In the Zone

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Eligibility for Grandfathering of Certain Storm Water Permit Conditions Ready to Expire

By M. Joel Bolstein

In 2010, Pennsylvania's Environmental Quality Board published the final-form rulemaking for its amended Chapter 102 regulations relating to erosion and sediment control and storm water management (25 Pa. Code Ch. 102). At the time of the regulation's development, concern was expressed by the regulated community over the impact the new rules would have on permitted construction projects that require an NPDES renewal. Specifically, there was fear that a permit renewal would trigger the need for a revised post-construction storm water management plan (PCSM Plan) on an existing project thereby potentially rendering it financially unviable.

In response, the department incorporated a "grandfathering" clause into the Chapter 102 regulations stating that "a person conducting earth disturbance activities under a permit issued before November 19, 2010 (the regulation's effective date), and renewed prior to January 1, 2013, shall implement, operate and maintain the PCSM requirements in accordance with the terms and conditions of the existing permit. After January 1, 2013, the renewal of a permit issued before November 19, 2010, shall comply with the requirements of this section." (See §102.8(a))

If eligible, NPDES permits (or other permits including a PCSM Plan) are renewed prior to the January 1, 2013, the new PCSM Plan receives the terms and conditions of the original permit.

Those grandfathered items include riparian buffers (§102.14), licensed professional oversight at critical stages, final certification, PCSM long-term operation and maintenance requirements (§102.8(k-m)). Additionally, those new sections of the regulation not in practice previous to November 19, 2010, are also grandfathered.

It is important to note that grandfathered permittees are not exempt from meeting water quality standards through managing rate, volume, water quality and anti-degradation requirements. Applicants will need to demonstrate they are currently meeting these requirements or bring the plans into compliance.

Since 2002, the Department has required by policy and practice that applicants for NPDES permits address various issues associated with rate, volume and water quality. The amended Chapter 102 regulations merely codified the performance standards that had already been in practice pre-November 19, 2010.

DEP reports that they will not require partially built-out projects to retrofit existing construction. New requirements would only apply to those "new" sections going forward under the renewed permit.

As the January 1, 2013, grandfathering deadline rapidly approaches, NPDES permit holders ideally would have already begun the renewal process. General and Individual NPDES Permits require the renewal application be submitted at least 120 and 180 days prior to expiration, respectively. However, renewals can still be submitted now. Applicants should contact their conservation district and regional DEP office to identify site-specific issues and formulate a plan of action.

Those interested in viewing a recorded webinar on the matter, or accessing presentation slides, can visit DEP's Storm Water Management Program webpage for more information.

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New Laws Soon to Govern New Jersey Limited Liability Companies

By John L. Grossman

The New Jersey statute that governs limited liability companies (LLCs) has been revised. On September 19, 2012, Governor Christie signed into law A-1543, entitled the Revised Uniform Limited Liability Company Act (Revised Act). This new law takes effect on March 18, 2013, with special repealer to take effect on March 1, 2014.[1] The Revised Act replaces New Jersey's current law, the New Jersey Limited Liability Company Act (Current Act), which became effective in 1994.

Certain highlights of the Revised Act include:

