In the Zone

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

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Court to Dr. Oz Neighbor: Exhaust Administrative Remedies Prior to Filing an Action

By Jack Plackter

In *Bisceglie v. Memhmet Oz and Lisa Oz and Cliffside Park Zoning Board of Adjustment, Cliffside Park Zoning Official*, Cliffside Park Code Official, the individual Plaintiffs and Defendants are next door neighbors. The properties are located near the Hudson River and overlook the New York City skyline. In or about 2008, the property owners submitted an application to the Cliffside Park Zoning Board of Adjustment, seeking approval for a landscape project, in connection with the construction of a guest house and in-ground swimming pool.

The Zoning Board approved the property owners' request, subject to the approval of a landscaping plan by the Borough Engineer/Planner, which plan was submitted on August 13, 2010. The same day that the landscaping plan was submitted to the Borough Engineer/Planner, the property owners personally delivered a copy of the landscaping plan to the neighbors.

Three days later, on August 16, 2010, the property owner planted certain bamboo trees on their property, consistent with the landscaping plan. Eight days later, the neighbors filed a motion for a probable cause hearing in the Cliffside Park Municipal Court, asserting that the bamboo trees violated the local fence ordinance. The application came before the Municipal Court on September 16, 2010. At the hearing, the court questioned whether a Municipal Court was the proper jurisdiction, but the court apparently never issued any ruling.

Following the hearing, the property owner moved the bamboo trees to the other end of their property, away from the neighbor's parcel of land in an attempt to accommodate the neighbor's objection. The neighbor, in addition to filing a Complaint in Municipal Court, took other steps to voice his objection to different aspects of the landscaping plans. Among other things, the neighbor discussed his objections with the planner and wrote letters to the mayor and other municipal officials. Nevertheless, and central to the case, the neighbor never appealed the matter to the Cliffside Park Zoning Board of Adjustment for a determination of these issues. Moreover, the neighbor never raised an objection to the cedar trees that were depicted on the landscaping plan, which were at issue in the case, at any time prior to filing a prerogative writ action in the Superior Court of New Jersey.

On or about October 28, 2010, the property owner planted the three cedar trees depicted on the approved plan. Apparently, the trees partially obstructed the neighbor's view of the New York City skyline and Hudson River. On November 16, 2010, the neighbor filed an action in lieu of prerogative writs against the defendants, claiming that the trees

In This Issue:

Fox Welcomes Team of Real Estate Attorneys to New Jersey

Robert A. Klausner, Deirdre E. Moore and Christopher M. Rider – all noted by *Chambers USA* as leading real estate attorneys in New Jersey – have joined Fox as partners. Grace J. Shin and Mat D. Carlson have also joined as partners, and as associates, Jennifer L. Solberg, Joshua J. Franklin and Corey D. Kaplan.

Stanley L. Goodman, Managing Partner of the firm's Roseland office says. "We have been looking to expand our transactional practice in Northern New Jersey for quite a while and to find such a prestigious real estate group, one of the few groups in New Jersey rated Band 1 by *Chambers USA*, is quite an exciting opportunity for Fox."

depicted on the landscaping plan constituted a "fence," in violation of the Cliffside Zoning Ordinance.

On July 21, 2011, the Superior Court Judge dismissed the action for failure to exhaust administrative remedies.

On appeal before the Superior Court, Appellate Division, the neighbor argued that the judge improperly dismissed the action and should have heard the merits of the case. The Appellate Division disagreed with the neighbor, finding no mistake in exercise of discretion in the judge's determination that an exhaustion of administrative remedies was required. The court went on to discuss when and under what circumstances an exhaustion of administrative remedies must occur prior to commencing an action in Superior Court.

The court discussed the powers of a Zoning Board under Section 70(a) and (b) of the Municipal Land Use Law, which are the sections that authorize the Zoning Board to hear appeals of an administrative decision and interpretations of the zoning map or ordinance. The court indicated that under the Municipal Land Use Law, such an appeal must be brought to the Board of Adjustment within 20 days of the date an interested party knows or should know of the action. The policy behind a time limit is the protection of individuals from the threat of an unrestrained future challenge. A person to whom a permit is issued may protect the right by providing reasonable notice to all those who might wish to challenge the undertaking. In other words, if one supplies his neighbor with a copy of the plan, as was done in this instance, a strong argument can be made that the 20 days would run from the time of supplying the plan to any neighboring property owners.

The court went on to discuss that actions in lieu of prerogative writs are not maintainable as long as there is an available right of review before an administrative agency. This is the exhaustion of administrative remedies requirement. Moreover, no action in lieu of prerogative writs may be commenced later than 45 days after accrual of right to review hearing or relief claimed. However, a trial court may excuse the requirement to exhaust administrative remedies or extend the forty-five day statute of limitations in the interest of justice.

The court went on to discuss the purpose behind the Doctrine of Exhaustion of Administrative Remedies and indicated it serves three primary goals: (1) the rule insures that claims will be heard, as a preliminary matter, by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may satisfy the parties and thus obviate resort to the courts.

Accordingly, there is a strong public policy in favor of requiring parties to exhaust their administrative remedies before resorting to an action in court.

