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In the Zone

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Pennsylvania Passes Long Awaited Marcellus Shale Regulation

By Philip L. Hinerman

The Pennsylvania legislature recently passed the long awaited regulation of Marcellus Shale exploration and drilling. The new law significantly expands the power of the Pennsylvania Public Utility Commission (PUC) and levies impact fees for wells drilled in the state.

The most publicized portion of the new law relates to impact fees, which vary based on the price of natural gas. If gas prices stay below $2.25 per thousand cubic feet, the fee will be around $190,000 per well during the life of the well. If prices triple, the fee could be in the range of $355,000.

Under the new law, the PUC will collect impact fees from natural gas drillers. The PUC will disburse the funds under a formula providing 60 percent to the counties and local government in the shale drilling area and 40 percent toward statewide environmental projects. Those projects may be a variety of ventures affecting water, park lands and infrastructure improvements.

If a municipality passes an ordinance restricting drilling, there is a new challenge available. Drillers can challenge those ordinances either at the PUC or in Common Pleas Court.

To help local governments, the law allows them to essentially pre-approve the changes in the law by requesting PUC input on any proposed zoning ordinance that restricts drilling.

The PUC does not currently have the staff to collect funds and review ordinances. The fees it will be collecting begin this September to cover drilling activity in 2011. The PUC anticipates subcontracting with a vendor to perform these services for at least the balance of 2012 and for half of the year in 2013. It also anticipates hiring staff to review proposed ordinances.

The law provides new responsibilities for the PUC in addition to more stringent drilling regulations.

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Lenders Beware - Sheriff Sale Notices in New Jersey

By Melvyn J. Tarnopol

A recent New Jersey case, *LaSalle Bank National Association as Trustee v. Plata*, App. Div. 06-2-5386, shows how technical the notice requirements are for sheriff sales in New Jersey and how a lender can be tripped up by them.

Martha Plata owned an interest in a property in Union City, New Jersey. LaSalle Bank obtained a final judgment for foreclosure and obtained an order for Plata's property to be sold by the sheriff. LaSalle's attorney sent a letter to Plata notifying her of the scheduled October 22, 2009 sheriff's sale by both certified mail and regular mail.

The sheriff's sale was adjourned to March 25, 2010. That morning, Plata filed a bankruptcy petition, resulting in the sale being further adjourned. The sale was subsequently adjourned a number of times until finally taking place on May 27, 2010. LaSalle Bank bid the property at the sale so there were no third parties involved in the sale.

Plata submitted a certification to the effect that at the time that she delivered a copy of her bankruptcy petition to the sheriff's office, an employee of the sheriff's office told her that the sale had already taken place on March 25, 2010. On May 3, 2010, Plata filed a motion in the trial court seeking to set aside the sale, which she believed had taken place on March 25, 2010.

Plata certified that when she called the sheriff's office on June 17, 2010, she was informed that the sale had taken place on May 27, 2010. Plata claimed she was never notified that the sale would take place on May 27, 2010, as she was under the impression that the sale had already taken place on March 25, 2010.

LaSalle's attorney provided the court with a copy of a letter informing Plata of a May 20, 2010 sheriff's sale date and she testified that she provided Plata with a copy of a subsequent letter requesting postponement of the sale until May 27, 2010.

Plata claimed that she never received these letters. Court rules provide that when a court authorizes the public sale of property, notice must be sent to the owner at least ten days prior to the date set for the sale by registered or certified mail. As mentioned above, LaSalle's attorney specified that she had done this, and although the certified letter had never been claimed, the regular mail letter had not been returned.

Subsequent notices of postponements of sheriff's sales are not required by rule to be sent by certified or registered mail. Instead, in the case of adjournments, the rules and case law require that "some reasonable communication" be made informing the owner of the adjournment.

Although LaSalle's attorney testified as to sending the letters specifying the adjournments, she apparently failed to furnish the court with a certification stating that (1) the mailing was correctly addressed; (2) proper postage was affixed; (3) the return address was correct; and (4) the mailing was deposited in the proper mail receptacle or at the post office.

The Appellate Division held that LaSalle's failure to provide a certification as to all those items caused its notice to Plata to be defective. The court further noted that even had Plata seen the notice adjourning the sale to May 20, 2010, LaSalle did not show evidence that it had informed Plata of the further adjournment to May 27, 2010, when the actual sale took place.

