice of the resolution to be published in *The Trenton Times*, a daily newspaper of general circulation.

On Oct. 1, 2008, BPG informed the Board Secretary-Administrative Officer, Joan Kiernan-O'Toole, of the publication and provided an affidavit of publication to her via e-mail noting "[t]he 45-day appeal period will run until November 11, 2008." On Oct. 2, 2008, the Board republished notice of the resolution in *The Hopewell Valley News*, a weekly newspaper of general circulation.

In October, Sheila Fields, a future member of the yet-to-be-formed Hopewell Valley Citizens' Group, Inc. (Citizens) and an objector who appeared at the site plan hearings, telephoned the Board Secretary-Administrative Officer and asked "when and where the Notice of Decision had been published to calculate the time for filing an appeal." The Board Secretary-Administrative Officer informed Fields the notice had been published in *The Hopewell Valley News* on Oct. 2. Relying on that information, Fields (and Citizens) calculated the 45-day period would expire on Nov. 17, 2008.

Citizens filed a complaint in lieu of prerogative writs on Nov. 17, 2008, which was within 45 days from the date Citizens was told the notice of decision was published but greater than 45 days from the date BPG published the first notice.

Citizens argued it was entitled to enlargement because it was advancing environmental issues with broad impact on the public.

The trial court denied Citizens' motion for an enlargement of time under the Civil Practice Rules and found no manifest injustice in its denial. The court distinguished the circumstances presented in this case from those where there was an affirmative showing of deliberate deception, which all parties agreed was not the case in this instance.

Moreover, the court applied a three-part standard that asked whether (1) the matter presented a novel or constitutional claim; (2) it involved an *ex parte* determination; or (3) it implicated a matter of great public interest. In the absence of one of those categories, the court held an enlargement could not be granted. The court concluded none of the factors were implicated in the case, declined to enlarge the limitations period and granted the motions to dismiss.

Citizens appealed, and the Appellate Division affirmed "substantially for the reasons expressed" by the trial court, differing only in its conclusion that "there may be circumstances that warrant an enlargement of time other than the [three] traditional categories." The panel concluded Citizens had failed to show any effort by BPG to mislead them, or any suggestion the zoning ordinance itself was invalid, circumstances that may have warranted an enlargement of time. Likewise, the panel declined to embrace Citizens' argument that the issues it presented constituted public interests and found the objections to be "normal" for a land use case.

The Supreme Court granted Citizens' petition for certification and held the circumstances presented in this case warrant enlargement of the 45-day period because "it is manifest that the interest of justice so requires."

The Municipal Land Use Law provides that "[t]he period of time in which an appeal of the decision may be made shall run from the first publication of the decision, whether arranged by the municipality or the applicant." N.J.S.A. 40:55D-10(i). Appeals from local land use decisions are accomplished by actions in lieu of prerogative writs. The Civil

Practice Rules set forth the time limitations on the institution of such actions. Those rules acknowledge a general limitations period of 45 days "after the accrual of the right to the review, hearing or relief claimed . . . ." The portion of the rules relating to appeals of land use decisions provides no action shall be commenced "after 45 days from the publication of a notice once in the official newspaper of the municipality or a newspaper of general circulation in the municipality . . . ." A subsection of the rule provides: "The court may enlarge the period of time where it is manifest that the interest of justice so requires."

It is undisputed that Citizens failed to meet the deadline imposed by the Rules as it did not file its complaint within 45 days of the first notice published by the developer. The court's task is to determine whether Citizens is entitled, in the "interest of justice," to an enlargement of time under the Rule and, hence, to an adjudication of the merits of its claim.

The methodology employed when the court interprets one of its rules mirrors the manner in which statutes are construed. Thus, the analysis in this case begins with the plain language of the Rule, which suggests a court has discretion to enlarge a timeframe when it perceives a clear potential for injustice. Prior case law is instructive as to when the courts have held the Rule to be applicable. The Rule was aimed at those who slumber on their rights. Certain cases are excepted from the rule governing limitation of actions, and included in that category were three traditional types of challenges: "important and novel constitutional questions;" "informal or *ex parte* determinations of legal questions by administrative officials;" and "important public rather than private interests which require adjudication or clarification." The court recognized that, as a general proposition, "ignorance of the existence of a cause of action will not prevent the running of a period of limitations except when there has been concealment."

The court has enlarged the limitations period, notwithstanding the defendants' interest in repose, based on "unique public policy concerns" and "the potential prejudice to the public that would result from not reaching the merits . . . ."

In another case dismissed by a trial court, the court strictly applied both the deadlines imposed by the Civil Practice Rules and the three categories of exceptions. The Appellate Division reversed, concluding the plaintiff had not slumbered on his rights, "but instead reasonably relied on his communications with [the borough official] . . . ." The panel also found no prejudice in the three-day delay and directed the case be remanded to the trial court because "it would be a miscarriage of justice to deprive plaintiff of a hearing on the merits of his challenge . . . ."

Here, the Appellate Division recognized the error by acknowledging there may be circumstances that warrant an enlargement of time other than the traditional categories. However, the panel itself went astray in concluding the law requires a willful concealment in order to justify the extension, and nothing in the case law supports that view. The law is that municipal negligence is a valid basis for invoking an enlargement of time to file an appeal. The Appellate Division has held that a communication snafu on which the plaintiff relied was sufficient to trigger enlargement and the three-day delay in that case did not prejudice the defendants.

The same is true in *Hopewell*. The plaintiff was entirely reasonable in calling the Board Secretary for information and was inadvertently misled. Certainly BPG was blameless, but so was the plaintiff, who cannot be said to have slumbered on its rights. Further, the six-day delay was such that the defendants could not have suffered prejudice sufficient to warrant the barring of this litigation. The court held this was the exact type of circumstances the Rules were designed to address.