Nevertheless, the court discussed that the exhaustion of administrative remedies requirement is neither jurisdictional nor absolute and would depend upon the facts and circumstances of each case. The court went on to discuss that a court may dispense with the requirement of exhaustion of administrative remedies when the interest of justice so requires.

The New Jersey Supreme Court has set forth the following guidelines for determining when an interest of justice exception should be permitted:

> This has been held to mean that exhaustion of remedies will not be required where administrative review will be futile, where there is a need for prompt decision in the public interest, where the issues do not involve administrative expertise or discretion and only a question of law is involved and where irreparable harm will otherwise result from the denial of immediate judicial relief.

In our experience, this five-part test is difficult to meet and further emphasizes that there is an extremely strong presumption favoring the requirement of exhaustion of administrative remedies in New Jersey.

On appeal, the neighbor argued that there was no need to appeal the approval of the property owners landscape plans to the Zoning Board because it involved the interpretation of a zoning ordinance, which is a purely legal issue. The court went on to discuss the competing policy goals and case law that interpret whether and in what instances the exhaustion of administrative remedies should be required and noted that the question of law exception ordinarily includes challenges to ordinances and may also be applied where issues involve interpretation of ordinances.

However, where the issues involve interpretation and application of a particular ordinance, ordinarily facts may be in dispute and it is best that a record be made at the local level, rather than in a trial court. Like this case, most zoning issues involve not only an interpretation of an ordinance, but also how that ordinance is applied to the specific fact pattern in any given land use matter.

In the instant matter, the court held that the question presented in the instant case involves interpretation of factual issues as applied to a legal determination. The court found that:

> It is not simply whether . . . trees fall within the legal definition of a fence under the ordinance, whether a row of trees constitutes a 'fence' therefore becomes a case-by-case determination involving a more fact-

intensive review in determining whether defendants' three trees constitute a fence considerations such as the size the trees, the positioning, the use and placement, the purpose behind their planning and any other facts that make the trees more or less likely to be considered a fence must be taken into account.

Because this case involved that mixed interpretation of an ordinance, as well as its applications to the facts of the matter, the court held that the appropriate process would have been to appeal the matter to the Zoning Board of Adjustment within 20 days of when the neighbor was supplied with the property owner's landscaping plan. Since the property owner gave the plans to the neighbor on August 13, 2010, the neighbor would have been required to apply to the Zoning Board of Adjustment for a determination under Section 70 of the Municipal Land Use Law on or before September 2, 2010.

The current action was not filed until November 16, 2010 – over three months after the neighbor received the landscaping plan. Since the neighbor did not appeal within the 20 days required under the Municipal Land Use Law, and never filed a prerogative writ action until more than three months after the neighbor had a copy of the landscaping plan, the dismissal of plaintiff's action in lieu of prerogative writs was affirmed.

Accordingly, as practitioners and property owners, it is critical that we remain mindful of the requirement to exhaust administrative remedies. The majority of questions are always mixed interpretations of factual issues as applied to a legal determination and, as a result, in almost every instance before resorting to filing an action in court an interested party must exhaust his administrative remedies.

While the case does recognize an interest of justice exception, the extensive five-part test enunciated by the Supreme Court is difficult, if not impossible, to meet. When coupled with the public policy that favors exhaustion of administrative remedies, one should almost never resort to the courts without first exhausting administrative remedies before the appropriate land use board.

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Delaware Supreme Court Confirms Lien Discharge of Real Property Sold at Foreclosure Sale and Priority of Distribution of Proceeds

By J. Breck Smith

In the case of *Eastern Savings Bank, FSB v. CACH, LLC* (Del. Supr. No. 88, 2012), the Delaware Supreme Court confirmed the lien status of real property sold at sheriff's sale and the priority of distribution of sheriff's sale proceeds between lienholders.

In this case, CACH, LLC (CACH) had obtained a judgment against its borrower, Aaron Johnson, to satisfy a deficiency balance on a car loan. CACH filed its judgment as a property lien on December 21, 2006. As of that date, Aaron Johnson owned real property in Newark, Delaware. On December 19, 2006, Aaron Johnson executed a deed conveying his owned real property to himself and his wife as tenants by the entireties, and later that day, Johnson and his wife mortgaged the property to Eastern Savings Bank, FSB (Eastern) for $168,000. The deed conveyance and the mortgage were not recorded at the New Castle County Recorder of Deeds Office until December 29, 2006.

In August 2008, Eastern filed a foreclosure action. In connection therewith, CACH notified Eastern that CACH's judgment lien had priority over Eastern's mortgage lien. CACH's judgment lien totaled $16,041.28 as of the date Eastern filed its foreclosure action. In April 2009, the property was purchased at foreclosure sale by a third party bidder for $133,000, and the New Castle County Sheriff sent the sale proceeds to the attorney for Eastern. After sale costs and payment of proceeds to Eastern, no excess proceeds remained for CACH.

CACH filed a complaint in Court of Common Pleas against Eastern alleging misappropriation of funds received from the sheriff's sale and unjust enrichment for not paying over to CACH funds from the sale sufficient to pay off CACH's judgment lien. The Court of Common Pleas denied CACH's motion for summary judgment and granted Eastern's motion to dismiss for failure to state a claim. On appeal to Superior Court, the judgment of the Court of Common Pleas was reversed. On appeal to the Delaware Supreme Court, Eastern argued that the sheriff's sale did not discharge CACH's judgment lien and therefore CACH was not entitled to any sale proceeds.

