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In the Zone

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NJ Tax Court Denies Municipality's Motion To Compel Production of Tax Returns Relative To Income-Producing Hotel Property in Pending Property Tax Appeal

By Alexander M. Wixted

In a recent unpublished decision (*HPT CW Properties Trust v. Township of Mount Laurel*, Docket No. 003351-2010 (Decided October 27, 2011)), the Tax Court of New Jersey refused the efforts of Mount Laurel Township to compel the production of income tax returns of a plaintiff-taxpayer in a property tax appeal dispute. The court's decision reiterates the strong presumption under the law against the disclosure of income tax returns except in compelling and limited circumstances.

The matter came before the Tax Court on the township's motion to compel the production of documents. It sought federal income tax returns against the owner of income-producing real property that was the subject of the pending tax appeal. The procedural history of the appeal appears straight-forward. The plaintiff filed a property tax appeal challenging the 2010 tax assessment on the limited service hotel operated on the subject property. From all accounts, the case proceeded on the usual course, and the parties exchanged discovery pursuant to court rules. During discovery, the plaintiff produced income and expense statements related to the hotel operation for the three years preceding the tax year in question. Upon review of that information, the township's motion papers indicated that due to inconsistency among the income and expense statements provided, the township requested the plaintiff produce income tax returns in order to resolve "considerable variation" in the reported revenues and expenses. The plaintiff objected to the production of the tax returns on the basis that it had produced detailed income and expense statements and the production of plaintiff's tax returns was not warranted absent a demonstration by the defendant of a compelling need for those documents.

The township moved for an order to compel the production of the tax returns, which the plaintiff opposed. The Tax Court held that the production of federal income tax returns was not warranted in this situation because the income and expense reports the plaintiff produced were comprehensive and the defendant made no argument that the documents produced were incomplete or insufficient. Further, the court rejected the township's justification for its request that the "considerable variation" in the income and expenses over the years compelled the production of the tax returns to the township's appraisal expert that were necessary for the appraiser's "due diligence." In fact, the plaintiff's moving papers indicated the variation reflected a steady decline of revenue attributable to a depressed economy and its impact on limited service hotels.

Moreover, the Tax Court reasoned the township was well within its powers of discovery to seek backup materials for the figures in the documents and to take the deposition of a person with knowledge of the income and expenses associated with the property to test the veracity of the information produced by the plaintiff. Because of these alternative avenues and the good cause requirement for production of tax returns, the court determined the "plaintiff's interest in protecting the confidentiality of its tax returns predominates over defendant's asserted interest in compelling the production of those documents."

The chief tenet of this decision is that owners of income-producing properties that might be subject to a tax appeal must recognize the importance of providing a true, accurate and detailed account of the income and expenses of the property. Sometimes, property owners give short-shrift to completing the income and expense statement requests promulgated by the municipal tax assessors (also known as a Chapter 91 Request) without giving due consideration of the importance for timely and accurate reporting of income and expenses. In this case, the taxpayer's willingness to compile and provide the requisite income and expense information staved off a motion to compel the production of its income tax returns, but that probably would not have been the outcome if the taxpayer had not been as forthright in its reporting.

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Contamination Reporting Revisited

By Philip L. Hinerman

Two years ago, in this newsletter, we reported on a case in which the Pennsylvania Department of Environmental Protection asserted that a site purchaser who had ultimately taken title was obligated to report historic groundwater contamination found during the initial investigation of the property. In that case, the purchaser had found elevated levels of petroleum-related chemicals in connection with his "due diligence." In depositions taken during that case, PADEP personnel stated that, upon taking title, the purchaser became an "owner" of the property, required to report the results of his groundwater investigation.

This column prompted many comments, including from DEP personnel. Ultimately, there was never a resolution of the reporting issue in that case.

The interest in reporting is spreading, however. The Delaware Department of Natural Resources and Environmental Control (DNREC) is proposing to codify reporting requirements. In its recently proposed Regulations Governing Hazardous Substance Cleanup, the DNREC has proposed that any person owning or operating a facility who has received information indicating a release of hazardous substances into the environment over health levels must notify the DNREC of the release within 60 days. This proposal has attracted significant attention from the regulated community, which primarily cite the chilling effect it will have on property investigations. Presumably, this issue will be resolved in Delaware during the regulation-making process.

Pennsylvania law will not be definitive, as the statutory scheme is not as clear. The PADEP's position conflicts with the interpretation of many private practitioners. In a recent transaction, joint legal counsel made a series of phone calls to PADEP personnel. They confirmed that in any enforcement action, the PADEP will use all of the legal mechanisms at its disposal, including alleging that reporting is required for historic releases.