Accordingly, the judgment of the Appellate Division was reversed, and the matter was remanded to the trial court for the reinstatement of the plaintiff's complaint and for further proceedings to determine the merits of the appeal.

The decision not only indicates that developers cannot rely on the strict application of time limitations for appeals when the violation was based upon a mistake on which the plaintiff reasonably relied and the plaintiff did not sleep on its rights, but it also points to the importance of a developer's actions. In this instance, had the developer sent the publication to the objector, the result would have been different.

For more information, please contact Jack Plackter at 609.572.2200 or jplackter@foxrothschild.com.

Legislative Update in Pennsylvania

By David H. Comer

Act 111 of 2010, which was approved by former Governor Rendell on Nov. 23, 2010, and took effect 60 days thereafter, amends the Pennsylvania Municipalities Planning Code (MPC) by (1) further defining "traditional neighborhood development," (2) further providing for grant of power to municipalities for standards and conditions for traditional neighborhood development designations and for manuals of written and graphic design guidelines and (3) providing for subdivision and land development ordinance provisions applicable to traditional neighborhood development.

The revised definition of "traditional neighborhood development" reads as

follows (with language added to the definition bolded and language deleted from the prior definition in brackets): "[A]n area of land **typically** developed for a compatible mixture of residential units for various income levels and nonresidential commercial and workplace uses, including some structures that provide for a mix of uses within the same building. Residences, shops, offices, workplaces, public buildings and parks are interwoven within the neighborhood so that all are within relatively close proximity to each other. Traditional neighborhood development is relatively compact[, limited in size] and oriented toward pedestrian activity. It has an identifiable center and a discernible edge. The center of the neighborhood is in the form of a public park, commons, plaza, square or prominent intersection of two or more major streets. Generally, there is a hierarchy of streets laid out [in a rectilinear or grid pattern of interconnecting] **with an interconnected network of** streets and blocks that provides multiple routes from origins to destinations and are appropriately designed to serve the needs of pedestrians and vehicles equally."

The foregoing revised definition appears to provide more discretion in finding that a development is a traditional neighborhood development.

Additionally, Act 111 provides that a zoning ordinance or amendment may authorize and provide standards, conditions and regulations for traditional neighborhood development that: "(i) designate a part or parts of the municipality as a district or districts which are reserved exclusively for traditional neighborhood development; or (ii) permit the creation of a traditional neighborhood development in any part of the municipality or in one or more specified zoning districts."

Finally, Act 111 provides a municipality additional power to enact subdivision and land development ordinance provisions applicable to a traditional neighborhood development to address the design standards appropriate to a traditional neighborhood development. Pursuant to Act 111, such design standards include, but are not limited to, compactness, pedestrian orientation, street geometry or other related design features.

For more information, please contact David H. Comer at 610.397.7963 or dcomer@foxrothschild.com.

Pennsylvania Case of the Month: Commonwealth Court Finds Bias Claims Must Be Raised First Before Hearing Tribunal

By Ellen M. Enters

In *HYK Construction Company, Inc. v. Smithfield Township et. al*, 8 A.3d 1009 (Pa. Commw. November 19, 2010), the Commonwealth Court of Pennsylvania relied on prior case law to determine that where a conflict of interest or appearance of impropriety has been found, the prevailing remedy is and has been to remand the matter to the hearing tribunal (in this case, the Board of Supervisors of Smithfield Township) to conduct a new hearing. It reasoned if the courts became involved every time a party alleges of bias, the courts, rather than the board, would be reviewing conditional use applications, and it would create infinite challenges to interlocutory determinations and defeat or, at the very least disrupt, the Commonwealth's structure for review of zoning decisions by local boards and governing bodies.

In this case, HYK Construction Company, Inc. (HYK) filed a conditional use application on April 3, 2007, with Smithfield Township to construct and operate a concrete manufacturing facility. Hearings before the Board of Supervisors of Smithfield Township, which is the governing body of the township, commenced on June 7, 2007. The Smithfield Township Environmental Advisory Council (EAC), along with approximately 75 neighbors, was granted party status by the board.

While the hearings before the board were proceeding, HYK filed a complaint on May 9, 2008, in the Court of Common Pleas of Monroe County seeking declaratory and equitable relief. HYK alleged it was improper for the EAC to participate as a party because it was funded by the township to prepare evidence, expert opinion and argument, presumably contrary to the application, and its right to a fair and impartial hearing was abrogated on this basis. HYK requested the trial court void the ongoing conditional use hearings before the board, preclude and enjoin the board from hearing the application, appoint a neutral hearing examiner to rule on the application and preclude EAC from participating as a party. The trial court ruled in favor of HYK, and the township and board appealed.

The township, board and EAC contended the trial court erred in finding it had equity jurisdiction because HYK failed to utilize and exhaust an exclusive statutory remedy set forth in the Municipalities Planning Code (MPC), and HYK's equity action amounted to an improper interlocutory appeal from the determinations of the board. HYK countered that the mere potential for bias or the appearance of nonobjectivity was enough to constitute a violation of due process and necessitated the trial court's

action to remove the matter from the board.

