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# In the Zone

A Publication of the Real Estate Department and the Zoning and Land Use Practice Group

July 2010

## Calculating Your Upset Price Before You Buy: The Costs Every Investor Should Identify Before Purchasing Mortgage Notes in Foreclosure

By Lauren W. Taylor



As an investor, if you are purchasing a defaulted mortgage note, you generally intend to make a return on your investment in one of two ways: either by receiving a payoff from the borrower in an amount that exceeds the purchase price of the note, or by foreclosing on and selling or operating the mortgaged real estate at a profit. When your goal is the latter, it is particularly important to identify upfront some of the often overlooked costs that may accumulate as you move through the foreclosure process.

Before a sheriff's sale, a lender will carefully calculate its "upset price" – the amount that the lender is owed by the borrower. Usually, the "upset price" is the sum of the outstanding mortgage and any interest and fees and other costs accumulated since the start of the foreclosure process. If only an investor could know what its "upset price" would ultimately be before it purchased the defaulted mortgage note, the investor could know whether the investment would be profitable. Unfortunately, we cannot see the future. But, by knowing the types of costs that can arise during the foreclosure process, an investor can make an informed decision as to whether to purchase a defaulted mortgage note and at what price.

### Prior Liens and Municipal Water and Gas Charges

Before making an offer to purchase a defaulted mortgage note, one of the first things an investor should do is determine the amount of the liens that have priority

over the mortgage by obtaining a title search of the property. These items include real estate taxes (current and delinquent), municipal claims (such as some licensing violations), and gas and water and sewer charges (current and delinquent). It is important to know what these amounts are since they will be paid by you if you purchase the property back at the sheriff's sale or, if the property is sold to a third-party bidder, they will be paid before any distributions are paid on account of your judgment against the borrower.

### Realty Transfer Tax

Generally, sheriff's deeds to the foreclosing lender are exempt from realty transfer taxes. In Philadelphia, however, if you are not the original lender and you purchase the property back at a sheriff's sale, the sale will be subject to the realty transfer tax. The Philadelphia realty transfer tax is three percent of the computed value of the property. Considering the potential transfer tax when you formulate the purchase price for the defaulted mortgage note is important as it can mean tens of thousands of dollars you did not otherwise plan to spend.

### Sheriff's Poundage

In most counties, the sheriff's poundage (or the sheriff's commission) is equal to two percent of the bid price up to \$100,000 and .05 percent of any amount above \$100,000. In Philadelphia, the sheriff's poundage is eight percent of the bid price up to \$5,000 and then two percent on the remainder. The sheriff's poundage is paid before any distributions

are made to the lender. And, when the mortgaged property is purchased back by the lender, the lender must pay a sheriff's poundage based on the other costs of the sale (i.e., realty transfer tax, liens, judgments, recording fees, etc.).

### Costs of Delays

Time is money. This old cliché proves true with respect to purchasing defaulted mortgage notes if the foreclosure process is delayed. Delays can mean increased attorneys' fees and, if you as the lender have control of the property, delays can also mean additional months of maintenance fees, insurance payments and other costs of operating the property. A borrower can delay the foreclosure process by, among other things, petitioning to open the judgment, petitioning to postpone the sheriff's sale or by filing for bankruptcy. As a result, it is important to consider at the outset whether the borrower will delay the process. During your due diligence, you may be able to get an idea of whether the borrower is likely to delay the foreclosure process. For instance, a borrower that has greater equity in the mortgaged property may be more likely to delay the foreclosure process than a borrower that has no equity and is willing to walk away from the property without a fight.

Delays may also necessitate the court filing of a Petition to Reassess Damages, which is filed when the judgment entered against the borrower no longer includes all of the costs the lender has incurred to date, such as accrued interest. Petitions to Reassess Damages are particularly important where the property has an appraised value that is

greater than the judgment amount and is likely to be bid on by third parties at the sheriff's sale. This is because if the property is sold to a third party at the sheriff's sale, the winning bid amount will be distributed first to pay the sheriff's costs (including prior liens, poundage, municipal charges, transfer tax, etc.) then to pay the lender in the amount of the judgment, and

then any balance will be paid to other creditors or the borrower. If you as the lender have not filed, and been granted, a Petition to Reassess Damages to update your judgment before the sheriff's sale and the property is sold to a third party, you may not recover all of your costs.