The Pennsylvania and Delaware developments remind us that thought is required regarding the needs of parties for information during property and business acquisitions. Any investigations should be tailored to meet the information needs of the involved parties. Also, an educated, experienced review of any testing plans should be a basic requirement before testing. Finally, all parties should realize there is a possibility that anything found will need to be reported and remediated.

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Philadelphia May Have New Zoning Code By the End of This Year

By Carrie B. Nase

On November 9, 2011, the Philadelphia Zoning Code Commission approved the latest revisions to the draft Zoning Code and voted to forward the Final Report to City Council for approval.

On November 17, 2011, Bill 110845 was introduced to City Council, which would amend the existing Zoning Code in accordance with the Final Report. A hearing on Bill 100845 is scheduled before the Committee of the Whole on December 7, 2011, at 10 a.m. The Zoning Code Commission is hopeful that the new Zoning Code will be adopted by the end of this year.

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Study Highlights Marcellus Shale Development's Impact on PA Housing

By M. Joel Bolstein

The Pennsylvania Housing Finance Agency (PHFA) and the Center for the Study of Community and the Economy (CSCE) at Lycoming College have published research highlighting the effects that the Marcellus Shale natural gas industry is having on housing prices and availability across the Commonwealth of Pennsylvania. CSCE conducted interviews with local elected officials, county and municipal planners, housing authority officials, social service agency representatives, landlords, developers, realtors, gas company representatives and new residents on four broad issues: (1) rental housing, (2) owner-occupied housing, (3) housing affordability and availability, and (4) the capacity of the development community to meet demand for housing.

Several broad themes emerged from the interviews. First, the severity of the housing problem attributable to Marcellus Shale development is localized. It depends on the nature and scale of the growth of the natural gas industry in a given county or community and on the existing pre-Marcellus capacity of that county or community to absorb the increased demand for housing. Generally, communities experiencing the highest

Marcellus activity relative to their size are experiencing the most difficult housing problems. In addition, counties where gas producers and service companies are establishing regional headquarters see more and longer term housing impacts than communities where there is only drilling and pipeline activity.

According to the report, counties that have previously experienced population growth due to other industries in the area or an influx of commuters from neighboring larger cities have existing development capacity. In these areas, there are local and regional builders who are familiar with the area's housing needs and are experienced in working with the area's zoning regulations and county and city officials. These builders appear ready to respond to any increase in housing needs.

The natural gas industry has a wide variety of housing needs with varying time frames. Two waves of gas industry employment correspond to the evolving housing needs of industry employees. For the first transitory wave of gas workers, housing needs are being met with hotels, gas-company sponsored temporary residential facilities (so-called "man camps"), campgrounds and a community's rental housing stock.

The second, more permanent, wave of gas employees are more diverse in background and have a more diverse set of housing needs. They will take advantage of a full range of long-term housing options, including rentals and owner-occupied housing. With a diverse set of job titles and experience levels, these second wave employees can expect to be located in an area for their entire careers, or their replacements will be if they were to move on. Included in this group are gas employees native to Pennsylvania with newly found financial stability who will increase demand for owner-occupied housing as they look to translate their new financial status into more desirable living conditions.

As these new residents move into the Marcellus region, a disconnect may exist between the housing expectations of this second wave of employees and the availability of owner-occupied housing. Most residents moving into the region are looking to buy new homes in move-in condition with all the modern conveniences. But in some of these areas experiencing Marcellus growth, they are finding an aging housing stock in poor condition and lacking modern touches.

Finally, the capacity of the development community varies considerably from county to county in its ability to meet the need for additional housing. Counties with little pre-Marcellus development are struggling to attract development to meet the new circumstances. Barriers to development include the lack of local developers, a tight financing market, inadequate utility-served land available for development, regulatory hurdles and some concerns about the long-term horizon for the Marcellus Shale gas industry. Market-rate housing development, especially in select counties, is further along in meeting the increased need for housing than is the case for subsidized housing development in the most problematic counties.

The authors of the study lay out several broad recommendations that decision makers might consider as they begin to develop a response to the housing shortages created by Marcellus development. While the body of the report can stand alone as a description of the changing housing circumstances since the arrival of Marcellus development, the authors added their personal recommendations on the issues identified in the report. Topics covered the timing of market-based responses and likely impediments or shortcomings to market-driven responses, zoning board and planning commission capacity, infrastructure capacity, senior housing solutions, aging housing stocks and gas industry engagement.