The procedures for a land use appeal set forth in Article X-A of the MPC are "the *exclusive* mode for securing review of *any* decision rendered pursuant to Article IX [Zoning Hearing Board and other Administrative Proceedings] or deemed to have been made under this act." Section 1001-A of the MPC, 53 P.S. § 11001-A (emphasis added). It is well-settled that where the General Assembly provides a "statutory remedy which is mandatory and exclusive, equity is without power to act." *DeLuca v. Buckeye Coal Company*, 345 A.2d 637 (Pa. 1975). A fair trial conducted in a fair tribunal is a basic and fundamental requirement of due process. *Horn v. Township of Hilltown*, 337 A.2d 858 (Pa. 1975).

For example, in *Horn*, the Pennsylvania Supreme Court held it was improper for the same individual to serve as a zoning board's solicitor and to appear before that same zoning board as the municipality's solicitor to oppose an application for a variance. The Supreme Court found such a procedure to constitute a denial of due process, even though there had been no showing of actual prejudice to the applicant resulting from the solicitor's dual role. The Court explained "a governmental body charged with certain decision-making functions ... must avoid the appearance of possible prejudice, be it from its members or from those who advise it or represent parties before it."

Similarly, in *Newtown Township Board of Supervisors v. Greater Media Radio Co.*, 587 A.2d 841 (Pa. Commw. 1991), the Commonwealth Court held the board failed to keep its role as an unbiased tribunal where the township's solicitor served as a legal adviser to the board of supervisors while also representing the township at the hearing in opposition to a conditional use application. Despite agreeing with the trial court that the procedures used by the board were prejudicial to the applicant, it found the trial court erred in disregarding this irregularity and deciding the case on its merits. "The appropriate action would have been to remand the matter to the Board, with an order to conduct new public hearings in a manner which is in accordance with its role as an impartial decision-making tribunal."

In *Lyness v. State Board of Medicine*, 605 A.2d 1204 (Pa. 1992), the Supreme Court held that because the members of the State Board of Medicine made both the decision to prosecute and the final adjudication to revoke a physician's license to practice medicine, they impermissibly commingled their functions and violated the physician's due process right to a fair and impartial tribunal. The Court noted the defect can be readily cured by placing the prosecutorial functions in a group of individuals or entity distinct from the board that renders the ultimate adjudication. The Court remanded the matter to the board for further proceedings in accordance with its opinion. In *Stone and Edwards Insurance Agency, Inc. v. Department of Insurance*, 636 A.2d 293, (Pa. Commw.), aff'd 648 A.2d 304 (Pa. 1994), the Commonwealth Court opined that a single administrative agency may exercise both prosecutorial and adjudicative functions if "walls of division" are constructed within an agency that clearly separate those two functions.

In *HYK*, the exclusive mode of review for a conditional use application is before the board. While HYK filed its conditional use application with the Board, it failed to exhaust this exclusive statutory remedy, claiming the remedy is inadequate. In its complaint, HYK asserted the board cannot sit as an impartial adjudicator of a conditional use application while at the same time funding the EAC to participate as a party litigant and likely adversary to the application. HYK also asserted that by funding EAC's preparation of evidence, expert opinion and argument, presumably contrary to the application, the board created a potential conflict of interest. HYK maintains its equity action was necessary to avoid the potential bias and the appearance of nonobjectivity of the board based upon the board's relationship with the EAC.

In hearing the appeal, the Commonwealth Court determined the facts of the instant case failed to rise to the level necessary to invoke equity. It reasoned there was not the same commingling of prosecutorial and adjudicative functions as contemplated in *Lyness* and *Stone*. The court noted that, while the EAC is funded by the township and was granted party status by the board, it is a separate and distinct entity from the board. Thus the court determined the requisite walls of division were in place to overcome any appearance of impropriety. To the extent any similarity could be drawn between EAC's role in this matter and the solicitor's role in *Horn* and *Newtown*, the court noted that even HYK conceded the apparent conflict of interest could be remedied by the removal of the EAC as a party litigant, which issue was required to be raised before the board in order to preserve it for appeal.

The court noted, as illustrated by the prior cases, that where a conflict of interest or appearance of impropriety has been found, the prevailing remedy has been to remand the matter to the hearing tribunal to conduct a new hearing as an impartial decision maker. The court believed HYK's equity action represented an improper attempt to circumvent the mandatory statutory review process. The court noted that to allow equity jurisdiction to usurp the power of the board would create infinite challenges to interlocutory determinations and defeat or, at the very least disrupt, the Commonwealth's structure for review of zoning decisions by local boards and governing bodies. It reasoned if the courts became involved every time a party makes an allegation of bias, the courts, rather than the board, would be reviewing conditional use applications. The court concluded any claims of unfairness or bias should be raised first before the hearing tribunal (in this case the board) and then ultimately on appeal. Otherwise such claims may be deemed waived.

For more information, please contact Ellen M. Enters at 610.397.6505 or eenters@foxrothschild.com.

2010 Pennsylvania Land Use and Growth Management Report Released

By Robert W. Gundlach, Jr.

The Pennsylvania Municipalities Planning Code mandates the Governor's Center for Local Government Services prepare a comprehensive State Land Use and Growth Management Report every five years. The 2010 report is the first update following the inaugural report in 2005.

Released in January 2011, the 2010 report evaluates contemporary land use issues, significant historic and projected trends and statewide and regional development patterns. It makes a number of recommendations and notes specific opportunities for the Commonwealth to positively impact future growth and development patterns. It is intended to promote a policy approach to land use and growth management, with the hope the recommendations will be used as guidelines and best practices.

