

Fox Gains Well-Known Five-Member Land Use and Zoning Team in New York

Building on recent significant additions to our real estate practice, Fox Rothschild is pleased to welcome a prominent five-member land use and zoning team in New York City.

Joining as partners are [Jesse Masyr](#) and [Karen Binder](#), along with associate [Jodi S. Stein](#) and Urban Planners, [Ethan Goodman](#), who will serve as Fox's new Director of New York Planning and Project Management, and [Jerald Johnson](#), joining as the firm's new Director of New York Zoning and Land Use. The team hails from Wachtel Masyr & Missry LLP.

"If you're looking to develop a real estate project in New York City, Jesse, Karen and their team are the go-to group you want at your side," said Michael I. Slapo, managing partner of the firm's New York office. "Their extensive familiarity with New York regulations and approval processes – at the city, state and federal levels – is renowned."

Stormwater Authorities Coming to Pennsylvania?

By M. Joel Bolstein

In geographic locations outside of Pennsylvania, stormwater facilities are frequently operated and maintained by local government and funded through user fees placed on residents of the watershed. For example, in Montgomery and Prince George Counties, Maryland, property owners currently pay a stormwater utility fee. And the state legislature in Maryland has recently enacted a "stormwater remediation fee" that creates a new fee within a nine-county region and is designed to pay for stormwater management as well as stream and wetland restoration.

In April 2013, the Pennsylvania Senate approved legislation that would amend [Title 53](#) (Municipalities Generally) to expressly allow for the creation of municipal stormwater authorities. [Senate Bill 351](#), authored by Sen. Ted Erickson (R-Chester/Delaware), would add "stormwater management planning and projects" to the list of activities for which municipalities are expressly enabled to establish authorities. By doing so, the legislation would remove any ambiguity as to whether storm water authorities are permissible under Pennsylvania law.

SB 351 does not offer any form or describe any specific requirements for stormwater authorities. However, the likely structure would entail a utility user fee (as distinguished from a tax) for property owners within a watershed and based upon some formula that attempts to incorporate impervious surfaces.

In search of a dedicated funding source for stormwater activities, some municipalities in Pennsylvania have

already undertaken to create stormwater fees. By way of example, the City of Philadelphia has created a stormwater utility fee. It is calculated based upon the individual characteristics of the property; namely it [calculates the charge](#) from the gross area of a property as well as the impervious area of the property.

In 2011, Mt. Lebanon, Pennsylvania, also approved the creation a [stormwater utility fee](#) for all developed properties. The new fee followed a common billing methodology. That is to say, it determined that a typical single-family home in the municipality contained 2,400 square feet of impervious surfaces, including roofs, sidewalks, patios, etc. Based upon this information, it established an "equivalent residential unit" (ERU) as 2,400 square feet of impervious surface. Individual residential units such as single-family homes, townhomes, duplexes each pay a flat \$8 per month. Commercial/industrial properties pay \$8 per 2,400 square feet of impervious (i.e., per ERU).

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Mt. Lebanon has met with some resistance to its stormwater fee in the form of lawsuits from an owner of an apartment complex over fee calculation as well as from religion institutions claiming they should be exempt from what they view as a tax. However, since the municipality's stormwater fee is applied as a utility fee versus a property tax, it applies to all property owners regardless of tax-exempt status.

A common facet of most, if not all, stormwater fees is a process for property owners who take specific approved actions to reduce demand on municipal stormwater services the opportunity to receive credits against the fee. Philadelphia provides for a 100 percent credit while Mt. Lebanon offers the potential for a 50 percent credit for the use of rain barrels, peak-flow attenuation and/or to educational institutions.

If stormwater utilities have a long history outside of Pennsylvania and there have been some municipalities within the Commonwealth currently

levying stormwater fees, some observers ask why SB 351 is needed. According to its sponsor, the answer is that there have been several municipalities in Pennsylvania who have considered creating stormwater authorities, but have been reluctant act to without express authority by the General Assembly.

Additionally, the urgency for additional municipal revenue mechanisms for stormwater costs is building. Constraints on municipal General Funds may dissuade local governments from continuing to rely on existing tax revenues. And, as urban municipalities in Pennsylvania begin the process of implementing their respective MS4 NPDES Phase II permit responsibilities, the new regulatory requirements are anticipated to quickly escalate municipal costs, particularly in impaired watersheds with strict new limits on pollution contribution. Some estimates place the cost to a municipality in an impaired watershed ranging upwards of \$700,000 over five years.