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PA UCC Review and Advisory Committee Begins Work on 2012 Building Codes

By Kimberly A. Freimuth

The Uniform Construction Code Review and Advisory Council (the Council) was established by Act 106 of 2008. Appointed by the governor, the 19-member Council is drawn from various construction industry trades and professions as well as local government. The Council is charged with making recommendations to the governor, the General Assembly and the Department of Labor and Industry regarding proposed changes to Act 45, the Pennsylvania Construction Code Act, and reviewing the latest triennial code revisions issued by the International Code Council (ICC) contained in the International Codes enforceable under the Uniform Construction Code.

With the release of 2012's triennial ICC code revisions, the Council must determine which revisions it should adopt, if any, as part of the Uniform Construction Code.

Act 1 of 2011 made changes to the Council and the Code adoption process including:

1) The Council is required to submit a report to the state secretary of Labor and Industry within 12 months following publication of the latest triennial codes, specifying each code revision that is to be adopted as part of the Uniform Construction Code;

2) Public hearings must be held around the Commonwealth; and

3) Require a two-thirds vote of Council members to approve recommended code revisions.

The Council must also apply the following criteria when reviewing the merits of code revisions:

1) The provision's effect on the public's health, safety and welfare;
2) The provision's economic and financial effect; and
3) The provision's technical feasibility.

The general public may request the Council address a particular subject or issue related to the PA Uniform Construction Code that is within the purview of the Council. Three public hearings are scheduled between September and November 2011. Furthermore, to facilitate this review, the Council has developed the "2012 Code Change Recommendation Form," which must be completed by any person recommending that a specific code change be adopted or not adopted. Completed recommendation forms must be received by the Council no later than December 31, 2011.

The Council is expected to determine controversial versus noncontroversial code changes and vote for the adoption of the noncontroversial as a group at its first meeting next year, then vote on controversial changes individually. Proponents and opponents of a code change will be given the opportunity to provide testimony.

The final report of recommended code changes is expected be approved by Council members and presented to the Pennsylvania Department of Labor and Industry in July 2012.

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Bi-Partisan Housing Commission Announced

By Robert W. Gundlach, Jr.

On October 26, 2011, the Bipartisan Policy Center (BPC) announced the launch of a bipartisan Housing Commission that will address the long-term challenges facing a struggling housing sector. Former U.S. Secretaries of Housing and Urban Development (HUD) Henry Cisneros and Mel Martinez (also a former U.S. Senator), former U.S. Senator Kit Bond and former U.S. Senate Majority Leader and BPC Founder George Mitchell have been named to lead the effort. (Watch video.)

The bipartisan Commission hopes to develop consensus recommendations on the most effective way to meet the future housing needs of America.

The housing finance system played a significant role in the recent U.S. financial crisis and the resulting economic recession. Since the housing bubble burst in 2006, the wealth of American homeowners has fallen by more than $9 trillion, or nearly 40 percent. Through September, the number of home foreclosures in 2011 reached 1.5 million. The strength of the housing industry has a substantial impact on the nation's economic recovery, affecting consumer spending, homebuilding, banking and local tax revenues.

BPC's Housing Commission will draw upon a wide range of political and industry perspectives and will include housing experts, business leaders, former elected officials, academics and other key stakeholders. The full Commission will be announced later this year and meet for the first time in December 2011.

Over the course of the next year, the Commission intends to craft a package of policy recommendations that will address the future housing needs of an increasingly diverse American society. The final recommendations will be released in early 2013 for consideration by the administration and Congress. As part of its work, the Commission will offer views on the appropriate role of the federal government in helping to shape the nation's future housing landscape and an analysis of the effectiveness of the full range of current federal supports to housing.

BPC's Housing Commission will examine the key issues of the housing finance system, including the roles of the private market and government as well as policies that support rental and homeownership housing options. The Housing Commission will also actively seek input and ideas from the public and thought leaders by hosting regional forums across the country, through the web and by conducting focus groups over the next year.

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Supreme Court To Clarify RESPA Fees

By Lauren W. Taylor

On October 11, 2011, the U.S. Supreme Court granted a petition for certiorari in *Freeman v. Quicken Loans, Inc.* (Docket No. 10-1042) in order to clarify the scope of a federal law meant to protect homebuyers from being overcharged for real estate settlement services.