Major findings included:

- Pre-recession development outpaced growth. Prior to the current recession (pre-2008), the principal trend identified in the 2005 Land Use and Growth Management Report was still evident: Pennsylvania was developing but not growing. Land data showed significant increases in developed land, mainly in suburbs and exurbs, at a time when population and the economy showed minimal growth. Pennsylvania is growing slower than the nation, but consistent with the Northeast region.
- Changing demographic demands. Demographic shifts affect future land use. Pennsylvania's large proportion of senior citizens will continue to impact land use due to seniors' less mobile lifestyle, desire for closer-to-home health care and need for smaller, more community-connected housing. With the number of deaths approaching the number of births, Pennsylvania communities will need to attract out-of-state residents to grow.
- Planning issues vary widely by region. Pennsylvania's different regions and municipality types are growing at different rates and changing in different ways. Areas to the south and east of the line running from South Central Pennsylvania through the Lehigh Valley up to the Poconos are experiencing more growth and better economic conditions and have a younger population than the north and west.
- Natural resource management and growth. There are large-scale natural resource issues that will have an impact on land use, including natural gas exploration and well activity related to the Marcellus Shale, Total Maximum Daily Load (TMDL) for the Chesapeake Bay Program and energy costs.
- Inadequate capacity to address growing needs. Governments' fiscal capacity to deal with land use and other challenges is shrinking. Various financial strains are forcing deferred maintenance of local infrastructure and cuts in service. Fiscal stress is becoming more of a reality for all levels of government, not just inner cities and boroughs. In 2008, 44.5 percent of Pennsylvania municipalities were operating at a deficit.

For more information, please contact Robert W. Gundlach, Jr. at 215.918.3636 or rgundlach@foxrothschild.com.

SCOTUS Eyes Decision on Global Warming

By M. Joel Bolstein

On Dec. 6, 2010, the Supreme Court of the United States granted certiorari in a significant global warming case. In deciding to hear *American Electric Power Co., et al. v. Connecticut, et al.*, the high court has expressed a desire to clarify the limits of federal courts' authority in addressing climate change issues through reinterpretations of national environmental policy.

At issue is (1) whether states and private parties can seek to curb emissions on utilities for their alleged contribution to global climate change and (2) whether a cause of action to reduce carbon dioxide emissions can be implied under federal common law.

Eight states, New York City and three land conservation groups filed suit against four electric power companies and the Tennessee Valley Authority, claiming they were the largest sources of greenhouse gases. The suit alleged the utility companies, which operate facilities in 21 states, are a public nuisance because their carbon-dioxide emissions contribute to global warming.

American Electric Power Co. and the other utilities argued the courts should not get involved in the issue and contended only the Environmental Protection Agency can set emissions standards.

A federal judge on the U.S. District Court for the Southern District of New York initially threw out the case, but the U.S. Court of Appeals for the Second Circuit said the matter could continue.

For more information, please contact M. Joel Bolstein at 215.918.3555 or jbolstein@foxrothschild.com.

Who Has the Burden of Proof in Conditional Use Cases?

By Herbert K. Sudfeld, Jr.

In *Marquise Investment, Inc. v. City of Pittsburgh and Pittsburgh City Council*, decided Dec. 30, 2010, the Pennsylvania Commonwealth Court affirmed the Court of Common Pleas of Allegheny County granting a conditional use to Marquise Investment, Inc. (Marquise) for use of its property as an adult cabaret in the city's Urban Industrial (UI) zoning district.

The issues before the court involved the shifting of burdens when it came to the evidence presented both in favor of and opposed to the application. The court reiterated the law as it applies to conditional uses.

Here the Pittsburgh Zoning Code permitted adult entertainment as a conditional use in the UI district. The adult entertainment use allowed a cabaret featuring topless dancers, exotic dancers, etc. Marquise filed a conditional use application for a 5,000-square-foot structure in the UI district. The business would cater to gentlemen between the ages of 21 and 50 and will be open from 9 p.m. to 4 a.m. seven days a week, offering food and non-alcoholic beverages. No alcoholic beverages will be allowed unless Marquise applies for a liquor license or allows patrons to bring their own. Located 80-feet away is the Onala Club, a nonprofit social club for recovering alcoholics and drug addicts. Objectors asked the court to find that the cabaret would adversely affect the public welfare because of its proximity of the Onala Club and that recovering addicts and alcoholics would be adversely affected by the presence of such a cabaret so nearby.

A public hearing by the City Planning Commission ended with a recommendation of denial. City Council twice failed to hold a hearing and on appeal, the Court of Common Pleas took jurisdiction and held a de novo hearing, accepting the evidence presented to the Planning Commission, although none of the objectors appeared before the trial court. The hearing resulted in the trial court granting the application to Marquise.

On appeal by the city, the Commonwealth Court disagreed with the city that the city had presented substantial evidence of a high degree of probability the proposed strip club would cause harm to the health, safety and welfare of the community and Marquise did not meet its burden of rebutting the evidence.

In upholding the trial court, the Commonwealth Court, citing *In re McGlynn*, 974 A.2d 525, 537 (Pa. Cmwlth. 2009), stated "the existence of a conditional use provision in a zoning ordinance indicates legislative acceptance that the use is consistent with the zoning plan and a use application should only be denied where the adverse impact on the public interest exceeds that which might be expected in normal circumstances." The court held that when addressing a conditional use application, a local governing body employs a shifting burden of persuasion. Citing *Aldridge v. Jackson Twp.*, 983 A2d. 247, 253 (Pa Cmwlth. 2009), the court held:

> First, the applicant must persuade the local governing body its proposed use is a type permitted by conditional use and the proposed use complies with the requirements in the ordinance for such a conditional use. Once it does so, a presumption arises the proposed use is consistent with the general welfare. The burden then shifts to objectors to rebut the presumption by proving, to a high degree of probability, the proposed use will adversely affect the public welfare in a way not normally expected from the type of use.