When added together, these often-overlooked costs can be significant and can

affect an investor's bottom line returns. But by considering these costs before you commit to purchasing defaulted mortgage notes, the better off you will be down the road.

For more information, please contact [Lauren W. Taylor](mailto:Lauren.W.Taylor@foxrothschild.com) at 215.918.3625 or [lwTaylor@foxrothschild.com](mailto:lwTaylor@foxrothschild.com)

## NJ Supreme Court Rules on Applicable Time Frame for Commencing Inverse Condemnation Actions

By Alexander M. Wixted



The New Jersey Supreme Court recently ruled in favor of husband and wife property owners in an inverse condemnation case nearly a half of a century in the making. In *Klumpp v.*

*Borough of Avalon* (decided June 22, 2010), the Supreme Court decided that equity considerations demanded that Edward and Nancy Klumpp be permitted to amend their lawsuit against the Borough of Avalon to include a claim for inverse condemnation, which would allow them to seek compensation from the borough for the value of their land taken.

The facts and procedural history of the lawsuit are explored in detail in the Supreme Court's opinion. In short, the lawsuit revolved around the construction of a protective dune that the Borough of Avalon had caused to be constructed in the wake of a 1962 nor'easter storm (The "Great Atlantic Storm") that devastated much of the New Jersey shoreline. The plaintiffs had purchased beachfront property in 1962 upon which they constructed a summer home. Their home, like many others along the beach, was leveled by the storm. Acting upon authority granted to municipalities to address the emergencies caused by the storm's serious erosion and destructive consequences, the Borough of Avalon adopted a resolution authorizing the borough to take control and possession of any affected property without first paying compensation to the property owners.

However, the resolution contained an express statement that the borough could not deny just compensation to any property owner if the borough's occupation amounted to a taking.

The borough constructed a dune on the plaintiffs' property that was completed by 1965, but it did not pay the plaintiffs any compensation. As part of the dune construction, the borough placed fences to limit public access and constructed an alternate access point to the beach that traversed another portion of the plaintiffs' property. At the present time, the borough has been unable to prove the plaintiffs were ever notified before the taking occurred. The plaintiffs never sought to rebuild their home.

However, over the years the borough continued to send the plaintiffs property tax bills as owners of private property, and the property was listed as private on the official town maps. Further, the borough's position changed over the years as to the legal theory by which it exercised control over the plaintiffs' property. Several decades later, the plaintiffs filed their lawsuit, claiming that the borough's construction of the dune was a trespass, and later, they claimed that there was a compensable taking.

Generally, under federal and state law, a taking occurs when a governmental actor takes private property for public use without just compensation. A "taking" is analogous to a "condemnation," and the government's power to effectuate a taking

is referred to as "eminent domain." Under New Jersey law, the government must bring a condemnation proceeding in the proper exercise of its eminent domain powers. Where it does not, then the property owner may claim an "inverse condemnation" and seek compensation from the government actor for the fair market value of the property as of the date of the taking.

This case is noteworthy because the Supreme Court addressed an issue of first impression to New Jersey's highest court: What is the applicable time frame for commencing an inverse condemnation action? Relying on earlier decisions of the New Jersey appellate court, the Supreme Court established a rule of law that a six-year statute of limitations will apply to a property owner's inverse condemnation claim. Here, the plaintiffs filed their claim decades later, and both the trial court and appellate court denied the plaintiffs' inverse condemnation claim on the basis that it was filed well beyond the six-year statute of limitations that some New Jersey courts have applied. In establishing the time period, the New Jersey Supreme Court noted that the six-year period begins to accrue "the date that the landowner becomes aware, or through the exercise of reasonable diligence, should have become aware, that he or she had been deprived of all reasonably beneficial use."

The circumstances in this case are somewhat unique. The court determined it was not until 2005 that the plaintiffs became aware their property clearly was

part of the dune construction project. Up to that point, the plaintiffs' legal theory centered around the alleged trespass and subsequent denial of access by the borough. Among the borough's initial arguments was that the borough had acquired title through adverse possession. Once the Borough of Avalon asserted in 2005 that it entered the plaintiffs' property with the intention of effectuating a taking, the plaintiffs sought to amend their complaint to allege an inverse condemnation. The trial and appellate courts denied the plaintiffs' attempts to amend their complaint. The Supreme Court's decision now permits the plaintiffs to amend their complaint to include a claim for inverse condemnation and seek proper compensation.