As an initial matter, the Delaware Supreme Court stated that the

interpretation of statutes is a question of law that the court reviews *de novo*, and also that when reviewing a grant or denial of summary judgment, the court views all facts in the light most favorable to the non-moving party and applies a *de novo* standard of review to determine whether there is a genuine issue of material fact in dispute. The court then cited two statutes, which it stated are based on the public policy of disencumbering lands as much as possible from liens when sold at foreclosure sale, as requiring the sheriff to discharge all nonmortgage liens when selling property at foreclosure sale.

First, according to 10 *Del.C.* §4985, real property purchased at a sheriff's sale must be free from all liens against the previous owner. In pertinent part: "Real estate sold by virtue of execution process shall be discharged from all liens thereon against the defendant, or against one or more of the defendants, if there is more than one, whose property such real estate is, except such liens as have been created by mortgage or mortgages prior to any general liens." Citing this statute, the court stated that the sheriff's sale discharged all nonmortgage liens against the foreclosed property.

Second, according to *Del.C.* §5066, land sold at foreclosure sale shall be discharged from all encumbrances incurred by the prior owner. In pertinent part: "The person to whom any lands and tenements shall be sold, or delivered, under §5065 of this title, and such person's heirs and assigns, shall hold the same, with their appurtenances, for such estate, or estates, as they were sold, or delivered for, discharged from all equity or redemption, and all other incumbrances made and suffered by the mortgagor, the mortgagor's heirs, or assigns; and such sale shall be available in law." The court stated that this statute directs that property sold at a sheriff's sale must be free of liens against the mortgagor. The court also stated that the fact that Aaron and Angela Johnson owned the property as tenants by the entireties was irrelevant. The court noted that Eastern's mortgage document identified the borrowers as "Angela A. Johnson and Aaron Johnson, Jr." and both signed in their individual capacity. When Eastern foreclosed on its mortgage, the sheriff's sale discharged all liens against the individual defendants Aaron Johnson and Angela Johnson. In affirming the Superior Court's holding that the foreclosure sale discharged all nonmortgage liens, the Delaware Supreme Court analyzed relevant case law, holding that longstanding statutory and common law precedent requires that land sold at sheriff's sale be transferred free of all nonmortgage liens.

The Delaware Supreme Court then turned to the issue of determining the order in which proceeds from a sheriff's sale must be distributed. The court discussed Delaware's recording statutes which provide that Delaware is a pure race state. Noting that CACH recorded its judgment as a lien against the property on December 21, 2006, but Eastern did not record its mortgage against the property until December 29, 2006, due to CACH having the first recorded lien it was first in line to receive distribution of sale proceeds. In affirming the Superior Court's holding that CACH's judgment lien must be paid before Eastern's mortgage lien even if the mortgagee filed the foreclosure action, the Delaware Supreme Court held that sale proceeds being distributed according to first in time, first in line priority of recording is consistent with prior case law and treatise analysis.

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Fox Rothschild Prevails in Commercial Eviction Action

By Michael J. Isaacs

Following a Justice of the Peace Court trial, the court ruled in favor of Fox Rothschild's client, 101 Greenbank Road LLC, in a commercial summary possession action. The case involved the alleged breach of contract by the tenant, defendant. With this victory, the parties were able to reach a universal settlement which includes the settlement of a companion Superior Court case seeking money damages. The client is represented by Fox Rothschild attorneys Michael Isaacs and Wali Rushdan. Wali Rushdan tried the case.

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Case Summary: *Koontz v. St. Johns River Water Management District*

By Peter L. Blacklock

In 1972, when Coy Koontz acquired a 14.9 acre vacant parcel of land east of Orlando, the Florida Legislature was busy enacting a series of conservation and environmental protection laws: the Land Conservation Act of 1972 (Fla. Stat. § 259), which created a program to acquire and conserve environmentally endangered lands, the Florida Water Resources Act (Fla. Stat. § 373), which granted the Florida Department of Environmental Protection and the state's five water management districts authority to protect Florida's water resources, and the Florida Environmental Land and Water Management Act of 1972 (Fla. Stat. §§ 380.012 - 380.12), which established procedures for increased protection of wildlife and wilderness. Florida adopted the Warren S. Henderson Wetlands Protection Act 12 years later, which provided the water management districts wetland resource permitting authority. Consequently, all but 1.4 acres of Koontz's property became a part of a Riparian Habitat Zone, which could not be developed without authorization from the St. Johns River Water Management District (the District).

In 1994, Koontz applied for a permit to fill 3.7 acres of wetlands on his parcel. The District's examiner agreed to recommend approval of Koontz's permit subject to Koontz's consent to either: (1) decrease development to one acre and dedicate the remaining 13.9 acres into a deed-restricted conservation area; or (2) deed the rest of his property into a conservation area and perform offsite mitigation by either replacing culverts located four and a half miles from his parcel or plug drainage canals on a property located seven miles away. Koontz agreed to deed the rest of his land into a conservation area but rejected the reduction in development and the proposed off-site mitigation.