The city argued that "once evidence is presented by objectors regarding any possible detriment to the health, safety and general welfare of the community, the applicant again regains the burden of persuasion," citing *Bray v. Zoning Board of Adjustment*, 410 A.2d 909 (Pa. Cmwlth. 1980). According to *Bray*, both the burdens of proof and persuasion as to the detrimental effect or general policy concerns about a conditional use are always on the objector. The burden of persuasion as to the health, safety and welfare concerns raised by objectors is on the objectors unless the terms of the ordinance provide otherwise. The court stated "in this case, while adult entertainment, including operating an adult cabaret, is permitted as a conditional use in UI zoning districts, ordinance terms have not placed the burden of persuasion on applicants with respect to detrimental effects on health, safety and welfare."

The court then examined the various specific provisions of the Pittsburgh Code relating to adult entertainment uses as well as the general criteria for all conditional uses and held that "where … the terms of an ordinance have not expressly placed the burden of persuasion regarding general detrimental effects to the health, safety and welfare on an applicant, the applicant has the burden of persuasion only for specific requirements, while objectors have the burden as to all general policy concerns and general detrimental effects," and the applicant needs only to prove "specific, objective conditional use criteria set forth in the zoning ordinance," citing *Aldridge*, 983 A2d. at 259.

Finally, the court held Marquise had satisfied all the specific criteria for the conditional use, much of the objectors' evidence was speculative and the city failed to rebut the presumption of compliance by demonstrating to a high degree of probability that an adult cabaret will adversely affect the public welfare in a way not normally expected from an adult cabaret. As to whether there was a detrimental effect on traffic, the court

stated Marquise had met its burden and the city had failed to show there was a high probability the proposed use will generate traffic not normally generated by that type of use and that the abnormal traffic threatens safety.

This case provides a thorough analysis of the shifting burdens of proof and persuasion in conditional use cases, but one must always look at the requirements of the local ordinance itself to see if the ordinance places a specific burden of proof on the applicant.

For more information, please contact Herbert K. Sudfeld, Jr. at 215.918.3570 or hsudfeld@foxrothschild.com. Mr. Sudfeld regularly represents applicants in complex conditional use cases before local governing bodies.

Pennsylvania Case of the Month: Supreme Court Finds Environmental Immunity Act Offers No Protection From Interference with Approval Process

By Clair E. Wischusen

In *Pennsbury Village Assocs., LLC v. McIntyre*, — A.3d —, 2010 WL — (Pa. 2011), the Pennsylvania Supreme Court held protestants could not seek protection under the Environmental Immunity Act (EIA), 27 Pa.C.S. §§ 8301-8305, for interference with the development approval process after the protestants had previously signed a settlement agreement with a developer and the municipality waiving their right to interfere.

In *Pennsbury Village* Assocs., a developer owned two large parcels in Pennsbury Township that bordered township land subject to an open space restrictive covenant. The developer applied for conditional use approval to use the parcels for mixed-use, high-density development. The township granted conditional approval, and the protestants appealed. The primary issues in dispute concerned whether a wastewater treatment facility and access road could be located on the township open space. The developer, protestants and the township ultimately entered into a stipulation agreement that gave the township the right to determine the access road configuration and included provisions regarding wastewater treatment.

Thereafter, the protestants communicated with township commissioners to persuade them to object and refuse to consent to the access road or wastewater treatment plant. As a result, the township issued a letter stating the access road and wastewater treatment plant were contrary to the restrictive covenant and they would oppose any such use. The developer filed suit against the protestants, alleging breach of contractual relationship and conspiracy, all of which arose out of the breach of the stipulation agreement. The protestants sought immunity from suit under the EIA, which protects citizens from Strategic Lawsuits Against Public Participation (SLAPP) suits where a citizen communicates with the government for the enforcement of environmental laws. The protestants alleged they were entitled to protection under the EIA because any interference was in furtherance of their protection of the environment. Specifically, they cited concerns about stormwater run-off.

The trial court denied the protestants' request for immunity, and the protestants filed an interlocutory appeal as of right to the Commonwealth Court. The Commonwealth Court overturned, holding the protestants' communications to the commissioners involved environmental laws and regulations because the township purchased the land with open space funds and the covenants attached to those parcels were intended as environmental regulations.

The Pennsylvania Supreme Court reversed, side-stepping the question of whether the restrictive covenants did indeed constitute an "environmental law or regulation" such that the EIA would even apply. The Court did, however, seem to acknowledge that general concerns about stormwater run-off cannot trigger the EIA's protection. Instead, the Court held the protestants were not entitled to immunity on the basis that they waived their right to immunity under the EIA by entering the stipulated settlement agreement. The Court found Anti-SLAPP legislation – like the EIA – will not shield a party from liability where a party "waived the very constitutional right it seeks to vindicate." In reaching this holding, the Court reaffirmed the enforceability of the settlement agreement to resolve development disputes. Despite the developer's victory on the immunity issue, the Court noted the question of whether construction of the access road on township open space would violate the restrictive covenant was not before it and would not be decided.

For more information, please contact Clair E. Wischusen at 215.918.3559 or cwischusen@foxrothschild.com.

New State Legislative Session, New Building Codes Battle

By Kimberly A. Freimuth

The clock may have run out during Pennsylvania's 2009-2010 state legislative session for efforts to delay the 2011 implementation of residential sprinkler mandates (see House Bill 1196), but, with a newly seated General Assembly comes renewed efforts to remove onerous building code provisions.

State Senator Jake Corman (R-Centre) and State Representative Donna Oberlander (R-Clarion) have begun circulating co-sponsorship memos in the Senate and House, respectively, seeking support to amend Pennsylvania's Construction Code Act (Act 45 of 1999) and reform the Commonwealth's Uniform Construction Code content and adoption process.