- **Company Duration**. The Revised Act provides for LLCs to have perpetual duration, as is the case with corporations; the default rule under the Current Act that LLCs have a limited life has been eliminated.
- **Operating Agreements**. The Current Act defines an operating agreement to be a written agreement; the Revised Act provides that operating agreements may be oral, in a record, implied or in any combination thereof. Thus, a written agreement is no longer required, but may be desired.
- **Statements of Authority**. Under the Revised Act, a member is not an agent of the LLC solely by reason of being a member; statutory apparent authority has been eliminated. The Revised Act permits the filing of statements of authority authorizing only certain people or entities to bind the LLC.
- **Management**. Like the Current Act, the Revised Act provides, in the absence of a contrary provision in the operating agreement, that the LLC is member-managed. However, the Revised Act provides for differences in each member's rights in management and for the requirement of unanimous consent for approval of acts outside the ordinary course of the activities of the LLC. Accordingly, unanimous member consent may be required for more activities than those specified under the Current Act.
- **Distributions**. Absent contrary agreement, the Revised Act provides for distributions to be made on a *per capita* basis. There is no longer a default rule for allocation of profits and losses; those allocations are left to the decisions of the members.
- **Deadlock and Oppression**. The Revised Act contains remedies for oppressed minority owners, allowing for dissolution of the company and for appointment of a custodian on proper application to a court of competent jurisdiction.
- **Dissociation of a Member**. The Revised Act no longer provides a resigning owner with the entitlement to receive the fair value of an LLC interest as of the date of resignation; instead, the resigning owner is considered to be dissociated and has the rights only of an economic interest holder.
- **Conversion**. The Revised Act has flexible provisions for domesticating, merging and converting an entity other than a domestic LLC, provided it is permitted by the law under which it was formed.

In the real estate world, as in others, single purpose entities are frequently formed for the consummation of transactions. LLCs have been a popular vehicle in New Jersey for these purposes. The Revised Act should be consulted for its impact on decisions concerning the formation and use of domestic LLCs going forward.

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[1] Prior to March 1, 2014, the Revised Act governs only: (2) limited liability companies formed on or after March 18, 2013; and (2) limited liability companies formed before March 18, 2013 which elect to be subject to the Revised Act. On and after March 1, 2014, the Revised Act governs all limited liability companies.

New PA Law Affects Municipal Invoice Disputes, Escrow Requirements

By Robert Gundlach

On October 24, 2012, Governor Tom Corbett signed into law legislation that amends Pennsylvania's Municipalities Planning Code (MPC) by increasing the amount of time a property owner has to dispute invoices from third-party municipal consultants; by providing penalties for excessive and unreasonable billings; and, by clarifying escrow requirements for land development projects. House Bill 1718 now becomes Act 154 of 2012.

The MPC provides an applicant with a set period of time to evaluate and dispute invoices received from a third-

party municipal consultant. If the invoice is for review fees associated with a land development project, the applicant previously had 45 days to identify the invoice as unreasonable or excessive. Act 154 increases that window to 100 days. Likewise, an applicant had 30 days to dispute bills for inspections of infrastructure installations; and, the new law similarly extends that deadline to 100 days. The new provision also further clarifies that the governing body must submit the invoice indicated as the "final bill" to the applicant.

While the primary focus of concern over "unreasonable" invoices has been third-party municipal engineers, the MPC defines professional consultants to additionally include "[p]ersons who provide expert or professional advice, including, but not limited to, architects, attorneys, certified public accountants, engineers, geologists, land surveyors, landscape architects or planners."

In the event a set of disputed invoices ultimately reaches the arbitration phase, the MPC has been expanded to impose various responsibilities on the losing party. Namely, the applicant pays the arbitrator fees if the disputed fees are upheld; the charging party pays the arbitrator fees if $2,500 or more in fees are deemed unreasonable; and finally, the arbitrator fees are split equally if under $2,500. If the arbitrator holds that the charging party has billed the applicant more than $10,000 in unreasonable or excessive fees, then not only does the charging party pay the arbitrator fees but also an additional 4 percent surcharge on whatever amount was deemed unreasonable or excessive.

The final area of the MPC that Act 154 amends addresses the financial security an applicant posts with the municipality for the installation of land development improvements. When calculating the total escrow amount, the value of the improvements plus a 10 percent contingency fee – for a total of 110 percent of value – is normally required by the municipality. As improvements are completed over the course of the project, the municipality releases a portion of the escrow fairly representing the value of that completed improvement. Act 154 makes clear that a municipality must release funds equal to that valuation. While the municipality may be able to retain the original 10 percent contingency fee, it cannot additionally withhold another 10 percent of the completed improvement in question. Put another way, the full value of the incrementally completed improvements must be released, not merely 90 percent of value.