Subsequently, Koontz's permit was denied premised upon the assertion that his development would adversely impact the Riparian Habitat Zone without adequate mitigation, and Koontz brought suit against the District for inverse condemnation. The trial court cited the constitutional principles pronounced by the U.S. Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1997), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and concluded that the District had effected an improper exaction of Koontz's property. The two-prong *Nollan/Dolan* analysis recognizes that exactions are permitted if there is a "rational nexus" (under *Nollan*) and "rough proportionality" of impact (under *Dolan*) between the development and the taking. The trial court opined that the District's actions constituted a temporary regulatory taking and awarded Koontz $376,154 in damages.

The District appealed the damages award to the Fifth District Court of Appeal, claiming that *Nollan/Dolan* relates solely to conditions requiring a property owner to dedicate real property, and was thus inapplicable to a condition requiring the owner to spend money to improve land within the District's purview. The District also averred that *Nollan/Dolan* applies only to permit approvals containing unconstitutional stipulations, arguing that inasmuch as Koontz's permit had not been granted, he hadn't actually fulfilled any unconstitutional conditions. The appellate court overruled the District's arguments and upheld the trial court's damages award.

The District's petitioned the Florida Supreme Court for review and on November 3, 2011, the court quashed the lower court's conclusion that the District's actions represented an improper exaction of Koontz's property. The court pronounced that the *Nollan/Dolan* rule "is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed.[1]" The court ruled that the test for regulatory takings set forth in *Penn Central v. New York City* (1978) was more appropriate to the dispute between Koontz and the District.

Koontz died during the pendency of the litigation. The petition to the U.S. Supreme Court was brought by Koontz's son, who is represented by the Pacific Legal Foundation, a libertarian not-for-profit law firm which frequently advocates for private property rights. Prior to commencement of oral arguments on January 15, many pundits felt that the current make-up of the Supreme Court would result in a five to four ruling in favor of Koontz. But the questions and comments posed by Antonin Scalia, who authored the *Nollan* decision and was part of the five justice majority in *Dolan*, left many observers with the conclusion that Justice Scalia would side with his liberal colleagues in favor of the District. The United States Supreme Court is expected to make a decision on the Koontz case this June.

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[1] St. Johns River Water Management District v. Koontz, 77 So.3d 1220 (Fla. 2011) citing Iowa Assurance Corp. v. City of Indianola, 650 F.3d 1094, 1096-97 (8th Cir. 2011); West Linn Corporate Park, LLC v. City of West Linn, 428 F. App'x 700, 702 (9th Cir. 2011).

Validity Variances in Pennsylvania

By Michael J. Kornacki

In the case of *Hunt, et al. v. Zoning Hearing Board of Conewago Township*, (2013 WL 387884 (Pa. Cmwlth)), decided February 1, 2013, the Commonwealth Court of Pennsylvania analyzed the requirements for obtaining a validity variance under Pennsylvania law.

The Appellants, Scott A. Hunt and Vicki E. Hunt and Sandra R. Glick owned properties in Conewago Township's conservation zone (Cv). The Hunts were the owners of two parcels and Glick owned one parcel. The Hunts sought approval to construct a single family home on their property, a use which is by right in the Cv zone. It is unclear how Glick intended to use her property, but she indicated it was also a by right use. The zoning officer analyzing the respective applications ruled that the lots could not be used as proposed because all lots lacked frontage on a public road as required under the definition of "lot" in Section 201 of the Conewago Township ordinance, and none of the lots had access to or abutment to a public roadway as required under Section 309(i) of the ordinance (relating to the Cv zone). The applicants then made application to the Zoning Hearing Board (ZHB) requesting (1) an interpretation of the ordinance confirming that it must be construed to permit development on lots that lacked public road frontage; (2) a variance from the requirements of Section 309(i); and, in the alternative (3) a validity variance.

At the hearing before the ZHB, Hunt provided testimony and evidence that there existed a Right-of-Way and Maintenance Agreement among Hunt, Glick and Harold King, Jr., the owner of a property adjacent to the three lots in question. The Right-of-Way and Maintenance Agreement provided for a fifty foot wide right-of-way to Bull Road, a public road, for the benefit of the three lots. There was no testimony offered to challenge or contradict the evidence of the road access.

In October, 2011, the ZHB upheld the zoning officer's interpretation. The ZHB said that the language of the ordinance was clear on its face, that all lots and the Cv zone must abut to a public roadway. In addition, the ZHB said the applicants failed to meet their burden of demonstrating every element necessary for the issuance of a variance under Section 503(c) of the ordinance (which mirrors Section 910.2(a) of the Pennsylvania Municipalities Planning Code (the MPC). The ZHB stated that the applicants did not establish that their land suffered from a physical hardship that was unique to their parcels as opposed to one that is imposed by the ordinance on all properties that lacked road frontage. The ZHB stated that owners of parcels that lacked road frontage were required to buy strips of land in fee in order to comply with the ordinance and develop their properties. Finally, the ZHB rejected the alternate remedy of a validity variance, stating that other properties in the area were also "landlocked," and that "the ordinance permits uses on such lots that do not require buildings." The Court of Common Pleas affirmed the decision of the ZHB, and the applicants appealed to the Commonwealth Court.

As a determinative matter, the Commonwealth ruled that the ZHB erred in denying the applicants a validity variance. The court noted that a validity variance is different from a "normal" variance insofar as a normal variance "is granted to adjust the zoning regulation to the particular property," while a validity variance is granted where "the zoning regulation is restrictive to the point of confiscation and requires the issuance of a variance permitting a *reasonable* use of the land." Put another way, a validity variance is appropriate where circumstances "essentially merit a zoning amendment."