While specific legislative language has not yet been introduced by either state legislator, their co-sponsorship memos indicate the direction they intend to take. Between the two bills, efforts will be made to permanently remove various code provisions found in the 2009 International Residential Code. Namely, both bills seek to repeal the requirement for sprinklers in one- and two-family dwellings. Additionally, Rep. Oberlander lists other code provisions to be targeted for deletion, including, in part, wall bracing and dryer duct length requirements.

Beyond the simple repeal of onerous and unnecessary building code provisions, both legislative proposals target a comprehensive reform of the code adoption process in Pennsylvania. In an effort to allow a more consensus-based approach to code promulgation, the legislators intend to remove the automatic adoption provision of the triennial codes and replace it with a more thorough and deliberative process. Such a process would include a detailed study of any new building codes, public hearings around the state and subjecting any code revisions to a full regulatory review process in the creation of a Pennsylvania-specific building code.

Currently, besides Pennsylvania, only California and Maryland have mandates for sprinkler requirements for one- and two-family dwellings.

For more information, please contact Kimberly A. Freimuth at 215.918.3627 or kfreimuth@foxrothschild.com.

U.S. Scores Win in Lumber Tariff Battle

By Carrie B. Nase

On Jan. 21, 2011, the London Court of International Arbitration (LCIA) ruled subsidies provided by the governments of Ontario and Quebec to lumber manufacturers in their provinces violate the terms of the 2006 U.S.-Canada Softwood Lumber Agreement (SLA). This trade agreement prohibits the Canadian federal and provincial governments from providing new subsidies to the Canadian lumber industry after July 1, 2006.

In late 2006 and 2007, Quebec and Ontario announced and implemented plans to provide hundreds of millions of dollars in grants, subsidized loans and subsidized loan guarantees to lumber producers. The United States initiated dispute settlement proceedings under the SLA with respect to these new subsidies in January 2008.

The text of the LCIA Tribunal decision has not yet been released publicly. However, the Office of the U.S. Trade Representative states that, according to the terms of the Tribunal award, Canada must implement a cure for this breach within 30 days or impose additional export taxes for the duration of the SLA. It is anticipated these additional export taxes will amount to US$ 59.4 million.

By providing new subsidies, Canada knowingly violated the terms of the lumber trade agreement to provide an unfair advantage to Canadian producers in this very challenging market. The remedy prescribed by the LCIA will help bring about a more level playing field for U.S. manufacturers, millworkers and private forest landowners.

The decision is the second consecutive ruling by an LCIA Tribunal that Canada has violated the 2006 Softwood Lumber Agreement. In 2009, another LCIA Tribunal agreed with the United States that Quebec, Ontario, Manitoba and Saskatchewan had exceeded quota requirements and ordered a 10 percent penalty export tax on lumber shipments from those provinces until C$68.26 million is collected.

The SLA entered into force in October 2006. Under the agreement, Canada collects export taxes on shipments of softwood lumber to the United States when lumber prices fall below certain levels. In return for Canada's commitment to collect these export taxes, the Coalition agreed to settle outstanding trade actions it had brought against unfair Canadian lumber subsidies and to refrain from pursuing such actions while the SLA is in place.

The agreement also prohibits the Canadian federal and provincial governments from circumventing these export taxes by providing subsidies to Canadian softwood lumber producers in excess of those in existence on July 1, 2006. Otherwise, Canada would be simply collecting the export taxes with one hand and giving them back to the lumber producers with the other hand – effectively circumventing the export tax requirements.

For more information, please contact Carrie B. Nase at 215.299.2030 or cnase@foxrothschild.com.

Delaware Case Summary: State Supreme Court Rules on Applicability To Commence Subdivision Process After Enacted County Ordinances

By J. Breck Smith

In *Chase Alexa, LLC v. Kent County Levy Court, et al.*, 991 A.2d 1148 (Del. 2010), the Delaware Supreme Court weighed in on the issue of the applicability of various Kent County development ordinances enacted after the submittal of an application for preliminary subdivision plan approval. In reversing the decision of the Court of Chancery, the Supreme Court, applying "settled principles of statutory construction," ruled against Kent County by finding that under Kent County Code § 187-17(D), a preliminary subdivision application submitted within six months of the developer's preliminary conference with county officials would not have to comply with new development ordinances enacted after the date of the preliminary conference.

In connection with a proposed residential subdivision to be located on a 166-acre parcel of land in Kent County, Delaware, Chase Alexa, LLC submitted a concept plan and held a preliminary conference in May 2005 with county land use officials. During the following 10 months, Chase Alexa closed on its purchase of the property, met with land use planners and paid various fees and expenses totaling more than $700,000. In March 2006, Chase Alexa submitted a revised concept plan and held its second preliminary conference. In June 2006, four "Adequate Public Facilities Ordinances" (AFPOs) were introduced in Kent County Levy Court relating to central water supply, school capacity, traffic and emergency medical services, which proposed to require the existence of these essential public facilities in minimum standards for the approval of new developments. A month later, Chase Alexa submitted to the Kent County Planning Office its application for preliminary subdivision plan approval, and in September 2006, the Kent County Regional Planning Commission approved the preliminary plan. The four AFPOs, which provided that they would be effective retroactively to the date of their introduction in Levy Court, were enacted at various times between October 2006 and March 2007.