On the developer/landowner side, the biggest issue with the legislation is that the new local government authorities created to manage stormwater will essentially be groups of unelected officials given considerable power, most notably, the power to impose user or impact fees and determine how those fees are assessed. Since fees are not collected in most jurisdictions in Pennsylvania, these would be new fees flowing from developers/landowners to local government, and such fees would become another factor in determining the viability of any particular project.

SB 351 has been approved by the Pennsylvania Senate and is currently in the House Local Government Committee.

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Case Summary: *Gallagher, Jr. v. ZHB Haverford Township*

By Julia D. Perkins

In the recent Pennsylvania decision in *Gallagher, Jr. v. ZHB Haverford Township* (No. 1788 C.D. 2012, Commonwealth Court of Pennsylvania, May 21, 2013), the Commonwealth Court affirmed the Zoning Hearing Board of Haverford Township's (ZHB) grant of a use variance and a dimensional variance allowing a zoned-residential property to be used as a day care center. By way of factual background, the applicants were lessees of property located at 104 East Township Line Road in Havertown, Pennsylvania (Property). The Property is zoned in the R-4 low-to medium-density Residential District under the Zoning Ordinance of the Township of

Haverford (Ordinance). Significantly, while the Property was initially constructed as a residential home, it was renovated for commercial use over the years and was even issued a variance in 1975 for use as a group home.

Section 182-206.B(1) sets forth the permitted uses in the R-4 residential district, which include, in relevant part, a day care for no more than two children not related by blood or marriage to the residents of the dwelling. See § 182-206.B(1)(d). Additionally, the Ordinance permitted the placement of signs on property in the R-4 district, so long as the sign did

not exceed 108 square inches. Applicants sought a use variance to open a day care for up to 36 children on the Property, and a dimensional variance for their proposed three by five-foot sign. Objectors appealed stating that the ZHB erred because Applicants failed to show unnecessary hardship, and the ZHB's determinations were not supported by substantial evidence.

The Use Variance

The court considers the following factors in determining whether to grant a use variance:

- (a) That there are unique physical

circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of this chapter in the neighborhood or district in which the property is located.

(b) That because of such physical circumstances or conditions there is no possibility that the property can be developed in strict conformity with the provisions of this chapter and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

(c) That such unnecessary hardship has not been created by the appellant.

(d) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located nor substantially or permanently impair the appropriate use or development of adjacent property nor be detrimental to the public welfare.

(e) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

See Section 182-1004.A(1) of the Ordinance; Section 910.2(a) of the Pennsylvania Municipalities Planning Code (MPC).

In affirming the ZHB's decision to grant the use variance for Applicants' proposed day care, the court emphasized that the Property's commercial features, which were added to the residential structure, amounted to an existing hardship justifying the

variance. Primarily, the court noted that the Applicants had presented evidence of the Property's fire-tower, three-story fire escape, two emergency exits per floor, commercial doors with panic bars and even a nine-car parking lot on the Property.

The court also emphasized the commercial nature of the surrounding properties to conclude that the variance would not alter the essential character of the neighborhood, nor impair the use or development of the surrounding properties. In so doing, the court took judicial notice of the surrounding commercial properties of a different municipality, Upper Darby, and the properties in that ordinance's C-1 Commercial District. Additionally, that there were other day cares in the surrounding properties added to the finding that the variance granted would be minimal. The court therefore rejected the Objector's argument that the ZHB's findings and conclusions were inadequate, and concluded due to the Property's various commercial improvements, Applicants did demonstrate a hardship.

The Dimensional Variance

A dimensional variance is a request to adjust the zoning requirements to use the property in a manner consistent with the existing regulations and involves the same criteria for a use variance. However, in *Hertzberg v. Zoning Bd. Of Adjustment of the City of Pittsburgh*, 721 A.2d 43 (Pa. 1998), the Pennsylvania Supreme Court "set forth a more relaxed standard for establishing unnecessary hardship for a dimensional variance," and allows courts to consider the economic hardship that will result from denial of a variance as well.

The court affirmed the ZHB's grant of the dimensional variance to allow a three-foot by five-foot sign, exceeding the 108 square-inch regulation in Section 182-701(C)(1)(a) of the

Ordinance, because a larger sign was necessary to fit the name of the day care, as well as to allow drivers on Township Line Road to adequately identify the day care center. The ZHB heard evidence presented by Applicants that the sign would be large enough to identify the school, but would not be large enough to amount to a distraction. The court found this was particularly appropriate given the amount of similar signs in the surrounding commercial properties, including those located in the Borough of Upper Darby.