Unfortunately, the plaintiffs' victory may be more moral than financial. Because the

Supreme Court's decision was limited to whether the plaintiffs could raise an inverse condemnation claim (which they now can), the court remanded the case back to the trial court for further proceedings to determine the amount of just compensation the borough must pay to the plaintiffs. The dune was constructed in or around 1965, so any amount of compensation would include 45 years of accrued interest. However, the law requires the trial court to determine the fair market value of the property as it was decades ago, and not based upon the fair market value of the property as it exists today (even with the distressed real estate market of late, the subject property would be quite valuable in today's dollars).

Going forward, the case will present unique challenges to the parties to determine the fair market value of the

property that was taken. As the Supreme Court noted, among the reasons for the limited timeframe for commencing an inverse condemnation action to ensure that "the closer in time the landowner commences the action, the more precise the valuation, **particularly when improvements by the government may be forthcoming and would alter the condition of the property at the time of the taking.**" (Emphasis added.) This case is certainly the exception to that rule. It may well boil down to a battle of the valuation experts to pin down a valuation from more than four decades ago.

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## Proposed Legislation in Pennsylvania

By *David H. Comer*



House Bill No. 2085 proposes to add to the Pennsylvania Municipalities Planning Code a Section 622, which could potentially prohibit the location of advertising signs in certain locations.

The proposed legislation provides, in pertinent part, that notwithstanding any other provision of law to the contrary and except as otherwise provided in the proposed legislation, "an advertising sign shall not be placed within 500 feet of an existing school, public playground, public park, residential housing area, child care facility, church, meetinghouse or other actual place of regularly stated religious worship or State-designated highway."

The proposed legislation does provide, however, that "an advertising sign may be located less than 500 feet from an existing school, public playground, public park, residential housing area, child care facility, church, meetinghouse or other actual place

of regularly stated religious worship or State-designated highway if, by majority vote of the governing body for the municipality in which the proposed advertising sign is to be located, the governing body issues the appropriate local permits and gives any other necessary approvals."

Furthermore, the proposed legislation addresses the procedure to obtain municipal approval, providing that "at least 14 days prior to the governing body of a municipality voting on whether to approve the issuance of the appropriate local permits or to give any other necessary approvals to allow an advertising sign less than 500 feet from a school, public playground, public park, residential housing area, child care facility, church, meetinghouse or other actual place of regularly stated religious worship or State-designated highway, one or more public hearings shall be held within the municipality following public notice. All owners of real property located within 500

feet of the proposed location shall be provided written notice of the public hearing at least 30 days prior to the public hearings being convened."

As used in the proposed legislation, the term "advertising sign" means either (a) a freestanding sign that (1) is supported by one or more poles, uprights or braces, (2) consists of 32 square feet or more of gross surface area, and (3) is internally illuminated and visible from a public way that utilizes technology to permit the characters, letters or illustrations to be changed or rearranged by computer, electronically or mechanically, without altering the face of the sign; or (b) an outdoor, off-premises sign on which space is leased or rented by the owner thereof to others for the purpose of conveying a commercial or noncommercial message.

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## Bill Would Provide Tax Incentives, Grants for Preservation Projects

By Robert W. Gundlach, Jr.



[House Bill 42](#), sponsored by state Rep. [Bob Freeman](#) (D-Northampton), would establish the Historic Preservation Incentive Grant Program within the Department of Community

and Economic Development. The program is designed to provide tax credits for certain historic commercial projects—up to \$500,000—and grants for certain residential external rehabilitation or restoration projects—up to \$15,000.

“These tax incentives and credits can act as a form of economic stimulus for older communities, creating restoration and

construction jobs while also preserving historic buildings and improving the look of older communities,” Freeman said.

The Pennsylvania Historical and Museum Commission would review requests within 45 days of application, with priority given to properties located within Elm Street and Main Street communities, enterprise zones and historic districts. All projects would have to be completed within two years.

“In order to preserve historic buildings, it is vital that we provide assistance to owners to renovate and preserve,” Freeman said. “These buildings are sometimes very costly to renovate and, because of that, can fall

into disrepair. This bill can make a difference for an owner.”

