In the Zone

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Off Tract Contributions: Be Careful!

By Henry Kent-Smith

On October 8, 2013, the Appellate Division released an unpublished opinion in *520 Victor Street Condominium Association v. Raymond Plaza and The Township of Saddle Brook Zoning Board*. Docket No. A5655-10T3. In *Victor Street*, the Appellate Division invalidated all approvals granted to Raymond Plaza for the construction of multi-story residential buildings, on the basis that the applicant agreed to a $400,000.00 contribution for off tract improvements related to sewer and storm water improvements in violation of N.J.S.A. 40:55D-42.

This opinion follows the long standing principles first annunciated in *Nunziato v. Planning Board of Edgewater*, 225 N.J. Super. 124 (App. Div. 1988), that deviation from the strict application of N.J.S.A. 40:55D-42 would lead to "the intolerable spectacle of a Planning Board haggling with an applicant over money to strongly suggesting that variances are up for sale." *Id*, at 134. *Victor Street* is a reminder that "courts must be extremely sensitive to the threat presented by unlawful exactions imposed by municipality on developers where the developers are reluctant or enthusiastic participants in the transaction." *Swanson v. Planning Board of Hopewell*, 149 N.J. 59, 66 (1997) Stein, J. concurring).

This case falls within similar factual patterns found in *Nuziato* and *Swanson*. Here, the applicant met all requirements for sewer and water utility service for its proposed project. However, there were pre-existing problems with both sanitary sewer and storm water flooding in the vicinity of the applicants proposed project. During the hearing process, it was determined that the proposed development would not adversely impact either storm water or sanitary sewer flow in the area. Therefore, the Board never made a determination that any sewer or drainage improvements were "necessitated" by the proposed development, as required under N.J.S.A. 40:55D-42. Instead, the Applicant and the Board had a series of discussions relative to these pre-existing off tract conditions. Based on these discussions, the applicant agreed to contribute $400,000.00 to the Township to fund improvements related to existing conditions found in the area and not directly necessitated by the proposed project. Therefore, 520 Victor failed to establish the first requirement for an off tract improvement under N.J.S.A. 40:55D-42, that the improvements are necessitated by impacts associated with the proposed development.

The trial court uphelp the contribution as within the discretionary authority of the zoning board, even if it failed to conduct the type of analysis required under N.J.S.A. 40:55D-42. In contrast, the Appellate Division found that the process that was followed was more akin to a "negotiation" between the developer and the municipality, which was found to be abhorrent to the statutory requirements under the Municipal Land Use Law in *Nunziato v. Edgewater*. 225 N.J. Super. 124 (App. Div. 1988).

520 Victor Street stands for the proposition that adherence to the MLUL requirements related to off tract improvements remains a concern of courts. Principles first annunciated in *Nunziato* have been upheld again in *520 Victor Street*. **Simple negotiation as to a blanket contribution for off tract improvements is improper, and may result in the voiding of all approvals associated with the project**. However, the requirements to compel off tract improvements under N.J.S.A. 40:55D-42 require the governing body adopting an ordinance to permit exaction of contributions as a condition of subdivision or site plan approval, and that such ordinance must be based upon circulation and competence of utility service plans of the municipal master plan. The ordinance must also establish the capital improvements for which off tract contribution is required. Finally, the ordinance must provide for reasonable standards to determine the proportionate share of each developer impacting those improvements.

Municipalities are once again on notice that undertaking capital improvement plans, and embarking on a conscious planning process, is a prerequisite to the requirement to compel developers to make contributions for off tract improvements. Developers are once again warned not to undertake negotiations with planning boards or governing bodies as to off tract improvement contributions, unless those contributions are specifically linked to improvements, the necessity of which are required to be made in order to address the direct impacts of the proposed development. The cost of failure to adhere to N.J.S.A. 40:55D-42 is severe: invalidation of approvals. Therefore, both the municipal and development community have been warned once again of the need to follow the Municipal Land Use Law in the exaction of off tract improvements.

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New Stream Assessment Methodology Proposed by DEP

By Joel Bolstein

On September 28, 2013, the Pennsylvania Department of Environmental Protection published notice of a new draft Assessment and Listing Methodology for evaluating the water quality of Pennsylvania streams and impaired waters. The methodology and its various protocols form the basis for designating stream segments according to their use attainment status. Such designations can directly influence the economic viability of impacted land development projects. For example, Category 5 waters are impaired by pollutants and require a Total Maximum Daily Load (TMDL) to correct the impairment. When TMDLs are imposed, development along that waterway can be limited, because water discharges must comply with the TMDL.

