In the Zone

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

Fox Rothschild LLP
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Pennsylvania Enacts Legislative Changes To Weaken PADEP Stream Buffer Requirements

By M. Joel Bolstein

Pennsylvania Governor Tom Corbett on October 22, 2014, signed into law legislation (HB 1565) making significant changes to the requirements imposed on developers working near high quality and exceptional value streams. The legislation had passed the Pennsylvania Senate by a vote of 27-22 on October 14 and the Pennsylvania House by a vote of 118-79 on October 15.

In 2010, Pennsylvania adopted regulations requiring a 150-foot buffer for new developments potentially affecting high quality and exceptional value streams. The applicable regulation, found at 25 PA Code Section 102.14(a), currently reads:

> "(a) *General requirements for mandatory riparian buffers* (1) Except as in accordance with subsection (d), persons proposing or conducting earth disturbance activities when the activity requires a permit under this chapter may not conduct earth disturbance activities within 150 feet of a perennial or intermittent river, stream, creek, lake, pond or reservoir when the project site is located in an exceptional value or high quality watershed attaining its designated use as listed by the department at the time of application and shall protect any existing riparian buffer in accordance with this section."

Under the recently passed legislation, the mandatory 150-foot buffer requirement now goes away, and developers will be able to satisfy Chapter 102 by using or installing "either" a riparian buffer or "another option or options among available best management practices, design standards and alternatives that collectively are substantially equivalent to a riparian buffer or riparian buffer in effectiveness, to minimize the potential for accelerated erosion and sedimentation and to protect, maintain, reclaim and restore water quality . . . to ensure compliance with 25 Pa. Code Ch. 93 (relating to water quality standards)." The legislation also includes an offset provision allowing developments with earth disturbances within 100 feet of surface water in a special protection watershed, so long as the developer offsets any reduction in the total square footage of the buffer zone that would have been used as a best management practice (BMP) with a replacement buffer "elsewhere along special protection waters in the same drainage list and as close as feasible to the area of disturbance at a ratio of one-to-one."

In explaining why she sponsored the legislation, Representative Marcia Hahn from Northampton County was quoted as saying: "We have seen significant frustrations under the current regulations as businesses, landowners and homebuyers alike have expressed their concerns with the riparian buffer requirements and the negative impacts they have on development and land use in many areas of the Commonwealth. Oftentimes, this has been seen as an instance of eminent domain without compensation as landowners could be prevented from using their own property." The legislation was actively supported by the Pennsylvania Homebuilders Association.

Now in the category of "be careful what you wish for," it will now be up to the Pennsylvania Department of Environmental Protection (PADEP) to determine how to implement HB 1565. The legislation explicitly abrogates "any and all regulations" that are inconsistent, and it takes effect 60 days from the Governor's signature. So, hypothetically, let's say a developer is getting ready to file an National Pollutant Discharge Elimination System (NPDES) stormwater construction permit application for a new subdivision. The subdivision has an EV or HQ stream running through the middle that would severely limit the number of houses that could be built if the 150-foot buffer requirement was in place. Presumably, with this new legislation, those plans could be revised to allow disturbance within the 150-foot buffer and propose other alternative BMPs. But which other BMPs will PADEP allow? Who decides which BMPs are "substantially equivalent" to a riparian buffer? Is the EQB going to need to develop new regulations? In the meantime, how is PADEP going to implement this change in a manner consistent with the legislative intent, which is clearly to enable developers to work within areas that previously would have been off limits? Also, what if a developer has an NPDES stormwater construction permit that currently imposes the 150-foot buffer? Can that developer now go back to PADEP and modify the permit to allow for disturbances in the buffer area? Presumably they could, since the legislation doesn't preclude it, assuming alternative BMPs could be designed to replace the riparian buffer and be substantially equivalent in effectiveness.

My guess is there will be a period in which both PADEP and developers will consider the full implications of the legislation on current and future projects. I would also hope and expect that PADEP will roll out some guidance, in short order, on how it intends to implement the legislation.