Freeman also co-sponsored a companion bill that would provide tax incentives for construction projects for environmentally friendly buildings. The measure would provide incentives for both the construction of high performance buildings as well as the renovation of existing buildings, making them high performance. The bill is sponsored by state Rep. Kate Harper, R-Montgomery.

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## Commonwealth Court Continues To Dial Back Dimensional Variances

By Andrew W. Bonekemper



The Pennsylvania Commonwealth Court recently held a cellular provider could not meet the relaxed standard for the grant of a dimensional variance where the property

already had another existing use in conformance with the ordinance.

In *Schomaker v. ZHB of the Borough of Franklin Park*, a cellular provider had submitted a request for two dimensional variances seeking permission to construct a 150-foot cell tower on an existing parcel containing an electrical utility substation, for which the cellular provider had already entered a lease. Communications towers up to 200 feet in height were permitted as a conditional use on the property, but only with a 200-foot setback from all neighboring properties. Due to the size, shape and topography of the property, it was physically impossible to meet the setback requirements with regard to all the adjacent properties. Appellant Schomaker, who had originally attempted to negotiate a lease for the tower to be placed on his own property, opposed the application.

Based on the relaxed standard for the granting of a dimensional variance set forth in *Hertzberg v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 554 Pa. 249, 721 A.2d 43 (1998), the zoning hearing board granted the variances and approved the application subject to the governing body’s review of the conditional use application. On appeal, the trial court affirmed the grant of the variances.

On Schomaker’s appeal to the Commonwealth Court, the court reversed the ZHB and the trial court and ruled the grant of the variances was an abuse of discretion. In reaching its decision, the Commonwealth Court relied upon two decisions following *Hertzberg* that placed some limitations on the hardship required for dimensional variances. First, the court discussed *Yeager v. ZHB of the City of Allentown*, 779 A.2d 595 (Pa. Commw. 2001), in which the court found Land Rover’s company-imposed requirements for a larger showroom than that permissible on a property did not justify a grant of a dimensional variance because a smaller showroom suitable for different brands of automobiles could comply with the ordinance. The court ruled that “a substantial burden must apply to all

dimensionally compliant uses of the property, not just the particular use the owner chooses.” *Id.* at 598. Second, the court cited *Twp. of East Caln v. ZHB of East Caln Twp.*, 915 A.2d 1249 (Pa. Commw. 2007), wherein the court reversed the grant of a dimensional variance for the extension and expansion of an existing cell tower. The court again ruled the hardship was not imposed upon all uses of the property but, instead, only affected the developer’s preferred use.

Based on the two precedents, the court found the proposed cell tower could not meet even the relaxed standard for the grant of a dimensional variance. The court noted there was already an existing permitted use on the property and, therefore, a reasonable use of subject property could obviously be made without the grant of a variance. Therefore, the court found no hardship existed and further noted, even if there had been a hardship, the variances were not the minimal variances necessary to afford relief, as a taller tower could have been placed at a lower point on the property further from the property lines, albeit still within the setback.

The decision in *Schomaker* reinforces the ongoing trend in Pennsylvania's appellate courts to restrict the grant of dimensional variances, which had been very generous in the immediate aftermath of the *Hertzberg*

decision. While *Hertzberg* was initially received as an open door to all but excuse the hardship requirements for dimensional variances, the decision in *Schomaker* further underscores the current direction back

toward a more restrictive view of dimensional variances.

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## Proposed Legislation in Delaware

By **Michael J. Isaacs**



House Bill No. 392 proposes to require a landlord in a manufactured home community to make a community center available to a tenants' association or, if none exists, to a group of tenants to use to hold meetings addressing matters affecting or relating to the tenants' rights, obligations and/or privileges in

and/or relating to the manufactured home community. Use of the community center by the tenants for such meetings shall be at no charge and shall be permitted within a reasonable amount of time after the tenants' association or group of tenants have made a request to the landlord. Representative Valerie Longhurst and Senator Bruce C. Ennis proposed this legislation. In the last several years, a great

deal of new legislation has been enacted to protect the rights of tenants in manufactured home communities and to preserve housing in mobile home parks.