Sections 303(d) and 305(b) of the Federal Clean Water Act require states to report on the condition of all their waters in the biennial Integrated Report. Stream and lake evaluations presented in the report must be supported by assessment methodologies based on sound science and technical procedures.

DEP's assessment and listing methodology constitutes the "decision rules" the Department uses when assessing the quality of waters and identifying water bodies that do not meet designated and existing uses. It includes the field collection standards to be utilized when sampling water bodies as well as the scientific data analysis methods to evaluate water quality data.

The draft 2013 methodology would update and expand upon the current 2009 version of its Assessment Methodology by adding new assessment protocols as well as amending some of the exiting protocols.

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Delaware Supreme Court Clarifies Standing Requirements To Appeal Issuance Of A Coastal Zone Act Permit

By J. Breck Smith

In the case of *Nichols v. State Coastal Zone Industrial Control Board et al*. (Del. Supr. No. 190, 2013), the Delaware Supreme Court clarified that "any person aggrieved" for purposes of standing to appeal a final decision under the Delaware Coastal Zone Act must demonstrate an injury in fact and that such injury is within the zone of interest protected by the statute.

This case dealt with an application to develop and operate an electrical generation facility on lands in the northern part of the state located within a "coastal zone" identified in Delaware's Coastal Zone Act (CZA), 7 Del. C. §7001 et seq. In November 2011, Diamond State Generation Partners LLC (DSGP) applied to the Secretary of the Delaware Department of Natural Resources and Environmental Control (DNREC) for a CZA permit to develop and operate a facility to be known as the Red Lion Energy Center where DSGP planned to utilize fuel cells which would "chemically convert natural gas to electrical power." The Secretary of DNREC issued an Environmental Assessment Report respecting the project proposal, finding DSGP's application complete and noting the benefits of the project and that no hazardous wastes would be generated from the facility. In March 2012, the secretary of DNREC through a hearing officer held a public hearing to receive comment on the proposed permit. Nichols appeared at this hearing and raised objections to the permit request, questioning whether DSGP had disclosed all materials that could be hazardous and pointing out that DSGP had not included an Environmental Assessment Report from DNREC's Natural Heritage Program as required by regulations. The hearing officer issued a report recommending approval of DSGP's application and the secretary thereafter issued the CZA permit.

Nichols appealed the order granting the permit on various grounds to the State Coastal Zone Industrial Control Board (the Board). In response, DSGP, joined by DNREC, filed a motion to dismiss based on lack of standing, arguing that Nichols had failed to show that he was an "aggrieved" person under 7 Del. C. §7007(b). Nichols responded with two arguments: That he was acting on behalf of the "nesting birds and other flora and fauna, which were unable to appeal," and that his interest was the "public interest in a thorough, fact-based administrative determination before a Coastal Zone permit is issued." The Board held a hearing in June 2012 to address the appeal. At this hearing, Nichols declined to be sworn in and present testimony, and instead relied solely on the arguments he advanced in response to the motion to dismiss together with the testimony of experts he called to testify. Nichols contended that the term "aggrieved" referred to "any person who simply thinks that DNREC got it wrong," and that grievance is based upon a "perception or state of mind." At the conclusion of the hearing, five of the seven board members present voted to dismiss the appeal for lack of standing. In its Opinion and Final Order, the Board cited that Nichols had "not identified or presented any evidence relating to any legally protected interest that he possesses that has been or will be invaded upon by the permit issued" to DSGP, and that Nichols had failed to connect the potential injury to the flora and fauna and his own legally protected interests.

Nichols then appealed to the Superior Court. In its Memorandum Opinion, the Superior Court cited that the sole issue before it was whether Nichols had standing to appeal the secretary's order granting the CZA permit, noting that the appellant has the burden of proof to establish standing. Whether the Board correctly interpreted the applicable standing provision was a question of law that it reviews de novo. As to the Board's factual findings, it stated that it must determine whether such findings are supported by substantial evidence in the record. The Superior Court affirmed the decision of the Board. Citing the Delaware Supreme Court's opinion in *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892 (Del. 1994), it held that for purposes of the CZA, a person wishing to appeal a decision of the Secretary must show (i) an injury in fact and (ii) that such injury is within the zone of interest sought to be protected by the CZA. Superior Court noted that Nichols' only argument with respect to an "injury in fact" was the potential injury to the flora and fauna in the coastal zone, but that he had failed to establish any connection between that potential injury and his own legally protected interests. In this connection, it pointed out that Nichols did not prove that he possessed a personal interest, financial or aesthetic, in the relevant coastal zone areas, nor did he demonstrate that he lived in close proximity to such areas.