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Delaware Supreme Court Clarifies Confession of Judgment Procedure, Applicability of Nonresident Obligor Affidavit

By J. Breck Smith

In the case of *Zimmerman v. Customers Bank* (Del. Supr. No. 668, 2013), the Delaware Supreme Court clarified the procedures for obtaining entry of a judgment by confession, holding that obtaining the nonresident obligor affidavit set forth in 10 *Del*. C. §2306(c) is not a requirement for a judgment by confession that is entered by the Superior Court itself, as opposed to a judgment by confession entered by the prothonotary.

In 2006, Michael Zimmerman and Connie Jo Zimmerman obtained two separate commercial loans totaling $602,163.30 and $1,558,792.95, respectively, from the predecessor in interest of Customers Bank. The Zimmermans later defaulted on these loans and on June 21, 2011, entered into a forbearance agreement that included confession of judgment language in all capital letters and had a bold paragraph header. In addition to the forbearance agreement, the Zimmermans each executed a disclosure for the confession of judgment acknowledging that the confession of judgment provision contained in the forbearance agreement had been called to their attention, that they understood that the provision permitted Customers Bank to enter judgment against them without notice or opportunity for a hearing and that the waiver of the right to notice and a hearing was knowing, intelligent and voluntary. The forbearance agreement also provided that all notices, requests, demands and other communications were to be sent to the Zimmermans at an address in Dover, Delaware, with a copy sent to their attorney.

Based on the warrant of attorney to confess judgment provision contained in the forbearance agreement, Customers Bank filed a complaint and supporting affidavit in Superior Court seeking the entry of a judgment by confession against the Zimmermans by the prothonotary pursuant to Superior Court Civil Rule 58.1. The Zimmermans opposed the entry of judgment by confession, and a hearing was held before Superior Court on September 27, 2013. At the hearing, the Zimmermans argued, among other things, that (1) at the time of executing the forbearance agreement, they were residents of the state of Florida and Customers Bank had not complied with the requirements for entry of a judgment by confession against a nonresident under Rule 58.1 and (2) they did not knowingly, intelligently and voluntarily waive their right to notice and a hearing before judgment could be entered against them. After deliberating on the hearing record, the Superior Court on November 22, 2013, held that the Zimmermans' waiver of their right to notice and a hearing had been knowing, intelligent and voluntary, and entered judgment by confession against the Zimmermans in the amounts of $602,163.30 and $1,558,792.95.

On appeal, the Zimmermans raised two arguments. First, they argued the lender was required to comply with the requirements of 10 *Del .C*. §2306(c) and Superior Court Rule 58.1(a)(3) and file the nonresident obligor affidavit prior to entry of judgment by confession and failed to do so. The court noted that under 10 *Del. C*. §2306(c), before a confession of judgment may be entered by the prothonotary against defendants who were not residents of the state of Delaware at the time of executing the document authorizing the confession of judgment, the plaintiff must file an affidavit executed by the defendant, which (1) states the sum of money for which judgment may be entered, (2) authorizes entry of judgment in the Superior Court of Delaware in and for a specific county, (3) states the defendant's contact with Delaware and (4) includes the mailing address and residence where defendant would most likely receive mail. The court also noted that Superior Court Civil Rule 58.1(a)(3) provides that, "In the case of a debtor who was a nonresident at the time of execution of the document, the plaintiff shall also file the affidavit required by 10 *Del. C*. §2306(c)." Second, the Zimmermans argued that Superior Court erred in finding that they had knowingly, intelligently and voluntarily waived their rights to notice and a hearing before the entry of judgment.