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## Tax Assessment Filing Deadline Approaches

By **Herbert K. Sudfeld, Jr.**



Filing deadlines are quickly approaching for taking a tax assessment appeal for the 2011 tax year in the five-county area. The deadline is August 1, 2010, for Bucks, Chester and Delaware counties. The deadline is September 1, 2010, for Montgomery County and the first Monday of October for Philadelphia County. The State Tax Equalization Board

(STEB) Ratio will be published at the end of June, and it is expected that the ratios will increase in each county this year, thereby lowering the assessed market value of properties throughout the area. This will make it slightly more difficult to obtain an assessment reduction for marginally over-assessed properties but should still allow for substantial reductions for those properties that have seen a true drop in market value over the last few years.

For a free analysis of whether you should be taking an appeal this year for your commercial, industrial or residential property, please contact [Herbert K. Sudfeld, Jr.](mailto:Herbert.K.Sudfeld.Jr@foxrothschild.com) at 215.918.3570 or [hsudfeld@foxrothschild.com](mailto:hsudfeld@foxrothschild.com). If you are a tenant and pay the taxes for the leasehold space, your lease may entitle you to appeal the real estate tax assessment. Check your lease, or contact Herb and he can review it for you.

## Chester County Health Department Revises Fee Schedule

By **Robert W. Gundlach, Jr.**

Six months after releasing a new fee schedule, the [Chester County Health Department](http://www.foxrothschild.com) has revised and approved a [new fee schedule](#) for on-lot sewage disposal systems and well drilling, effective June 1, 2010.

The Department reacted to concerns from various local contractors over the January 1 schedule. That fee schedule had attempted to break out the individual costs for each activity (testing, inspecting, etc.). However, due to confusion within the contractor

community, the Department opted to return to a single-fee style of charging for its services.

Many local agency and health department budgets across Pennsylvania have suffered as a result of the Department of Environmental Protection balking on its reimbursement for on-lot sewage programs. Consequently, and at the urging of Gov. Rendell, delegated agencies have been raising fees to cover all costs.

The Chester County Health Department calculated its most expensive sewage permitting scenario and set its fees accordingly. For a new major permit that requires testing, a residential permit would cost \$1,700.

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### Recent Successes

The Bucks County Real Estate Team recently secured major victories for two long-standing Doylestown institutions, with Herbert K. Sudfeld, Jr., obtaining seven variances from Doylestown Township for the New Apostolic Church, and Robert W. Gundlach, Jr., obtaining preliminary/final plan approval for the Doylestown Presbyterian Church, all to allow much needed expansions and renovations to the churches and their facilities.

Robert W. Gundlach, Jr., obtained the Warrington Township Planning Commission's recommendation for approval of a rezoning proposed by Teva Pharmaceuticals USA in connection with its proposed construction of a new main

warehouse/distribution center on approximately 160 acres at the intersection of County Line Road, Limekiln Pike and Lower State Road. Rob also obtained five variances from Warrington Township to allow the construction of a self-service car wash facility.

Herbert K. Sudfeld, Jr., obtained an extension of time of the five-year development requirement under Section 508 of the MPC for a client's subdivision in Richland Township.

Also, the Bucks County office achieved a victory in a challenge to an agricultural soil overlay in Tinicum Township, Bucks County, which limited development in all zoning districts to no more than 25

percent of the agricultural soils on a property. In an issue of first impression, the Bucks County Court of Common Pleas found that the township had improperly applied its agricultural soils overlay to the districts designated to accommodate development. The court found that by effectively transforming the entire township into an agricultural conservation district, the township had demonstrated its unwillingness to reach a meaningful balance between agricultural preservation and opportunities for overall community growth and development. The court granted the applicant's land use appeal and remanded the case back to the township for approval of the applicant's development plans.

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## Closing Deadline for Home Buyer Tax Credit Extended to September 30, 2010

By **Clair E. Wischusen**



On July 2, 2010, President Obama signed into law legislation to extend the deadline to close for the popular home buyer tax credit program. Under the tax credit's prior deadline, qualifying purchases that were under contract by April 30 were required to close by June 30. As reported by the *Miami Herald*, an estimated 180,000 consumers

eligible for the government's tax credit were at risk for losing the benefit due to a huge backlog by lenders hindering their ability to complete the transaction. Under the latest extension, consumers have three more months to seal their deals. The closing deadline has been pushed to September 30, 2010, in an effort to ensure that qualifying sales can close. According to the realtors, 4.4 million people have taken advantage of the various home buyer

tax credits offered to consumers since February 2009. The tax credit helped fuel a major sales spike immediately before the qualification deadline in April. The Commerce Department reported that sales of new single family homes were up 14.7 percent that month.