On appeal to the Delaware Supreme Court, Nichols raised two claims. First, that the Board's vote on whether he had standing to pursue the appeal failed due to a lack of a five vote majority of the nine member Board. Second, that he possessed standing under the "any person aggrieved" standard, or, in the alternative, as a matter of common law.

On the first issue, although noting that generally issues not presented to the Board will not be considered for the first time on appeal, the Court stated that where the interests of justice require the Court may choose to adjudicate a question not fairly presented at the hearing. On this issue, the Court noted that the transcript of the hearing as well as the subsequent signed Opinion and Final Order sufficiently demonstrated that a five member majority of the Board voted that Nichols lacked standing to appeal. With regard to the issue of standing, the Delaware Supreme Court concurred with the Superior Court's use of the standing requirements set forth in the Oceanport case. Although noting that Oceanport did not specifically address the "any person aggrieved" phrase in the CZA, the Court noted that in its Oceanport opinion it had made reference to the CZA, stating that "it seems clear that the General Assembly intended a stricter standing requirement for appeals to the Environmental Appeals Board or under the CZA." In its opinion in this matter, the Court noted that in Oceanport it had relied upon the United States Supreme Court decision in Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970), to determine standing under the term "substantially affected" and would look to the same decision for guidance regarding the word "aggrieved." The Court noted that in the Oceanport matter it had determined that "[B] y enacting the standing provisions, the General Assembly adopted an appeals standard requiring a heightened interest. It seems clear that the intent of the legislature was to limit standing to appeal to those who were actually affected by the Secretary's decisions." The Court held that the Oceanport standing requirements must be satisfied to establish that a person is aggrieved under the CZA: Demonstration of an injury in fact together with an interest arguably within the zone of interest to be protected or regulated under the CZA, and that such invasion must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."

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Restrictive Zoning Ordinances Questioned

By Julia Perkins

In *Keener v. Rapho Tp. Zoning Hearing Bd.*, No. 2306 C.D. 2012, July 31, 2013, the Pennsylvania Commonwealth Court held that Rapho Township's Zoning Ordinance (the Ordinance) improperly restricted a permitted use in the Agricultural Zoning District without substantial relation to the health, safety and welfare of the community. Consequently, the Court remanded the case to the Rapho Township Zoning Hearing Board (the ZHB) to reconsider the appellant's application for special exception.

Factual Background:

James C. Keener (Keener) owned a 130-acre parcel situated in the Agricultural Zoning District which was primarily used as an active farm. Keener submitted a special exception application (the Application), to use the existing structures on the property, including an 18th Century Bank Barn and a farmhouse, as a banquet hall, as well as to use the property as a whole for farm tours and guided walking and riding tours, among other things (the Proposed Use). In support of his Application, Keener argued that the Proposed Use was permitted by right in the Agricultural Zoning District under the Parks and Playgrounds uses set forth in Section 112 of the Ordinance.

Parks and Playgrounds uses, including the use of banquet halls, are permitted in the Agricultural District if they meet the following definition under Section 112: "[t]hose facilities designed and used for recreation purposes by ***the general public*** that are not operated ***on a commercial basis***." In his first argument, Keener asserted that absent the prohibition of

using the structures on the property "on a commercial basis," his Proposed Use would qualify as Parks and Playgrounds use. He argued that the Ordinance's distinction between commercial and non-commercial operations violated the uniformity requirement of the Municipalities Planning Code (MPC) section 605 by treating the same use differently based on the type of ownership.

Keener argued in the alternative that the Proposed Use met the definition of the Adaptive Reuse of Existing Agricultural Buildings under Section 401.1 of the Zoning Ordinance, as a "Commercial Recreational Facility" or a "Restaurant." Keener's second alternative was that the Proposed Use met the definition of a "Tourist Farm" which are permitted in the Agricultural Zone by Special Exception. Finally, as a last alternative, Keener argued that the Proposed Use should be permitted by special exception as a "Use Not Otherwise Provided For" under Section 107 of the Ordinance.