Referring to the standard established in the case of *Laurel Point Assocs. v. Susquehanna Twp. Zoning Hearing Bd.*, (887 A.2d 796) (Pa. Cmwlth 2005), the court stated that in order to obtain a validity variance, and applicant must establish "(1) the effect of the regulations complained of is unique to the applicant's property and not merely a difficulty common to other land in the neighborhood; and (2) the regulation is confiscatory in that it deprives the owner of the use of the property." In addition, the applicant must comply with the requirements of Section 910.2 of the MPC, which sets forth the requirements for obtaining a "normal" variance. However, the Commonwealth Court held that not all of the requirements for obtaining a "normal" variance must be established in order to obtain a validity variance. In particular, the court noted that "Section 910.2(a) of the MPC requires a zoning hearing board to make findings regarding the variance criteria where relevant." As established in the *Laurel Point* decision, that means "not all criteria must be satisfied in every case and that the quantum of proof necessary to establish a particular criterion may vary depending on the type of variance sought." The Commonwealth Court determined that the fact that there were other properties that lacked frontage on or access to a public right-of-way would not automatically invalidate the request for a validity variance.

As a result, the Commonwealth Court ruled that the ZHB committed an error when it failed to issue the validity variance. In particular, the ZHB should not have required that the hardship imposed by the ordinance be unique to the properties at issue. The court

quoted from the *Laurel Point* opinion again, when it noted "where an owner's land along with adjacent properties is denied any reasonable use by an unduly restrictive ordinance, the findings [regarding unique physical circumstances or conditions] should not be "relevant in [the] given case," and are not necessary. The practical effect of a contrary rule would be to force the landowner to seek relief under the Federal rules prohibiting takings without compensation." Ultimately, the most important factor is a confiscation and "confiscation is the unnecessary hardship."

As to the question of whether the property has no value as a result of the ordinance, the court noted that the applicant for a validity variance may establish "*that the property has no value for any purpose permitted by the zoning ordinance*" (emphasis in original). In this case, Section 201 of the Ordinance defined "lot" as a parcel "having frontage on a public road." The court noted that this requirement was clear on its face and that all "lots," by definition, must abut to a public road. There is a similar requirement in Section 309(i) of the ordinance which provides that "each lot shall have access to and abut to a public roadway." Contrary to the finding of the ZHB, the Ordinance does not permit any use of any property that does not have the required frontage on a public right-of-way. As a result, the ordinance is confiscatory insofar as it deprives the owners of such lots of all reasonable uses of their property. As an aside, the court also noted that the Zoning Hearing Board was mistaken in failing to recognize the right-of-way agreement that granted an easement to the applicants permitting them access to a public right-of-way. The ordinance did not distinguish between access by way of easement vs. access over land owned in fee simple.

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Case Summary: *Krohn, et al. v. Snyder County Bd. of Assessment Appeals*

By Julia D. Perkins

In this tax assessment appeal, Richard and Elaine Krohn (Krohns Sr.) and their son, John Krohn, and wife Pamela Krohn (Krohns Jr.), challenged the trial court's decision denying their appeals from the reassessment of their respective properties by the Snyder County Board of Assessment Appeals (Board). By way of factual background, the Krohns Sr. owned a tract of land that contained a barn on the property (Barn Tract). The Krohns Jr. acquired a farm (Krohns Farm) that adjoined the Barn Tract, by gift from the Krohns Sr. The Krohns Sr. had originally recorded a subdivision plan for the Krohns Farm in 1996, but conveyed the Krohns Farm in one parcel to the Krohns Jr.

In January 2010, the Board notified the Krohns Sr. of an increased valuation of the Barn Tract, from $2,090 to $3,770, stating that the reason for change was due to "the sale of land and the assessment of a home site not assessed previously." The sale of land the Board was referring to was the transfer of the Krohns Farm to the Krohns Jr. in 2009. Similarly, in January 2010, the Board also notified the Krohns Jr. of an adjusted valuation of the Krohns Farm, from $16,640 to $18,610, reasoning that the increase was due to the "purchase of land" and the assessment of a home site. The Board alleged that to determine the highest value and best use of property, it routinely assigned home sites and increased the value of properties to reflect home sites, even if those home sites were merely hypothetical places for homes that were not planned for construction.

Both the Krohns Sr. and the Krohns Jr. appealed the reassessment, challenging it as "spot assessment" (defined as the reassessment of property that is not conducted as part of a countywide revised reassessment, and which creates, sustains or increases disproportionality among properties' assessed values). They argued that under Section 602.1 of the Fourth to Eighth Class County Assessment Law, changes in valuation are only proper when:

(1) a parcel of land is divided and conveyed away in smaller parcels; or

(2) when the economy of the county or any portion thereof has depreciated or appreciated to such extent that real estate values generally in that area are affected; and

(3) when improvements are made to real property, or existing improvements are removed from real property or are destroyed.