The court ruled that LaSalle's failure to prove that it had properly sent the notices caused the sale to be defective, and the court ordered the sale to be vacated.

The lesson here is that courts will strictly construe notice requirements for sheriff's sales, so lenders have to be aware of this and be prepared to show how notices were delivered. One small, technical slip up could result in a sale being overturned.

It should be noted that the Appellate Division stated at the end of the opinion that because the property was sold to LaSalle, and there was no evidence that innocent third parties had any interest in the property, the court was proceeding with vacating the sale. The result might have been different had a third party purchased the property at the sheriff's sale.

In any event, lenders need to be sensitive to the fact that courts are going to be bend over backwards to protect debtors, especially in the current market.

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Fox Rothschild Successful in Challenge to Governor Christie's Reorganization Plan Abolishing COAH in New Jersey

By Henry L. Kent-Smith

In a published opinion on March 8, 2012, the New Jersey Appellate Division found that Governor Christie's Reorganization Plan 01-2011 violates both the Reorganization Act of 1969 and constitutional principles of the separation of powers. Reorganization Plan 01-2011 abolished the Council on Affordable Housing and transferred all powers of the Council to the Commissioner of the Department of Community Affairs.

Fox Rothschild appeared as Amicus on behalf of three nonprofit agencies: the Housing and Community Development Network of New Jersey, the Corporation for Supportive Housing and the Mercer Alliance to End Homelessness. These three nonprofit agencies successfully argued that in the Fair Housing Act, N.J.S.A. 52:27D-301 et seq., the legislature is committed to providing a voice for affordable housing advocates on COAH. This legislative commitment could not be abolished through the Reorganization Act of 1969. By eliminating the Council on Affordable Housing, Reorganization Plan 01-2011 divested affordable housing advocates of any voice in the creation of affordable housing policy or adjudication of affordable housing disputes.

The Appellate Division construed the Reorganization Act of 1969 to exclude the abolition of independent agencies "in but not of" the executive branch. The court found that such an expansive reading of the Reorganization Act violates principles of separation of powers underlying the creation of quasi-independent agencies by the legislature.

The court distinguished the simple relocation of an agency from one department in the executive branch to another while keeping the agency's powers, duties and composition intact from the entire abolishment of the agency and referral of the underlying legislative powers to a different department in the executive branch. In the first instance, the reorganization of a quasi-independent "in but not of" agency would be considered within the powers vested to the governor under the Reorganization Act, as such a relocation does not and would not impair or impede the function of the agency as created and vested through the legislature. However, Reorganization Plan 01-2011 abolished the council and transferred all powers directly to the Commissioner of the DCA.

On behalf of the affordable housing advocate groups, the court endorsed the argument that the legislature crafted the council to be a balanced group of voices to determine affordable housing policy, and that affordable housing advocacy groups were part of the composition of the council and their voices could not be silenced through use of the Reorganization Act.

Governor Christie has already announced his intention to appeal this decision to the New Jersey State Supreme Court. In the interim, Reorganization Plan 01-2011 has been invalidated, and as such, COAH has been "resurrected." Questions remain as to the composition of the council, as many members terms have expired, and whether Governor Christie will reappoint the membership of the council. We will continue to update our readers on the ongoing saga of affordable housing policy in New Jersey.

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STEB Grants Philadelphia Taxpayers' Petition To Intervene To Serve the Public Interest

By Jeffrey M. Herskowitz, Elizabeth J. Hampton and Christopher C. Fallon, III

On March 2, 2012, Pennsylvania's State Tax Equalization Board (STEB) granted the Petition to Intervene filed by Fox Rothschild on behalf of more than 150 Philadelphia taxpayers, as noted in the *Philadelphia Inquirer*. The Petition was filed in response to an appeal launched by the City of Philadelphia to challenge the certified Common Level Ratio (CLR). The taxpayers sought intervention in the STEB proceeding to: (i) ensure full and complete disclosure of appropriate information, (ii) vigorously defend the certified 18.1 percent CLR for Philadelphia County promulgated by STEB and published in August of 2011 and (iii) foster transparency in the process of CLR determination.

Recognizing the impact of the city's appeal, specifically with regard to the effect it might have on the real estate tax liability of all Philadelphia taxpayers, STEB granted taxpayers' intervention to serve the public interest.