Procedural Background:

The ZHB denied Keener's application because the Proposed Use did not meet the definition of a "Park or Playground" because the Proposed Use would only be available to paying individuals, and therefore would not be available for use by the 'general public.' Additionally, the ZHB found that the Proposed Use fit into the definition of a "Commercial Recreational Facility" because it was open to the public, and therefore it could not be considered a "Use Not Otherwise Provided For" under Section 107 of the Ordinance.

The Lancaster Court of Common Pleas remanded the decision solely to have the ZHB explain an inconsistency: the ZHB found on the one hand that the Proposed Use was a "Commercial Recreation Facility" because it was open to the public, but on the other hand was not a "Park or Playground" because it was not open to the general public. Without explaining the difference between the terms 'public' and the 'general public,' the ZHB's decision was inconsistent.

On remand, the ZHB did not address the inconsistency and denied Keener's request to present additional evidence. Further, the ZHB concluded that instead of a "Commercial Recreational Facility," the proposed use was a "restaurant type use" under Section 107 which was impermissible in the Agricultural District. Keener appealed to the Court of Common Pleas again, and this time the Court affirmed the ZHB. The Court concluded that the Ordinance did differentiate between the 'public' and the 'general public' because a proposed banquet facility under the Parks and Playground use is a facility operated as a commercial venture only to paying members of the public, not to the general public as a whole. Therefore, the term 'general public' applied to any individual whereas 'public' applied to paying individuals.

On appeal to the Commonwealth Court, Keener argued, among other things, that defining the Parks and Playgrounds use to only those uses operating without a commercial basis amounted to illegal restriction of land ownership. Keener claimed that the Ordinance improperly prohibited a for-profit owner from operating the same exact permitted use as a non-profit owner, without any discernible relationship to the public health, safety, morals or general welfare in violation of Section 605 of the MPC.

Holding:

The Commonwealth Court rejected Keener's argument that the Ordinance improperly regulated land ownership by discerning between for-profit and non-profit entities because under the Ordinance, a non-profit entity would also be prohibited from operating a park or playground on a commercial basis. Moreover, citing the YMCA as an example, the Court reasoned that non-profit entities participate in business activities and their commercial activity alone does not render their organization for-profit.

Still, the Court did find that the Ordinance's distinction between banquet halls used for a commercial basis versus a non-commercial basis improperly differentiated between two types of the same use, without a rational relationship to the health, safety, and general welfare of the community. Relying on *Mahoney v. Township of Hampton*, 651 A.2d 525, 527-28 (Pa. 1994), the Commonwealth Court concluded that the distinction between the commercial/noncommercial banquet hall was arbitrary, the Ordinance's means failed to reasonably relate to the ends sought, and the distinctions failed to demonstrate a substantial relation to the health, safety and welfare of the community.

Additionally, the Court dismissed the Township's argument that the Ordinance created a valid use distinction between facilities open to the 'general public' and those who pay for the Proposed Use. The Court reasoned that it would be nearly impossible to simultaneously permit banquet facilities in the Agricultural Zone while requiring that their use "be free of charge and unrestricted to the indefinite general public." Moreover, the Court concluded that regardless of whether the banquet facility was open to the 'general public' or only available to paying customers, the underlying nature of the use—serving food to a limited number of individuals—is identical. The record failed to set forth any support that this distinction for the identical uses was reasonable or necessary to protect the health, safety and welfare of the community. Therefore, the case was reversed and remanded once again to the ZHB to determine whether Keener may use his proposed banquet facility in the Agricultural Zone, regardless of whether such facility would be operated on a commercial basis.

Conclusion:

Keener reinforces the long-standing principle that a restrictive zoning ordinance is unenforceable unless the restriction is reasonably related to the health, safety, and welfare of the community.

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Revisions to Pennsylvania's Uniform Construction Code Review Process Proposed

By Lauren Taylor

Both chambers of Pennsylvania's General Assembly recently held public hearings on separate bills seeking to amend the state's Construction Code Act in different ways. Senate Bill 1023 (McIlhinney, R-Bucks) would change the code review standard. House Bill 1209 (Harkins, D-Erie) would separate the commercial construction code from the residential construction code adoption process.

The Construction Code Act creates the Uniform Construction Code (UCC) and the method by which the Pennsylvania Department of Labor and Industry and the Pennsylvania UCC Review and Advisory Council (RAC) adopt statewide building codes. The Act has been subjected to numerous changes over the past several legislative sessions.