Although the trial court agreed than none of those instances existed with respect to either Krohn property, the court still found the increased reassessment valid because the reassessment was necessary in order to comply with Article VIII, Section 1, of the Pennsylvania Constitution (known as the Uniformity Clause). The

Uniformity Clause requires that "all taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." Pa. Const. art. VII, § 1. The trial court reasoned that Snyder County had a longstanding policy of assigning home sites to parcels of vacant land, and, without the reassessment to the Krohns' properties, their properties would not be uniformly treated.

The Commonwealth Court rejected the trial court's reliance on the Uniformity Clause, holding that the reassessment did amount to spot assessment. The court found that the Board's reassessment was improper because first, there was no division of property that was then conveyed away in smaller parcels that would trigger a reassessment as stated in Section 602.1; rather there was merely a transfer of an adjoining parcel as a gift, and this alone should not trigger the reassessment. Moreover, the court stated that the Board's application of a hypothetical value of a hypothetical home site in order to increase the value for tax purposes is inconsistent with the law, and the Krohns' could not be taxed on a hypothetical use as if it were a current use. Therefore, the Commonwealth Court reversed the trial court, and remanded the case to restore the previously established assessment for both properties and to refund any taxes paid.

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PA Steel Products Procurement Act Modernized to Decrease Costs/Delays

By Ellen M. Enters

In 1978, the Steel Products Procurement Act (the Act), 73 P.S. §§ 1881 et. Seq, was enacted under the police powers of the Commonwealth of Pennsylvania as matter of public policy to promote the development of the steel industry of the United States and to stimulate and improve the economic well-being of the Commonwealth and its people.

The Act was recently amended in October 2012 by legislation (H.B. 1840) and co-sponsored by State Rep. Peter J. Daley II, D-Fayette/Washington, who said:

> The Steel Products Procurement Act was, and continues to be, a good tool to safeguard and promote the production of U.S. steel. Since 1978, however, applying the act to some equipment and machinery, such as lighting fixtures, speakers, heat pumps, dehumidifiers, sound systems, water treatment systems and fire alarm systems, to name a few items, has become a burden that can increase contract costs and construction delays. In many cases, these products are no longer produced in the U.S., or are produced in very limited quantities. What this measure does is to modernize the act and remove the burden of extra paperwork and costly construction delays from contractors, which in turn saves the public money on projects.

Section 4 of the Act, 73 P.S. § 1884(a), requires every public agency to include in its contracts for construction, reconstruction, alteration, repair, improvement or maintenance of public works a provision that, if any steel products are to be used or supplied in the performance of the contract, only steel products as defined in the Act are to be used or supplied in the performance of the contract or any subcontracts thereunder. The term "public agency" is broadly defined and includes, for example, Commonwealth agencies, counties, cities, municipalities, school districts, authorities and other public bodies.

Section 6 of the Act, 73 P.S. § 1886, defines "steel products" as (emphasis added):

> *products* rolled, formed, shaped, drawn, extruded, forged, cast, fabricated or otherwise similarly processed, or processed by a combination of two or more of such operations, *from steel made in the U.S.* by the open hearth, basic oxygen, electric furnace, Bessemer or other steel making process and shall include cast iron products and shall include machinery and equipment listed in U.S. Department of Commerce Standard Industrial Classification 25 (furniture and fixture), 35 (machinery, except electrical) and 37 (transportation equipment) and made of, fabricated from, or containing steel components.

In other words, the Act requires public agencies to use products made from U.S. steel in their public works projects. Previously, the Act contained one exception (73 P.S. § 1884(b)(1)) to the requirement to use products made from U.S. steel – when the head of the public agency, in writing, determined that steel products were not produced in the U.S. in sufficient quantities to meet the requirements of the contract.

The Act was amended on October 24, 2012, effective 60 days thereafter, creating a second exception (73 P.S. § 1884(b)(2)) to the requirement to use products made from U.S. steel – the creation by the Pennsylvania

Department of General Services (the Department) of an official list of steel products that are not produced in the U.S. in sufficient quantities. The second exception states that the requirement to use steel products made from U.S. steel does not apply (emphasis added):

> *to items on a list of exempt machinery and equipment steel* products, which have been identified by the Department of General Services as not produced in the U.S. in sufficient quantities in the previous calendar year, and published on *the department's publicly accessible Internet website, which contractors, subcontractors, suppliers, bidders, offerors and public agencies can rely upon in preparing bids and contracts*. The list of exempt machinery and equipment steel products shall be updated annually on a date selected by the Department of General Services. The Department of General Services may not make changes to the list during the year following publication. Prior to publication on the Internet website, and in each subsequent year, the Department of General Services shall publish the list of exempt machinery and equipment steel products in the Pennsylvania Bulletin and provide for a 30-day public comment period. The Department of General Services shall, *through a statement of policy, establish a process for creating the list* of exempt machinery and equipment steel products and resolving disputes with respect to items on the list raised during the public comment period prior to the publication of the Internet website.
>
> The provisions of 2 Pa.C.S. Ch. 5 Subch. A (relating to practice and procedure of Commonwealth agencies) shall not apply to this section.

As required by the amendments, the Department issued a Statement of Policy in the *Pennsylvania Bulletin* on February 9, 2013, setting forth the processes by which the Department will establish the list each year and for resolving disputes raised during the public comment period (43 Pa. B. 877). The Department also published an initial list of the exempt steel products in the *Pennsylvania Bulletin* on February 9 (43 Pa. B. 940).