On the first issue, the court noted that Section 2306 and Rule 58.1 address the situation where a judgment by confession is entered by the prothonotary, but that Section 2306 and the Superior Court Civil Rules also provide for the entry of judgment by the Superior Court itself rather than by the prothonotary. The court pointed out that 10 *Del .C*. §2306(h) provides, "In addition to the procedure herein set forth, the Superior Court may adopt rules for confession of judgments by defendant-obligor in open court, provided, however, the debtor is afforded a judicial determination on the question of whether he or she has understandingly waived any of his or her constitutional rights concerning the entry of judgment and the right to execution thereon." The court further noted that Superior Court adopted such a rule when it adopted Rule 58.2 which in part provides that, "A judgment by confession may be entered in open court by the Superior Court either for money due or to become due, or to secure the obligee against a money contingent liability, or both, on the application by the obligee or assignee of a bond, note or other obligation containing a warrant for an attorney-at-law or other person to confess judgment." The court noted that Rule 58.2(a) expressly contemplates entry of judgment by confession by the Superior Court based upon an obligation that contains a warrant for an attorney-at-law to confess judgment, like the one contained in the forbearance agreement at issue in the present case, and further noted that neither Section 2306(h) nor Rule 58.2 require a plaintiff to file the Section 2306(c) affidavit when judgment by confession is entered by the Superior Court as opposed to the prothonotary. The court stated that the procedures followed by the Superior Court at the September 27, 2013, hearing satisfied all the requirements in Rule 58.2: Both Customers Bank and the Zimmermans appeared at the hearing, a court reporter was present and the proceedings were recorded, Customers Bank provided the Superior Court with both the *praecipe* described in Rule 58.1(a)(1) and the forbearance agreement authorizing the confession of judgment, and, most importantly, the Superior Court issued an opinion – after a full hearing where the Zimmermans presented evidence

and arguments – holding that Customers Bank had proven that the obligation was genuine and that the Zimmermans had knowingly, intelligently and voluntarily waived their constitutional rights.

With respect to the second issue regarding whether the waiver was knowing, intelligent and voluntary, the court noted that it must defer to the Superior Court's findings of fact as long as those facts are sufficiently supported by the record and are the product of an orderly and logical deductive process, and the court stated that the Superior Court's findings on this issue were supported by ample evidence in the record. The court noted that since it found that the record indisputably demonstrated that the procedures used by the Superior Court satisfied the requirements of Section 2306(h) and Rule 58.2, and any noncompliance with Rule 58.1 would not be a reason for reversal, the final judgment of the Superior Court was affirmed.

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COAH Fails To Meet Court-Ordered Adoption Deadline in New Jersey

By Henry L. Kent-Smith

On October 20, 2014, the Council on Affordable Housing (COAH) met to adopt the third iteration of the Third Round Rules. This iteration was in response to the New Jersey Supreme Court's Order on March 14, 2014, which mandated that COAH adopt Third Round Rules on or before October 22, 2014[1] for publication in the November 17, 2014, *New Jersey Register*. The order arose out of motions filed by Fair Share Housing and related parties addressing the delay in COAH's rulemaking in response to the Supreme Court's invalidation of the second iteration of the Third Round Rules in *In re Adoption of N.J.A.C.* 5:96 and 5:97 215 N.J. 578 (2013).

COAH had "successfully" met the prior deadlines established by the court's March 14 order in proposing its new iteration of Third Round Rules. However, more than 3,000 comments were received from municipal, affordable housing and residential developers, criticizing the rules for their obvious flaws. In accordance with the court's order, COAH held a public hearing on July 2, 2014, to receive comment on the rule proposal. Public comments stressed the flaws permeating these rules.

At its meeting on October 20, 2014, COAH considered the rules for adoption. Initially, members of the council moved to table adopting the rules for 60 days, coupling this motion with a request for additional time for the Supreme Court to address the time limitation set forth in the March 14, 2014, order. This motion failed by a 3-3 vote. The motion was then made to adopt the rules as presented to the council, and that motion similarly failed by the same 3-3 vote.