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## Grand Jury in Corruption Trials Take Aim at PennDOT Unit

By **Robert W. Gundlach, Jr.**

While the so-called "Bonusgate" trials in Harrisburg, PA, have primarily focused on issues of state officials and employees politicking on the taxpayers' dime, the grand jury has made a number of recommendations on the way business is conducted in the state capitol.

As reported by [The Patriot News](#), Gov. Rendell is "disbanding a special unit of the

PennDOT that the grand jury said exists only to expedite paperwork for legislators seeking to win favor with voters." According to the report, the House Democrats and Republicans pay nearly \$900,000 a year to staff the unit. The grand jury suggested a number of other reforms to the Pennsylvania legislature.

The newspaper reports that the unit will be disbanded and the PennDOT staff in question reassigned. Assistance with PennDOT issues will still be available to legislators, but only through normal administrative channels.

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## Alternative Energy Bill Passes PA House

By **Carrie B. Nase**



On June 23, 2010, a bill authored by State Rep. [Tom Houghton](#) (D-Chester) that would remove obstacles for Pennsylvania homeowners who want to take advantage of alternative energy use in their homes passed the state House.

The legislation would make it easier for homeowners to install solar panels on their roofs, which will support residents employing alternative energy means. However, restrictions for other alternative energy installations elsewhere on the property would not be changed.

[House Bill 2234](#) would prohibit restrictions to deeds or covenants of residential properties that prevent homeowners from installing solar panels.

Houghton said the final version of the bill addressed concerns raised by local homeowners' associations and includes an amendment he authored, which was supported by the Communities Associations Institute, that ensures the right of homeowners while also recognizing the legal and safety liability of homeowners associations.

Houghton also worked to preserve the ability of homeowners associations to

reasonably regulate the aesthetic impact of solar panels to ensure the harmonious design of a community is maintained as intended.

"Like the 21 other states with solar access laws, I wanted this bill to be about creating a freedom of energy choice for Pennsylvania homeowners, while protecting essential HOA agreements," Houghton said.

The bill heads to the state Senate for consideration.

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## Final-Form Chapter 102 Regulations Move to IRRC

By **Robert W. Gundlach, Jr.**

After obtaining final-form approval by the Pennsylvania Environmental Quality Board, the new Chapter 102 regulations have moved on to the Independent Regulatory Review Commission for final consideration. The current Chapter 102 language has undergone successive revisions since first introduced as proposed last year. DEP has amended or changed the erosion and sediment pollution control and stormwater regulations in response to public feedback,

reaction to various stakeholder groups and input from the Water Resource Advisory Committee.

The Independent Regulatory Review Commission (IRRC) has planned a hearing to consider final approval of the regulations on June 17, 2010. If it approves them, the legislative oversight committees—the Pennsylvania House and Senate Environmental Resources Committees—can opt to formally review them.

Legislative oversight committees have 14 days from IRRC's approval to disapprove the regulations. To formally bar the regulations from enactment, the General Assembly would then have to vote to disapprove the regulations within 30 calendar days (or 10 legislative days), and the governor would have to sign the disapproval.

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## State House OK's Plan To Verify Immigration Status

By **Lauren W. Taylor**

By an overwhelming vote, Pennsylvania's House of Representatives approved on June 8, 2010, legislation aimed at curbing construction companies from hiring illegal immigrants.

House Bills [1502](#) and [1503](#), which passed with overwhelming bipartisan support and now move to the state Senate for consideration, would require contractors and subcontractors doing business in Pennsylvania to verify the employment eligibility of their employees.

New employees would be verified through the E-Verify Program. Existing employees would be verified through the Social Security Number Verification Service. Contractors that violate these rules could be barred from state projects or, in the case of private construction work, face forfeiture of state licenses or certifications. The bills also would offer protection for whistle-blowers who report construction sites hiring illegal workers.