The initial list is presently in the 30-day public comment period, and remains subject to change. Accordingly, it should not be relied upon by public agencies, contractors, subcontractors, suppliers, bidders, offerors and public agencies in preparing bids and contracts until it is officially published on the Department of General Services website.

During the 30-day comment period, the public may submit written comments as to the domestic availability of a steel product on the list, which comments must be supported with evidence that the disputed product is produced domestically (4 Pa. Code § 67a.1(a)&(b)). If the Department finds that the product is produced domestically in sufficient quantities, then it may be removed from the exempt list prior to its official publication on the Department's website (4 Pa. Code § 67a.1(c)). Once the list is officially published on the Department's website, it will not be changed for one year (4 Pa. Code § 67a.1(d)). The list will be updated annually utilizing the same process of publication in the *Pennsylvania Bulletin*, 30-day comment period, resolution of disputes and publication of the official list (4 Pa. Code § 67a.1(e)). The Department will update the list on or about January 31 of each calendar year (4 Pa. Code § 67a.1(f)).

Accordingly, once the official list is published, contractors, subcontractors, suppliers, bidders, offerors and public agencies can rely upon the list in preparing bids and contracts. This will ease the administrative burden on both public agencies and contractors, as they will not have to independently verify on a project-by-project basis that a steel product is not produced in the U.S. in sufficient quantities if it is a listed exempt product. The head of a public agency will not need to make a written determination that the steel products are not produced in the U.S. in sufficient quantities to meet the requirements of the contract if the product is listed as exempt. This will also help to eliminate construction delays associated with procuring domestically produced steel products that are produced in limited quantities and have a long lead time – to the extent these products have been identified and included on the exempt list.

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Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 148 proposes to amend the Pennsylvania Municipalities Planning Code (MPC) by authorizing municipalities and school districts to impose development impact fees.

House Bill No. 148 first proposes to amend Section 502-A of the MPC to change the current term "impact fee" to "transportation impact fee" and then revise Section 503-A of the MPC to account for the revision. The foregoing change would not substantively alter the right of a municipality to impose what House Bill No. 148 proposes to call a

"transportation impact fee." A "transportation impact fee" would assume the current definition of an "impact fee," or "a charge or fee imposed by a municipality against new development in order to generate revenue for funding the costs of transportation capital improvements necessitated by and attributable to new development." Municipalities currently are permitted to collect the foregoing fee.

Most significantly, however, House Bill No. 148 proposes to permit municipalities and school districts to impose development impact fees. The proposed legislation would add various definitions to the MPC, including the following definition of "development impact fee:

> A charge imposed upon new development by a governmental entity to fund all or a portion of the public facility's capital improvement costs affected by the new development from which it is collected.

Furthermore, the following definitions, among others, would also be relevant:

- **Governmental entity**: A municipality or school district.
- **Capital improvements**: Improvements and equipment that increase or improve the service capacity of a public facility and have a useful life to ten years or more.
- **Public facilities**: School facilities and municipal facilities.
- **School facilities**: Public schools and equipment.
- **Municipal facilities (in part)**: Police, emergency medical, rescue and fire protection facilities and equipment.

The proposed legislation includes mechanisms for calculating development impact fees and various requirements related to development impact fees. Interestingly, the proposed legislation would allow governmental entities to accept the dedication of land or the construction of public facilities or capital improvements in lieu of payment of development impact fees if various criteria are met.

Representative Scott Petri, who represents the 178th Legislative District, which includes portions of Bucks County, was one of the legislators who introduced House Bill No. 148. In connection with House Bill No. 148, Representative Petri authored a memorandum to all House of Representative members that, in part, stated the following:

> Under my legislation, municipalities or school districts considering the adoption of development impact fees would need to conduct needs assessment for the type [of] public facilities or capital improvements require[d] by new residential, commercial or industrial development. Such new development would then be assigned a fee based on the proportionate share of the cost of new public facilities. For purposes of this bill, public facilities would include public schools, police stations, fire house, parks and other recreation facilities.

As for the status of House Bill No. 148, shortly after it was introduced, it was referred to the Committee on Local Government, where it remains.

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Billboard Upheld Ban in Mount Laurel, New Jersey

By Jeffrey M. Hall

The case of *Interstate Outdoor Advertising, LP v. Zoning Board of the Township of Mount Laurel, et al.*, decided February 11, 2013 by the Third Circuit Court of Appeals, calls to mind an expression commonly heard within the billboard industry: "there is law and then there is billboard law." It also prompts the thought that bad facts make bad law — here, the billboard company opportunistically sought approval at one time for nine billboard locations along Interstate 295 in New Jersey where no billboards existed. From gleaning the decision, the case below appeared to be a "go for broke" litigation for both sides with Interstate ultimately ending up as the loser. Relying exclusively on the dated *MetroMedia* decision, the Third Circuit affirmed the United States District Court's grant of summary judgment in favor of the Zoning Board and the Township.