The importance of this action is clear. The Supreme Court's March 14, 2014, order expressly provided that the council adopt the proposed rules before October 22, 2014, and transmit those rules to the Office of Administrative Law (OAL) for publication in the *New Jersey Register* for the November 17, 2014, edition. By failing to adopt the rules, COAH is simply not able to meet the October 22, 2014, deadline under the Sunshine Law. Certainly, it is possible that the council may take emergency action to transmit rules for publication in the OAL, although any emergency rule adoption would be of questionable legal authority.

In the event that the council does not take a corrective action that allows the rules to be published by November 17, 2014, the Supreme Court specifically permitted motions in aid of the litigant's right to lift the protections provided to municipalities in accordance with the Fair Housing Act *N.J.S.A.* 52:27D-313 and thereby allow the commencement of builders' remedy challenges against specific municipalities.

COAH's failure to adopt the rules as presented at its October 20, 2014, meeting is likely to result in a substantial flood of lawsuits both by builder/landowners seeking to enhance density through the builder's remedy, and municipalities flocking to the protection of the courts by filing declaratory judgment actions pursuant to *N.J.S.A.* 52:27D-317. In either case, the result will be the same: a flood of lawsuits in the judicial system seeking to address the municipal affordable housing obligation as a direct result of COAH failing to take action by the Supreme Court's deadline.

Developers and landowners should seriously consider whether builders remedy litigation would afford the opportunity to enhance density and enable development of projects on property that is suitable for such higher density development. In the alternative, municipalities are left with no recourse but to seek declaratory judgment protection by voluntarily submitting themselves to judicial oversight.

Regardless of which party is before the courts, the problem remains: what are the rules that will govern the evaluation of municipal compliance with the Mt. Laurel Affordable Housing Obligation? The Supreme Court's straightforward answer in *In re Adoption of N.J.S.A.* 5:96 and 5:97, 215 *N.J.* 578 (2103) would likely result in a strict application of the previously adopted rules under *N.J.A.C.* 5:92 and 5:93, which established a relatively straightforward and readily comprehensible methodology by which to calculate municipal affordable housing need and a series of well-tested options by which municipalities may address that need. Regardless of the outcome, this issue has reached a constitutional crisis. How the Supreme Court addresses this crisis will determine much as to the future of affordable housing in the State of New Jersey.

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[1] See Order here: http://origin.library.constantcontact.com/download/get/file/1102308224571-43/140314+Supreme+Court+Order+Granting+Mtn+Time+to+Extend.pdf

Pennsylvania Commonwealth Court Reverses Decision Denying Approval of Stormwater Facility in Environmental Protection Overlay Districts

By Jennifer L. Wunder

In the case of *Williams Holding Group, LLC v. Board of Supervisors of West Hanover Township*, 2014 WL 4627729 (September 17, 2014), Williams Holding Group (WHG) appealed the order of the Dauphin County Court of Common Pleas dismissing its appeal of the denial of WHG's application for conditional use approval by the Board of Supervisors of West Hanover Township.

WHG sought conditional use approval from the board for a stormwater facility in conjunction with its townhouse development project. The project was within an environmental protection overlay district (EPOD), as defined by the township's Zoning Ordinance.

WHG applied for and was issued a permit from the Pennsylvania Department of Environmental Protection (PADEP) and the U.S. Army Corps of Engineers (COE) to build the stormwater facility, which consisted of a stormwater pipe enclosing a length of a waterway within a stream protection overlay district (SPOD) and a hillside and slope protection overlay district (HSPOD), each a type of EPOD. The proposed facility would enclose the waterway and eliminate the SPOD and HSPOD in that area of the property.

The board focused on two provisions within the Zoning Ordinance in coming to its decision. The first provided limitations on removal or alteration of "land with slopes" within an HSPOD, and the second provided, in pertinent part, that any "construction" within an EPOD shall be "minimally invasive."

The board examined the issue of whether the ordinances were negated by the state and federal permits issued to WHG. They concluded that the issuance of permits did not constitute per se approval under the ordinance because the ordinance contained more stringent standards and WHG failed to meet those standards. Specifically, the board found that WHG violated the "land removal" provision and the proposed use was "far from minimally invasive" due to the elimination of the EPOD. The trial court affirmed this decision.