Although Chase Alexa was aware of the new ordinances, it believed they would not apply to its project. In April 2007, upon learning Kent County intended to apply the new ordinances to its subdivision and while continuing to obtain approvals needed to file its subdivision plan, Chase Alexa filed suit in the Court of Chancery against Kent County Levy Court, Kent County Regional Planning Commission and their members. In April 2009, the Court of Chancery decided cross motions for summary judgment in favor of Kent County, ruling Kent County Code §187-17(D) did not create a "safe harbor" for Chase Alexa's plan and the facts did not support the developer's claims of vested rights or equitable estoppel. The developer appealed.

The Delaware Supreme Court started its analysis by reviewing Kent County Code § 187-17 relating to the requirement of a preliminary conference in connection with major subdivision plat proposals. Code § 187-17(D) provides as follows:

> D. *The preliminary application must be submitted within six months of the preliminary conference meeting or another preliminary conference will be required and the project must meet all current standards.*

Chase Alexa's position was that its plan should not be subject to the AFPOs, as the plain language of § 187-17(D) protects a project from having to comply with any changes in statutes or regulations after the date of a preliminary conference as long as the preliminary application is filed within six months of the preliminary conference. Alternatively, Chase Alexa argued if the statute is deemed ambiguous, its interpretation should prevail because ambiguous zoning laws must be construed in favor of the landowner. Kent County's position was that the developer's reading of § 187-17(D) would lead to an absurd result of depriving the county of its discretion to adopt progressive zoning regulations in the public interest and to apply them to applications pending their review at a later stage of the approval process. In addition, Kent County argued since the statute does not expressly provide that applicants that meet the six-month requirement will not be subject to any new laws, a safe harbor should not be construed by its silence.

In analyzing initially whether the statute is ambiguous, the Supreme Court stated the fact that parties may disagree about the meaning of a statute does not create ambiguity, and if a statute is unambiguous, then the plain meaning of its language controls. The court additionally stated a statute is ambiguous only if it is reasonably susceptible of different interpretations. Concluding § 187-17(D) is plain and unambiguous, the court found that because the statute only requires applicants that miss the six-month deadline to attend another preliminary conference and comply with current standards, it follows that applicants that meet the six-month deadline need only comply with the standards in effect at the time of their preliminary conference. Further, even if the statute were deemed ambiguous, Chase Alexa's interpretation would prevail, because if there are two reasonable interpretations of a statute, the interpretation that favors the landowner controls. Finally, noting that approval of a preliminary plan is valid for 18 months, plans must be approved by Levy Court and

recorded within 24 months of preliminary approval, and construction must begin within five years from the date a plan is recorded, the court observed that under such regulatory scheme, if a developer does not take the required steps by the applicable deadlines, it will need to obtain a new approval that will be subject to any new laws.

For more information, please contact J. Breck Smith at 302.622.4208 or jsmith@foxrothschild.com.

FHA Extends "Anti-Flipping Waiver"

By Lauren W. Taylor

In an effort to continue stabilizing home values and improve conditions in communities experiencing high foreclosure activity, the Federal Housing Administration (FHA) extended its temporary waiver of the agency's "anti-flipping rule." The extension is intended to accelerate the resale of foreclosed-upon homes in neighborhoods struggling to overcome possible property abandonment and blight.

With certain exceptions, FHA regulations prohibit insuring a mortgage on a home owned by the seller for less than 90 days. Early last year, FHA temporarily waived this regulation through Jan. 31, 2011. On Jan. 28, the FHA posted a notice extending this waiver through the remainder of 2011.

This action will permit buyers to continue to use FHA-insured financing to purchase HUD-owned properties, bank-owned properties or properties resold through private sales. It will allow homes to resell as quickly as possible, helping to stabilize real estate prices and revitalize neighborhoods and communities.

Since the original waiver went into effect last February, FHA has insured more than 21,000 mortgages worth more than $3.6 billion on properties resold within 90 days of acquisition.

FHA research finds that in today's market, acquiring, rehabilitating and reselling these properties to prospective homeowners often takes less than 90 days. Prohibiting the use of FHA mortgage insurance for a subsequent resale within 90 days of acquisition adversely impacts the willingness of sellers to allow contracts from potential FHA buyers because they must consider holding costs and the risk of vandalism associated with allowing a property to sit vacant during a 90-day period of time.

To protect FHA borrowers against predatory practices of "flipping," where properties are quickly resold at inflated prices to unsuspecting borrowers, this waiver continues to be limited to those sales meeting the following general conditions:

- All transactions must be arms-length, with no identity of interest between the buyer and seller or other parties participating in the sales transaction.
- In cases in which the sale price of the property is 20 percent or more above the seller's acquisition cost, the waiver will only apply if the lender meets specific conditions.

The waiver is limited to forward mortgages and does not apply to the Home Equity Conversion Mortgage (HECM) for purchase program.

For more information, please contact Lauren W. Taylor at 215.918.3625 or lwtaylor@foxrothschild.com

Uniform Property Reassessment System Proposed in PA

By Herbert K. Sudfeld, Jr.

The Pittsburgh Tribune-Review reported on Jan. 19, 2011, that western state legislators are advocating the creation of a uniform, statewide process to update property values. Pennsylvania is one of only two states in the country that approaches reassessment in a fragmented fashion, leaving the responsibility to its 67 individual counties. A property's assessed value is utilized in calculating municipal, county and school district taxes.

State Representatives Jesse White (D-Washington) and Frank Dermody (D-Allegheny) argue a moratorium on county reassessments is necessary so that the state legislature can establish a statewide system.

During Pennsylvania's last legislative session, a similar measure successfully passed the State House but was not taken up by the Senate. Several concerns exist over whether such a bill, and any subsequent reform of the Commonwealth's property reassessment system, would survive a challenge on state constitutional grounds.