STEB has permitted limited intervention on the issue of whether it was legally proper and statistically sound for the City of Philadelphia's Office of Property Assessment (OPA) to have adjusted its assessed values based on Philadelphia Code § 19-1308.

Philadelphia Code § 19-1308, enacted on June 10, 2004 (2004 Ordinance) is the city's purported justification for the artificially inflated data submitted on Jan. 13, 2012. Specifically, the city asserts that the 2004 Ordinance directs the Philadelphia Board of Revision of Taxes (BRT) to refrain from amending the ratios used to calculate assessed value unless city council adjusts real estate tax rates so such a change is revenue neutral, or unless city council otherwise approves the change by ordinance.

The city is attempting to impose the same restrictions on STEB, which would require a state agency to obtain approval for the Philadelphia County CLR from local government. Taxpayers submit that such a result is not supported in the language of the 2004 ordinance and is expressly prohibited by the doctrine of conflict preemption.

Having granted the taxpayers intervention on this issue, STEB will permit taxpayers to participate in a hearing to determine whether it is proper for STEB to modify or adjust its computation of the 2010 CLR for Philadelphia County.

As announced by STEB this week, the hearing shall take place on Friday, March 23, 2012. Efforts are underway to prepare for the hearing in order to advance the interests of our clients.

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Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 1702 proposes to reenact and amend what is commonly referred to as the Borough Code, which has been substantial in its current form since 1966. According to an executive summary on the proposed revisions to the Borough Code, the Pennsylvania General Assembly Local Government Commission ("Local Government Commission") wrote that the proposed legislation "seeks to modernize and recodify the Borough Code," which it adds is "an effort that has not been attempted in the last 45 years."

The Local Government Commission provides that since 2003 the Borough Code Revision Committee that was established by the Pennsylvania State Association of Boroughs has reviewed the Borough Code in order to, among other things, remove obsolete provisions, consolidate common subjects and incorporate pertinent and updated language.

One interesting proposed addition to the Borough Code as highlighted by the Local Government Commission would "permit members of council to participate in meetings by telecommunication device provided a quorum has been established by the physical presence of a majority of the membership of council."

As for the status of the proposed legislation, the House of Representatives voted on and passed House Bill No. 1702 on December 19, 2011. The Senate is now in the process of reviewing it.

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New DEP Waiver Rules in New Jersey

By Jack Plackter

In an action, favoring developers and condemned by environmental groups, the New Jersey Department of Environmental Protection has adopted a rule allowing relaxation of the Department's standards under certain circumstances. The DEP Waiver Rule will be published in the April 2, 2012 "New Jersey Register."

The Waiver Rules do not impose any new DEP standards. Instead, the rules provide a mechanism for the consideration of relaxation of standards in the DEP's existing rules in appropriate circumstances.

The DEP provides that the purpose of these rules "is to set forth the limited circumstances in which the department may, in its discretion, waive the strict compliance with any of its rules in a manner consistent with the core missions of the department to maintain, protect and enhance New Jersey's natural resources and to protect the public health, safety and welfare, and the environment."

The regulations provide the limited basis for a waiver and require that the department may, in accordance with this chapter, prospectively waive strict compliance with any of its rules, only when it determines at least one of the following exists:

1. Conflicting rules are adversely impacting a project or preventing activity from proceeding;
2. Strict compliance with the rules would be unduly burdensome;
3. A net environmental benefit would be achieved; or
4. A public emergency that has been formally declared.

The rules specifically provide that no waiver will be approved of a specific requirement of, or a specific duty imposed by, a federal statute or regulation, unless that statute or regulation provides for such a waiver. Further, waivers are precluded for standards contained in a federally delegated, authorized or assumed program, where the waiver would not be consistent with New Jersey's delegation, authorization or assumption of the authority under that federal program.

No requests for waivers will be accepted before August 1, 2012, and there is no time frame for the DEP to act on a waiver request.

The rules further contain notice and decision requirements calculated to provide the public with notice of the application and the applicant with a basis for DEP's approval or denial of a requested waiver.

The New Jersey Department of Environmental Protection rule adoption document and additional information regarding the waiver of department rules can be found at http://www.state.nj.us/dep/waiverrule/

These new waiver rules will provide the development and regulated community with some flexibility to apply for waivers in the limited instances set forth in the rules and would give the DEP some added flexibility to enable worthwhile development projects to move forward.

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