The Commonwealth Court, citing *Bray v. Zoning Bd. of Adjustment*, 410 A.2d 909 (Pa. Commw. 1980), first analyzed the standards of proof in a conditional use proceeding, noting that if a requirement of an ordinance places the burden on an applicant, but the requirement is nonobjective or too vague for the applicant to comply, the requirement is either nonenforceable or the burden shifts to the objector to show noncompliance. The court thus indicated that a key element in evaluating conditional use decisions is whether ordinance requirements are specific and objective or vague and subjective.

The court found that the conditional use was per se permitted under the ordinance, which allowed as a conditional use "any other use requiring a federal or state encroachment permit," due to the issuance of the DEP and COE permit.

In analyzing the "land removal" provision, the court determined that the term "land" and the removal limitations were ambiguous and vague, and therefore the burden rested with an objector to prove noncompliance. Because no objector participated in the board hearing, the court rejected the board's conclusion that WHG failed to satisfy its burden with regard to this provision.

Similarly, in analyzing the "minimally invasive" requirement, the court found again that the term was vague and subjective and therefore, the burden to prove noncompliance rested on an objector, of which there was none. The court aptly noted, however, that even if "minimally invasive" was considered specific and objective, WHG satisfied its burden through the DEP and COE permit approvals, which required demonstration of "minimal detrimental impact" from the project.

The Honorable James Gardner Colins issued a dissenting opinion, agreeing with the trial court and the board that the plain language interpretation of the "minimally invasive" requirement prohibited conditional use approval where that use would eliminate an EPOD. The dissent argued that the language of the ordinance was not vague but rather clear and provided sufficiently objective criteria. It further noted that an interpretation of an ordinance that produces an absurd result is contrary to the rules of statutory construction and asserted that where a landowner seeking to use land in an EPOD eliminates the EPOD in order to use the land as it sees fit, such interpretation produces an absurd result. The court addressed the dissent, noting that the key goal in regulating the development on hillsides and slopes is a means to an end, such end being the prevention of damage to waterways.

The decision of the Commonwealth Court demonstrates the court's emphasis on the specificity versus ambiguity of the language of a township's zoning ordinance and focuses on the liberal interpretation of such ordinances in favor of conditional use applicants when containing ambiguous language. This decision further provides that, where an ordinance allows as a conditional use "any use requiring a federal or state permit," issuance of said permit constitutes per se approval and shifts the burden of noncompliance to an objector.

NOTE: As of the publication date of this article, no petition for appeal has been filed with the Pennsylvania Supreme Court.

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Henry Kent-Smith and Irina Elgart Receive Equal Justice Medals for Pro Bono Work

Henry L. Kent-Smith and Irina B. Elgart received Equal Justice Medals during the 2014 annual Equal Justice Awards Reception. This prestigious honor is given for outstanding *pro bono* work performed on behalf of Legal Services of Northwest New Jersey.

Henry and Irina assisted with a matter involving an attempt by the Township of Allamuchy to evict low-income tenants in township-owned affordable housing units. Through Fox's efforts, the team was able to negotiate a settlement whereby, among other things, the township filed a 30-year deed restriction, the affordable housing tenants remained in their apartments and the township revised its lease to conform with UHAC requirements for affordable apartments.

Henry and Irina were presented with the award by former Chief Justice Deborah Poritz at a special ceremony on October 15 at the Bridgewater Marriott in Bridgewater, New Jersey.

Recent Approvals

Fox Rothschild's New York Land Use Group obtained the discretionary approvals to develop a retail mixed use building at the gateway to the historic SoHo district. Approvals were obtained from the New York City Landmarks Preservation Commission for a new structure to be built in the historic SoHo Cast Iron District, and zoning approvals were obtained from the City Planning Commission and the New York City Council to permit the proposed retail use as well as bulk modifications to provide waivers from required setbacks.

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