The Dissenting Opinion

The dissenting opinion by Senior Judge Collins is of note here because the judge took issue with the consideration of the zoning in a different municipality, citing precedent, *Amerikohl Mining Inc., v. Zoning Hearing Bd. Of Wharton Tp.*, 597 A.2d 219 (Pa. Commw. Ct. 1991), which allowed consideration of adjacent properties located in a different zoning district, but not an adjoining municipality with a completely different zoning ordinance. The dissent emphasized that "[t]he fact that the Borough of Upper Darby has allowed far more commercial development on the other side of Township Line Road cannot be used to undermine the properly enacted zoning ordinance of Haverford Township." The dissent also noted that with respect to the signage, that Upper Darby permits large signs across the street also is irrelevant to allow a sign that is "twenty-times larger than that permitted in Haverford Township's R-4 District...."

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Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 1322 proposes to add provisions to the Pennsylvania Municipalities Planning Code (MPC) that would allow a municipality to charge “review fees for the municipality’s evaluation of conditional use applications” consistent with existing MPC provisions.

The proposed legislation, which its prime sponsor noted reintroduces House Bill No. 1639 of 2011-12, provides that review fees “may include reasonable and necessary charges by the municipality’s professional consultants for review and report on a conditional use application to the municipality.” (The term “professional consultants” is defined in the MPC as “persons who provide expert or professional advice, including, but not limited to, architects, attorneys, certified public accountants, engineers, geologists, land surveyors, landscape architects or planners.”)

House Bill No. 1322 provides that the review fees, among other requirements, (1) may not duplicate review fees charged under subdivision and land development ordinances, (2) must be based upon a schedule established by the municipality in accordance with ordinary and customary charges for similar service in the community and (3) in no event shall exceed the rate or cost charged by the professional consultants for comparable services to the municipality not reimbursed or otherwise imposed on applicants.

The proposed legislation also provides an applicant with the right to dispute the amount of review fees subject to time limitations set forth therein.

Representative Steven Santarsiero, who represents the 31st Pennsylvania House of Representatives District in Bucks County, is the prime sponsor of House Bill No. 1322. He noted in a

memorandum to all House members regarding the proposed legislation that in one instance a “Pennsylvania municipality was billed \$108,000 in review fees for a conditional use development.”

As for the status of House Bill No. 1322, it has not yet been passed. House Bill No. 1322 was introduced May 6, 2013, and, on that same day, it was referred to the Committee on Local Government, where it remains.

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State Legislation To Moot Anti-Degradation Review of On-lot Septic Systems Advances

By M. Joel Bolstein

Legislation introduced by State Representative David Maloney (R-Berks) to address the review requirements for new on-lot sewage systems proposed in special protection waters advanced out of the House Environmental Resources and Energy Committee on May 15 and was approved by the full House on June 10 by a vote of 118-80. [House Bill 1325](#) was introduced in response to a draft Pennsylvania Department of Environmental Protection (DEP) technical guidance document.

Prompted by an Environmental Hearing Board decision from November 2011, [Pine Creek Valley Watershed Association v. DEP](#) (EHB Docket No. 2009-168-L), DEP

published a [draft technical guidance document](#) requiring proposed new on-lot sewage treatment systems located in High Quality or Exceptional Value watersheds to utilize various Best Management Practices (BMPs) to prevent the degradation of surface waters as required by state and federal regulations (see [25 Pa. Code Chapter 93](#) regarding Water Quality Standards).

The public comment period for the draft policy was extended through June 3, 2013, and the DEP has held numerous public webinars on the topic that are available on its [website](#). It has received considerable pushback from certain areas of the Commonwealth that possess a considerable number of special

protection waters and where on lot sewage disposal is commonplace.

According to the DEP, it would prefer a legislative fix to the new legal standards created by *Pine Creek*. Indeed, it is supportive of the language contained in House Bill 1325, as well as a companion bill in the Senate.

HB 1325 would essentially moot the need for the draft policy because it would deem those individual and community systems proposed to be installed in special protection watershed as meeting the anti-degradation standards of Chapter 93 if they were properly designed and installed per current regulatory requirements.

In the Zone

However, should the General Assembly fail to act on Rep. Maloney's legislation, the DEP intends to review and incorporate feedback it received during the policy's public comment period. A revised guidance policy would then be republished for

additional public input. Some potential changes could include the permitted use of the referenced watershed approach and the plume plot approach to demonstrate the proposed septic system's impact (or lack thereof) on a receiving water.

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