There are an estimated 35,000 illegal construction workers in Pennsylvania. The unemployment rate in the construction industry is more than 35 percent. In addition to the negative impact on jobs, prime sponsor [Rep. Galloway](#) (D-Bucks County) said illegal employment brings fiscal strain to local communities and the state.

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## New PennDOT Policy on Stormwater Drainage Effective

By Kimberly A. Freimuth



In a [letter distributed to PennDOT district offices](#) on June 24, 2010, the Pennsylvania Department of Transportation noted it is implementing new standards pertaining to the management of stormwater runoff directed to new or existing drainage facilities in the state highway right-of-way.

PennDOT's intent is to provide a consistent approach in identifying maintenance responsibility for the installation of new drainage facilities and/or modifications to existing drainage facilities under various scenarios encountered during the highway occupancy permitting (HOP) process. The new policy is effective immediately and

includes any HOP not yet issued by PennDOT.

The stormwater facility maintenance updates require a local government or a local government and private applicant to be co-applicants for permits involving subsurface stormwater facilities connecting to highway drainage facilities within the state right-of-way. Permits for subsurface drainage facilities not connected to highway drainage facilities can be issued to public or private applicants if they can be defined as a utility facility under Pa Code, Title 67, Chapter 459 and the consent, permission or authorization from the downstream property owner is obtained. Permits related to new land development may be issued to private applicants if for surface stormwater facilities.

It is recommended that every new land development project be designed to retain the site development stormwater runoff or provide a design that does not require stormwater to be directed to the state highway right-of-way. Realistically, however, this is not always possible, and PennDOT is faced with site development stormwater designs that are directing and discharging stormwater drainage toward and within the state highway right-of-way.

The policy changes may affect stormwater management and facilities design of runoff produced by the construction of sidewalks, curbing and other drainage conveyors adjacent to state highways.

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## EPA Seeking Input on Changes to Sanitary Sewer Overflow and Peak Flow Rules

By Robert W. Gundlach, Jr.

On May 26, 2010, the Assistant Administrator for the Office of Water signed a [Federal Register Notice](#) seeking stakeholder input to help the EPA determine whether to modify the National Pollutant Discharge Elimination System (NPDES) regulations as they apply to municipal sanitary sewer collection systems and [sanitary sewer overflows](#).

Input will be provided through both written comments and during four public listening sessions in late June and early July: Seattle (June 24), Atlanta (June 28), Kansas City (June 30) and Washington, DC (July 13). A webcast for members of the public who cannot attend the listening sessions will be held July 14, during which the EPA will accept oral comments over the phone. All sessions will be held from 10 a.m. to 3 p.m. local time. View a [copy of the presentation materials](#).

Properly designed, operated and maintained sanitary sewer systems are

meant to collect and transport all of the sewage that flows into them to a publicly owned treatment works (POTW). However, occasional unintentional discharges of raw sewage from municipal sanitary sewers occur in almost every system. These types of discharges are called sanitary sewer overflows (SSOs). SSOs have a variety of causes, including but not limited to severe weather, improper system operation and maintenance and vandalism. The EPA estimates that there are at least 40,000 SSOs each year. The untreated sewage from these overflows can contaminate our waters, causing serious water quality problems. It can also back up into basements, causing property damage and threatening public health

Registration is now open for the public listening sessions on the EPA's efforts to initiate rulemaking to address sanitary sewer overflows and to resolve longstanding issues concerning peak flows.

These public listening sessions will afford an opportunity for the public to provide input on regulatory and other actions the EPA is considering.

After a brief presentation by the EPA, public comments will be accepted. Attendees may sign up to give brief three-minute oral comments at the sessions, but written comments will also be accepted until August 2. The July 14 webcast will be a "virtual" listening session for anyone who cannot participate in one of the four live listening sessions. During the webcast attendees will be able to give comments over the phone.

To sign up for the public listening sessions or the webcast, please visit the [EPA's web site](#).

For more information, please contact [Robert W. Gundlach, Jr.](#) at 215.918.3636 or [rgundlach@foxrothschild.com](mailto:rgundlach@foxrothschild.com).

### Pennsylvania Realty Transfer Tax Statement of Value Revised

**By Lauren W. Taylor**

The Pennsylvania Department of Revenue recently revised the Realty Transfer Tax Statement of Value (Form REV-183), which is the form used to either claim an exemption from the realty transfer tax or report full consideration for the realty transfer tax payment when the full sale price is not set forth in the deed.