Interstate had filed development applications for nine outdoor advertising sign locations along Interstate 295, which in the Mount Laurel area is a six lane limited access highway. Hearings on four of the applications were ongoing when the Township adopted an ordinance which became the subject of the challenge as it banned billboards on the basis of aesthetics and traffic safety listing a number of municipal goals and purposes. While Mount Laurel had regulated signs since 1988, the 2008 Ordinance incorporated new provisions which allowed for privately-owned signs to display both commercial and non-commercial

messages and provided that enforcement of signs would be accomplished in a content-neutral fashion. After the passage of the Ordinance, Interstate filed in Federal Court alleging that the Ordinance violated the First Amendment guarantee of free speech. After discovery, Mount Laurel filed a motion for summary judgment which was granted by the District Court. The trial judge analyzed the Ordinance's constitutionality under the four-part test applicable to commercial speech that is set out in *Central Hudson Gas & Electric Corp v. The Public Service Commission of NY*, 447 U.S. 557 (1980). On appeal by Interstate, the Third Circuit affirmed the grant of summary judgment.

The Third Circuit acknowledged that the Mount Laurel had the burden of establishing the constitutionality of the Ordinance. In so doing, the court observed that a municipality must demonstrate a substantial governmental interest which is advanced no more extensively and necessary, and such demonstration cannot be mere speculation or conjecture. That is, here Mount Laurel must show that it presented substantial evidence which supports its interest in order to sustain the Ordinance from constitutional challenge.

In this matter, Mount Laurel submitted a traffic report prepared by the Township Engineer which surveyed 37 articles pertaining to billboards and traffic safety. The Township Engineer concluded that eliminating the number of driver distractions by not allowing billboards would advance traffic safety. There was evidence in a form of expert reports and depositions and testimony of the Township's planner who stated that Mount Laurel sign control ordinance has served to preserve the "billboard-free aesthetic charm and character for over 20 years."

Interstate countered with testimony of a traffic expert who reviewed the New Jersey Department of Transportation's accident records which demonstrated the accident rate in the area of the proposed billboards was well below what would be regarded as a hazardous condition. That expert also testified in depositions that there was no causal relationship between billboards and accidents as they were not distracting. Interstate countered the municipal planner's testimony by attempting to differentiate the heavily trafficked I-295 corridor by contending that Mount Laurel's argument on aesthetics was overblown in that there were no residential or scenic views to protect. This argument got short shrift from the appellate court which implicitly acknowledged Mount Laurel had the right to control aesthetics and safety on I-295 referring to the interstate as one of "its highways."

The appellant court pushed aside Interstate's arguments and in affirming the summary judgment order below, relied virtually exclusively on *MetroMedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). In so doing, it virtually ignored the body of law amassed over the 30-year period, including Bell v. Stafford Township, 110 N.J. 384 (1988).

Interstate argued that its case should have been seen by the District Court as a classic "Battle of the Experts" for which accordingly a genuine issue of material fact existed which needed to be resolved by a finder of fact. Thus, the experts' opinions from each side should have been weighed by a fact-finder and consequently, the District Court improperly granted summary judgment.

In relying on *MetroMedia*, the Third Circuit relied heavily on the older court case's value judgments in the plurality opinion that billboards were plainly unattractive and therefore extremely intrusive. Therefore, the Third Circuit seized on the *MetroMedia* court's observation that the most effective approach is to prohibit billboards entirely if a municipality has a sufficient basis for concluding they are traffic hazards and/or unattractive. *MetroMedia's* "conclusion rested on 'the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety.'" *Metromedia* at 509. That court also stated that billboards no matter where located and however constructed can legitimately be perceived as aesthetical harmful.

Particularly troubling was the Third Circuit's conclusion that the District Court could resolve the conflicting expert testimony without a plenary hearing in the absence of a showing of bad faith. Referring to Interstate's arguments as an "academic" challenge, the Third Circuit concluded that the Ordinance survived Interstate's challenge because it advanced Mt. Laurel's substantial interest in the aesthetics of the community. Thus, the fact that the Ordinance all inclusively bans billboards, it nonetheless is not overreaching given the impact of billboards notwithstanding the very real impact on commercial speech. Thus, "we have no trouble concluding that Interstate's challenge to the validity of Mount Laurel's studies falls short of creating a genuine issue of material fact" on the issue of whether the town's legislative judgments were facially unreasonable or palpably false.

Finally, the Third Circuit rejected Interstate's argument that the Ordinance's reach was excessive because it totally prohibited billboards by noting that *MetroMedia* would legitimize the total ban in stating that "perhaps the only effective approach to solving the problems they create is to prohibit them." Accordingly it sustained the ordinance.

At the present time, it is not known whether Interstate will seek review by the United States Supreme Court. If it

does and is successful, it would be helpful to review a case that does not necessarily reflect the growth of commercialism and the value of speech throughout the country. Wholesale reliance on *MetroMedia* fails to consider the collective wisdom of local legislatures throughout New Jersey and indeed the country in permitting billboards. They have found that billboards perform a highly important function of communicating ideas and informing the public all the while without endangerment to the traveling public or destabilizing the aesthetics of a community. The Third Circuit opinion fails to recognize the significant difference between the heavily traveled corridors of limited access highways such as the interstates which hardly duplicate the apparent charm and aesthetic value of a particular community. Further, the appellate court opinion does not take into account the fact that many governments have embraced billboards making public property available for them. This opinion should be reviewed and *MetroMedia* revisited especially in light of the affirmance of the District Court's summary judgment without a rigorous testing of Mount Laurel's claims on traffic safety and aesthetics and the dated value judgments in *MetroMedia*.

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