Lastly, when the governing body accepts dedication of the project's improvements, it may require posting of financial security for a period of time on the integrity and functioning of the installed improvements. Act 154 confines the governing body's ability to require such financial security to those improvements that have been specifically dedicated to the municipality.

As House Bill 1718 (Act 154) amends the MPC, similarly does House Bill 1719 amend the Municipal Authorities Act. Both take effect on or around December 24, 2012.

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Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 2365 proposes to amend the Pennsylvania Municipalities Planning Code (MPC) by revising Section 508 of the MPC regarding the approval of plats. A plat is defined by the MPC to mean "the map or plan of a subdivision or land development, whether preliminary or final."

The proposed legislation, in pertinent part, would add additional requirements regarding the approval of a plat. The proposed legislation would add the following provisions: "(8) No plat shall be finally approved unless the plat contains a notice from the design consultant stating that: (i) the design consultant has been properly compensated for the creation of the development plan; and (ii) the provisions of the development plan have been released for use by the municipality and any applicable regulatory agency."

The proposed legislation is interesting as it would require that a design consultant both confirm that it has been paid and that the development plan has been released for use by the municipality and any applicable regulatory agency before a plat can be recorded.

As for the status of House Bill No. 2365, shortly after it was introduced, it was referred to the local government committee, where it remains.

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Law Clarifies Boards of Appeals on Building Code Matters

By Carrie B. Nase

Pennsylvania House Bill 2530 (now Act 179 of 2012) resolves an issue for municipalities seeking to designate a Board of Appeals for building code issues. Prior to the new law, a municipality who has elected to administer and enforce the statewide building code was required to establish a Board of Appeal either on its own or in conjunction with another municipality. Act 179 grants municipalities the flexibility to designate another Board of Appeals to hear appeal requests.

Existing case law in Pennsylvania has previously determined that if a municipality administers and enforces building codes, then that municipality must likewise provide for a Board of Appeals. Indeed, the Pennsylvania Construction Codes Act (PCCA) provides that a "municipality which has adopted an ordinance for the administration and enforcement of this act or municipalities which are parties to an agreement for the joint administration and enforcement of this act shall establish a board of appeals … to hear appeals from decisions of the code administrator." (34 P.S. Sec. 7210.501(c))

Some municipalities have chosen to delegate this responsibility to regional or county Boards of Appeals without statutory authority. And as such, they have encountered issues before the courts. Act 179 seeks resolves that issue by expressly permitting a municipality which has adopted an ordinance to administer and enforce the PCCA the option to "designate" a board of appeals or a joint-board of appeals.

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Taking the Lead (Again) to Protect Philadelphia Taxpayers

By Jeffrey M. Herskowitz

Fox Rothschild recently filed a class action on behalf of the owners of approximately 1,240 properties located in the City of Philadelphia (the City) and the class of all real property owners in the County of Philadelphia (collectively, Taxpayers), in a concerted effort to challenge and invalidate recent legislation known as 53 Pa.C.S.A. § 8565 (the Statute) and Philadelphia Ordinance No. 120175-AA as well as Code Provisions 19-1301(1)(b) and 19-1801(2)(b) (collectively, the Ordinance), which purport to "adopt" an artificially high Established Predetermined Ratio (EPR) for the 2013 tax year. *Gerald S. Kaufman Corp., et al v. Commonwealth of Pennsylvania, et al*, was filed in Commonwealth Court at 652 MD 2012. Significantly, while the Statute expressly recognizes that real estate tax assessment in the City has become "increasingly at variance with principles of uniformity and sound assessment," 53 Pa.C.S.A. § 8565(a)(1), it arbitrarily incorporates knowingly inaccurate 2011 property values and 2009 sales data as the foundation for the new EPR. In so doing, Taxpayers allege that the Statute and Ordinance have undermined the integrity of the assessment process by eviscerating Taxpayers' fundamental rights to uniformity in taxation.