The revised form features an additional yes/no question clarifying whether the transfer was part of an assignment or relocation. In addition, the revised form includes a new exemption category for transfer from a trust, and it requires the taxpayer to provide the date of transfer into trust and attach a copy of the trust

document and amendment if the trust was amended since the date of transfer.

The revised form is available at [www.revenue.state.pa.us](http://www.revenue.state.pa.us)

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### Lehigh County Explores Sewer Capacity Expansion Options

**By Robert W. Gundlach, Jr.**

The Lehigh County Authority is examining its options to upgrade sewer treatment facilities and expand its current capacity. Combined with the City of Allentown, the authority [serves](#) much of central Lehigh County, PA. The authority has come up with [four options](#) to upgrade sewage treatment capacity, including a major \$221 million expansion of the Kline Island treatment plant, upgrades to Lehigh County Authority plant and/or various discharge options.

The wastewater treatment plant owned and operated by the City of Allentown has no

additional capacity available to allocate for future needs. The plant can treat up to 40 million gallons of wastewater a day, on average, and all of that capacity has already been sold to the municipalities served by the plant or is held by Allentown for its needs. Based on economic growth projections for this region, additional capacity will be required in three to five years to meet the needs of existing and future customers.

A steering committee is being formed to allow key stakeholders to discuss the options that are available in a productive

way. Stakeholders include municipalities and organizations that must decide the future of regional wastewater services, customers connected to the regional sewer system, organizations concerned about environmental impacts and others that have an interest. The authority held a [public meeting](#) on June 10, 2010, to outline potential plans and hear from the community.

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### PA Senate Environmental Resources and Energy Committee Takes No Action on New Stormwater Regulations

**By Clair E. Wischusen**

After the Pennsylvania [Independent Regulatory Review Committee](#) approved the final-form [Chapter 102 rulemaking](#) on June 17, the state legislative oversight committees exercised their option to review the regulations for 14 calendar days. However, in a [letter](#) sent on June 29, Senate Committee Chairwoman [Mary Jo White](#) (R-21) informed DEP Secretary John Hanger that the committee does not intend to take any formal action on the new erosion and sedimentation pollution control/stormwater regulations.

The committee could have voted to “disapprove” the rulemaking, which would have sent the disapproval to the full General Assembly for its consideration. However, since the committee opted against taking any action, the final-form regulations will move forward with likely publication in the [Pennsylvania Bulletin](#) in mid-July. With an effective date 90 days after publication, the new rules will take effect across the Commonwealth sometime in November.

The committee still recognizes that many aspects of the new Chapter 102 regulations

are impractical and will pose a hardship on many future applications. In lieu of taking formal action on the Chapter 102 regulations, the committee has expressed the possibility of fixing some of the onerous aspects through a legislative fix to the Pennsylvania Clean Streams Act. Such a bill would need to go through the normal legislative process.

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## Buffer Regulations Approved by PA IRRC

By *Robert W. Gundlach, Jr.*

On June 17, 2010, the Pennsylvania Independent Regulatory Review Committee approved the [final-form Chapter 102 regulations](#), which govern erosion and sedimentation pollution control as well as stormwater controls. The regulations contained a contentious provision requiring new developments in an Exceptional Value or High Quality watershed to implement a 150-foot buffer on either side of streams and other waterways.

By a vote of 4-1, the [IRRC approval](#) represents one of the final steps necessary before the regulation can go into effect. Among the remaining hurdles is a legislative

review at the hands of both the House and Senate Environmental and Energy Resource Committees. Last week, the House joined the Senate in opting to exercise its review power, which includes a 14-day window following the IRRC action to evaluate the regulations and vote to approve or disapprove. Should either committee vote to disapprove, the General Assembly will have 10 legislative days (or 30 calendar days, whichever is longer) to likewise vote to disapprove the regulations. If such a vote occurs, the legislative disapproval will have to overcome a potential veto by Gov. Rendell, who has been supportive of the regulations.

Leading up to IRRC's hearing and vote, countless interested parties offered [comments and testimony](#), advocating both the approval and disapproval of the regulations. Many state legislators likewise [recommended](#) a course of action for IRRC.

Under the most likely scenario, the new Chapter 102 regulations will go into effect sometime this fall.

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