For more information, please contact Herbert K. Sudfeld, Jr. at 215.918.3570 or hsudfeld@foxrothschild.com.

PA Commonwealth Court Finds No Unlawful Spot Zoning in Ordinance Amendment

By Clair E. Wischusen

In *Takacs v. Indian Lake Borough Zoning Hearing Bd. ("Takacs I")*, — A.2d —, 2010 WL 5116376 (Pa. Commw. 2010), the Pennsylvania Commonwealth Court held an ordinance amendment that added permitted uses that could only be developed on one lakefront property owned by the borough council president did not constitute unlawful spot zoning because the uses applied to all properties in the zoning district, and protestants did not establish that the ordinance was arbitrary, unreasonable or had no relation to the public welfare.

In 2004, the Indian Lake Borough Council appointed an ad hoc committee to study the borough zoning ordinance and provide insight as to how it should be amended. The borough council president initially served on the committee but was replaced after he purchased a lakefront property at issue in the study. Based on the committee's recommendations, the borough council considered and ultimately adopted Borough Ordinance 144 on Aug. 20, 2007, which, among other things, added multifamily structures and commercial boat docking as permitted uses in the Commercial-Recreational (C-R) District. After Ordinance 144 was passed, protestants challenged its adoption by filing an appeal with the Zoning Hearing Board. The board rejected the challenge and the trial court affirmed.

On appeal to the Commonwealth Court, the protestants essentially offered three arguments as to why the adoption of Ordinance 144 was invalid: (1) the amendment was not initiated by the borough planning commission; (2) the borough council failed to provide notice of a map change; and (3) the changes to the C-R District constituted illegal spot zoning. The Commonwealth Court rejected all of these arguments.

First, the court rejected the argument that Ordinance 144 was invalid because it was not initiated by the borough planning commission as purportedly required by a provision of the borough zoning ordinance. The court found Section 609 of the MPC specifically provides for amendments **other** than those prepared by the planning commission. See 53 P.S. § 10609. The court held that to the extent a provision of the zoning ordinance limited initiation of zoning amendments to the planning commission, the provision was invalid because the MPC takes precedence over and invalidates all inconsistent municipal zoning enactments. See 53 P.S. § 10103.

Second, the court denied the protestants' argument that Ordinance 144 was invalid because the addition of new uses in the C-R District constitute a zoning map change, and the borough failed to provide notice of a map change pursuant to Section 609(b) of the MPC. See 53 P.S. § 10609(b) (requiring posting of the tract and mailing to all owners of property to be rezoned). The court held the addition of permitted uses to a zoning district does not constitute a zoning map change. Thus, Ordinance 144 was not invalid for failure to give notice pursuant to the provisions of Section 609(b) of the MPC.

Third, the court rejected several arguments that Ordinance 144 constituted illegal spot zoning. The court defined spot zoning as "a singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character for the economic benefit or detriment of the owner of that lot." The court stated to establish spot zoning, "the challenger must prove that the provisions at issue are arbitrary and unreasonable and have no relation to the public health, safety, morals and general welfare.

The court declined to find the amendment constituted spot zoning despite the protestants' assertions that multifamily and commercial boat dock uses were specifically added to the C-R District to accommodate development of the lakefront property owned by the borough council president. The court was unmoved and held the state of mind of a legislative body in amending a zoning ordinance is not relevant to determining its validity. The court stated the ordinance must stand or fall on its own terms.

Finally, the court rejected the argument that adding the new uses constituted spot zoning because, although they applied to all properties in the C-R District, they could not as a practical matter be developed on any property other than the borough president's lakefront property. The court found the commercial boat dock use was justified because it would benefit owners of non-lakefront C-R District properties who sought to rent a dock. Additionally, the court found there was conflicting evidence as to whether multifamily structure could indeed be developed on other properties in the C-R District.

For more information, please contact Clair E. Wischusen at 215.918.3559 or cwischusen@foxrothschild.com.

Rep. Harper Reintroduces Energy Efficient Building Bill

By Robert W. Gundlach, Jr.

Pennsylvania State Representative Kate Harper (R-Montgomery) is reintroducing legislation aimed at promoting the construction of energy-efficient and environmentally friendly buildings in the Commonwealth.

Under House Bill 193, the design, construction and renovation of state-owned or leased buildings receiving state funding would have to be built using high-performance standards.

"When we build a new government building in this Commonwealth, we expect it to serve present and future generations," Harper said. "These are not buildings with a short shelf life, and they should be designed for long-term efficiency and performance."

Specifically, the bill would require the application of high-performance construction standards to be applied where:

- A state-owned new building construction project is larger than 10,000 gross square feet.
- A new construction project is larger than 10,000 square feet and a Commonwealth agency has agreed to lease no less than 90 percent of the gross square feet.

The bill requires a minimum set of criteria for the high-performance buildings standards to be used to ensure compliance. These would include being consensus-based, employ third-party post-construction review and verification and have a track record of certified green buildings in the United States.

Additionally, projects would have to achieve a U.S. Environmental Protection Agency Energy Star Program rating of 85 or above.

"Pennsylvania government must lead by example to help make green building the rule rather than the exception," Harper said. "Green building is friendlier to the environment because it saves energy, and saving energy saves money. This is a very worthwhile investment in our Commonwealth's future."

A similar measure passed the House by a 180-17 vote last session, but the bill was not taken up by the Senate.

For more information, please contact Robert W. Gundlach, Jr. at 215.918.3636 or rgundlach@foxrothschild.com.

Fox Rothschild LLP
ATTORNEYS AT LAW