According to the Taxpayers' Verified Petition for Review filed on October 26, 2012, the Statute and Ordinance constitute an unprecedented use and abuse of legislative power by, among other things, incorporating improper and unreliable 2011 property values and 2009 sales data in an effort to achieve a desired financial benefit for the City at the expense of the Taxpayers. Moreover, the Statute and Ordinance have prevented Taxpayers from having their property assessment conform to the Common Level Ratio (CLR) to cure any lack of assessment uniformity, and ensure that Taxpayers pay no more and no less than their fair share. By mandating use of the EPR rather than the CLR, Taxpayers have been subjected to an unfairly high tax burden and denied the right to file appeals seeking application of the CLR. Taxpayers further allege that the City's unlawful action in manipulating the system to further its own interest to the significant economic detriment of the Taxpayers, is in direct contravention of the procedural and substantive constitutional protections afforded to property owners under the law.

We are prepared to pursue all available remedies for our clients and will continue to monitor and provide updates on this important matter of constitutional significance.

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Superstorm Sandy: Legislative Response In New Jersey

By Jeffrey M. Hall

Superstorm Sandy left a profound and lasting impact to individuals and businesses in New Jersey and the tri-state region. In the wake of the widespread dislocation and destruction it caused, the storm has also spawned legislative activity in both houses of the New Jersey legislature. Since late October, the legislature has dropped several bills and passed resolutions urging action by the U.S. Congress and others. While it is widely speculated that the New Jersey legislature is drawing up an omnibus bill to address relief and reconstruction needs, such legislation has not been introduced as of December 17, the date this note was finalized.

The legislature's creative juices are flowing and bills have been introduced to address Sandy's impact. For those who have suffered from Sandy, they should keep tabs on this legislation as it goes through the legislative process. Some examples are:

- A3065 – Provides sales and use tax rebates for certain purchases made by individuals and small businesses affected by Hurricane Sandy.
- A3522 – Permits NJ gross income tax deduction for charitable contributions made for Hurricane Sandy relief.
- A3566 – Allows voluntary contributions through filed gross income tax returns to support Sandy victims.
- A3584 – Suspends temporarily penalties and interest for late payment of state taxes by disrupted businesses.
- S2388 – Provides a corporation business tax or gross income tax credit to small businesses reinvesting in shore municipalities.

Given the sense that a comprehensive bill is being drafted, the future for these bills is uncertain. However, their presence reflects a legislative concern for those individuals and businesses devastated by the storm.

The legislature has also called upon others to offer relief. For example, both houses passed a resolution urging financial institutions to provide financial assistance in the form of short term, low or zero interest loans (SR85 and AR125). In another resolution, the NJ Commissioner of Health is urged to ensure that healthcare providers and expectant parents are made aware of the impact the effects of Hurricane Sandy on pregnant women. Most notably, both the Assembly and the Senate have urged the U.S. Congress to enact legislation requested by President Obama to provide $60.4 billion in federal resources to help New Jersey and other afflicted states to guide and support their successful navigation of the road to recovery from the Superstorm's wake. Such legislation is pending in Congress, but unlike similar legislation passed to address Hurricane Katrina's massive devastation, it has not proceeded as quickly. While Katrina relief was passed into law within two weeks of the storm event, the Superstorm Sandy legislation is moving along at a more measured pace. It is anticipated to pass, but its progress appears impacted by fiscal cliff and other economic issues grabbing the attention of Washington and headlines.

The unfathomable losses from the hurricane will call for more legislative and executive action over the next several months. It will pay to follow developments in order to benefit from resources and programs that will be created or replenished. For more information on resources and links related to the Superstorm Sandy, please consult Fox Rothschild's Disaster Recovery Consultation Unit.

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