The question presented is whether Section 8(b) of the Real Estate Settlement Services Act prohibits a bank or title company from charging fees for services it did not perform, or instead is limited to prohibiting only kickback arrangements, in which the bank or title company shares fees with another company or person.

The case, brought by Louisiana residents Tammy Foret Freeman and Larry Scott Freeman, alleges Quicken charged them a $980 loan discount fee on a mortgage loan in 2007. Though that fee is normally imposed in exchange for a lower interest rate, Quicken did not reduce the Freemans' interest rate, they charge in their complaint.

Section 8(b) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(b), provides:

> "No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed."

In this case, the Fifth Circuit joined the Fourth, Seventh and Eighth Circuits in ruling that this provision prohibits the acceptance of unearned fees only when those fees are divided with a culpable third party, as in a kickback arrangement. It acknowledged, however, that the Third, Second and Eleventh Circuits, as well as the Department of Housing and Urban Development, have taken the contrary view that the provision also applies to unearned fees retained by a single defendant.

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Municipal Stormwater Permit Renewals in Pennsylvania Announced

On September 17, 2011, the Pennsylvania Department of Environmental Protection advertised the renewal of National Pollutant Discharge Elimination System General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (PAG-13).

The current PAG-13 permit was previously extended by nine months and is scheduled to expire at midnight on June 11, 2013. The term of the renewal PAG-13 is from March 16, 2013, and continues for five years to midnight on March 15, 2018.

General Permit PAG-13 addresses stormwater discharges from certain small municipal separate storm sewer systems (small MS4s). The federal regulations define a "small MS4" as all separate storm sewers owned or operated by the United States, a state, city, town, borough, county, parish, district, association or other public body (including state departments of transportation, universities, local sewer districts, hospitals, military bases and prisons) having jurisdiction over disposal of sewage, industrial wastes, stormwater or other wastes, including special districts under state law, such as a sewer district, that discharge to waters of the United States.

Within a municipality, small MS4s are designated as "regulated" primarily on the basis of whether they are located within an "urbanized area" as determined by the 1990 and 2000 censuses.

As with the previous edition of the general permit, municipalities must develop minimum control measures in six categories: (1) public outreach and education; (2) public participation and involvement; (3) illicit discharge detection and elimination; (4) construction activities greater than one acre; (5) post-construction in new and redeveloped areas; and (6) good housekeeping for municipal operations.

According to PADEP Secretary Krancer, each municipality regulated by the new permit will have the flexibility to develop and implement its own Chesapeake Bay Pollutant Reduction Plan, which can account for local conditions and allow for local decision-making. Municipalities will also be able to rely on the state's existing robust post-construction stormwater control requirements to address their construction and post-construction related control measures.

PA House Advances Regulatory Impact Legislation

By Kimberly A. Freimuth

On October 5, 2011, the Pennsylvania House of Representatives approved legislation that seeks to give small businesses a seat at the table when it comes to advancing state regulations.

Sponsored by Rep. Tina Pickett, (R-Sullivan County), House Bill 1349 ensures that small business advocates be contacted whenever new state regulations are proposed. It allows the small business community to have greater input into the proposed regulations and communicate to state regulators about any potential negative impacts.

The overall intent of the bill is to help the private sector create jobs by considering the impact proposed regulations have on small businesses. If a negative impact exists, the state agencies would be required to offer alternative requirements to meet the intent of the regulation.

According to the sponsor, the cost of regulations to a small business is about 60 percent more than the cost to a large employer.

Small businesses are often defined as those employing less than 100 people, but this legislation would follow federal definitions of small businesses. In Pennsylvania, that includes nearly half of the private-sector workforce.

Under House Bill 1349, agencies must inform the Independent Regulatory Review Commission (IRRC) of the following when submitting regulatory proposals:

- The type of small business that would be affected by the proposed regulation.
- Any financial, economic or social impacts on small businesses.
- An economic impact statement to include estimated number of small businesses affected; cost of compliance to the regulation; probable effect on impacted small businesses; and a description of any less intrusive or less costly alternative.
- Alternatives to small businesses that would still achieve the effect of the proposed regulation.

Supporters of the bill argue the need for policymakers to better understand how the cost pressures associated with government regulations and mandates ultimately impact job creators' ability to effectively and efficiently operate. Allowing small business greater flexibility will ensure compliance with reasonable, necessary regulations in a manner that does not take away from their ability to operate, maintain and potentially grow their business and workforce and stay competitive.

The measure now goes to the Pennsylvania Senate for consideration.

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