At its core, the Construction Code Act requires the RAC to review and recommend to the Department of Labor and Industry those changes published by the International Code Council (ICC) every three years that should be incorporated into the state's building code. Currently, the RAC must *affirmatively approve* any ICC changes to the building code by a two-thirds vote - otherwise the change is rejected.

Both bills stem, in part, out of concern that no changes contained in the 2012 ICC codes were recommended by the RAC and, therefore, were not incorporated in the statewide building code.

Sen. McIlhinney's legislation would reverse the current language by which the RAC makes decisions. It would allow all proposed code changes to be adopted *unless* two-thirds of the RAC votes them out. It would also direct the RAC to re-review the 2012 ICC code changes under this new standard. Additionally, Senate Bill 1023 provides an extra year for the review and adoption of code changes in order to permit adequate time for meaningful debate.

The legislation introduced by Representative Harkin would separate the commercial construction code adoption process from the residential process. If this legislation were to become law, the RAC would review the ICC's commercial construction code revisions and recommend those commercial items that should be excluded from adoption, as distinguished from the residential code, which would still require a two-thirds vote to adopt any changes. Furthermore, when the RAC submits its report to the Department of Labor and Industry, House Bill 1209 provides that the Department may opt to exclude any or all of the commercial provisions recommended to be omitted by the RAC during the final regulatory promulgation process. House Bill 1209 would require the new commercial codes be adopted by the end of the same year they issued by the ICC.

Both bills have received public hearings in their respective legislative Committees, but have not yet been scheduled for a vote.

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Fox Rothschild Successfully Closes $3B Environmental Development Deal in Queens, NY

Jesse Masyr successfully closed one of the largest land use and environmental development deals to date in New York.

The New York City Council gave final approval on October 9, 2013 for a historic redevelopment plan that will allow the Queens Development Group, a joint venture between Sterling Equities Inc. and The Related Companies, to invest $3 billion to transform Willets Point, next to Citi Field, Flushing Meadows-Corona Park and the National Tennis Center, into a new retail and living destination.

The Willets Point redevelopment will clean up 23 acres of heavily polluted land and unlock more than five million square feet of new development that will include 2,500 housing units – of which 875 units will be affordable – along with retail, hotel and commercial space. It will also create more than six acres of new open space – without removing any existing open space – as well as a new school and recreational facilities for the area.

The redevelopment will create 12,000 union construction jobs and 7,100 permanent jobs, with Minority and Women-owned Business Enterprises and local hiring goals of 25 percent. Additionally, more than $310 million in new tax revenue will be generated during construction and more than $150 million in new annual tax revenue will be created during operation.

Fox Provides Pro Bono Assistance To Help Create New Home for University City Chinese Christian Church

Joel Bolstein and Carrie Nase-Poust, partners with Fox Rothschild LLP, successfully completed a pro bono project for the University City Chinese Christian Church (UCCCC).

The Fox team was instrumental in obtaining the necessary environmental and land use/zoning approvals to allow UCCCC to build a new church at 4501 Walnut Street in Philadelphia for Chinese immigrants and Chinese students.

Work on the project began in December 2011, when UCCCC elder Dr. Philip Siu reached out to Bolstein, known for his extensive background working with brownfield redevelopment projects, for assistance.

After a comprehensive search, UCCCC identified a potential site for its new church, but it needed legal guidance to move forward as the property was a vacant strip center built on a former gas station. Fox attorneys reviewed the environmental reports on the property and worked with the PADEP's Southeast regional office in Norristown to ensure the property was cleared for redevelopment as a church with residential living space.

The UCCCC elders also needed counsel on land use and zoning issues, because the property was not approved for use as a church and variances were required to address parking and other issues. The Fox team helped secure the necessary land use and zoning approvals from the City of Philadelphia, participating in numerous public meetings that culminated in a favorable zoning ruling in March 2012. The UCCCC then raised the private funding needed to purchase the property and construct the new church.

On Sunday, September 29, 2013, the UCCCC held a dedication service for the new church, inviting Bolstein and Nase-Poust as honored guests.

The University City Chinese Christian Church benefits religion-related, spiritual development, focusing specifically on Christian programs. It reaches out to Chinese students, scholars and their families in the University City section of Philadelphia and provides a place of study, fellowship and worship.