In the Zone

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PADEP Proposes Changes to Pennsylvania Natural Diversity Inventory (PNDI) Procedure

By Robert W. Gundlach, Jr.

On November 10, 2012, the Pennsylvania Department of Environmental Protection (PA DEP) published a new draft policy for "Pennsylvania Natural Diversity Inventory (PNDI) Coordination During Permit Review and Evaluation." The proposed policy comes on the heels of the PA DEP's recent finalization of its Permit Decision Guarantee Process and its Permit Coordination Policy. It is aimed at improving the treatment of threatened and endangered species within Pennsylvania's permit review system.

PNDI is a database of plant and animal information containing site-specific references to known occurrences of threatened and endangered (T&E) species, special concern species and significant ecological features. Applicants must run a screening of their project area for potential species impacts and respond according to what is found: no impact or a potential impact. If a potential impact is identified, the applicant must take additional action as directed by the appropriate jurisdictional agency to obtain a PNDI "clearance" letter.

The proposed policy makes a couple key changes to existing PNDI procedure.

First, the policy would offer two separate paths that an applicant can take to handle PNDI coordination within the permit review process. Those two paths entail either a sequential review or a concurrent review of requirements.

Sequential review has been the traditional review process for T&E species. Under sequential review, the permit applicant runs the PNDI search and completes all coordination with the appropriate jurisdictional agencies prior to submitting the permit application. As the alternate path's name indicates, a concurrent review would allow a permit application to be reviewed while the applicant is addressing any PNDI issues with the respective agencies.

While a concurrent review may save an applicant time under the best of circumstances, it also subjects him to new risk. That is to say, should the PNDI search indicate a potential impact in the identified project area, the jurisdictional agency may require a partial project re-design to resolve that impact. As a result, the applicant may be left with a substantively altered project application that would need to be re-submitted to the PA DEP as a new application (along with a new application fee).

A second change made by the PA DEP's proposed policy deals with the length a PNDI receipt is valid. Under the existing policy, PNDI receipts are only valid for one year and as such have often caused applicants the extra aggravation of having to re-run and respond to frequent PNDI searches throughout the lifespan of a project.

The proposed policy would extend the validity of a PNDI receipt to two years from the date of screening or from the issuance of a clearance letter. Additionally, if an applicant requires a subsequent permit within the project area identified and documented on the PNDI receipt, he will not be required to conduct a new PNDI screening for the subsequent permit application.

The two-year validity of a PNDI receipt would only apply to those clearances obtained after July 2, 2013 (the proposed effective date of the final policy). Those PNDI clearances obtained prior to that date would still only have a life of one year and would need to be re-run to qualify for two years.

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Penrose Walk

Rob Gundlach and Kim Freimuth recently represented Metropolitan Development Group to obtain the required zoning and land use approvals for a new semi-detached community, consisting of 55 homes, in Warrington Township, Bucks County, Pennsylvania. The name of the community is Penrose Walk and Metropolitan is selling the approved/improved building lots to NV Homes. The project involved the use of transferable development rights, conditional use approval, and preliminary/final subdivision plan approval among multiple parcels.

New EPA Enforcement Guidance on CERCLA Liability of Tenants

By Philip L. Hinerman

In December, the Environmental Protection Agency (EPA) released a revised guidance on how it intends to exercise enforcement discretion for tenants who lease contaminated property. Under the Superfund law, CERCLA, there is a defense to liability if an owner is a "bona fide prospective purchaser" (BFPP) of contaminated property. The new guidance clarifies EPA's position regarding tenants who were not covered by previous EPA guidance.

Tenants are technically not BFPPs as they do not purchase property. The new guidance clarifies EPA's position that these tenants can also obtain liability protection in certain situations. Also, EPA may assist in land development by providing "comfort letters" to tenants of properties that have been contaminated by stating its intent not to pursue them for cleanup claims.

Under the CERCLA statute, a tenant may "derive" BFPP status if the owner already has satisfied the BFPP requirements. Their tenants are protected from liability provided they did not dispose of hazardous substances at issue on the property and that they did not impede the performance of any restoration or response to contamination. If the tenant otherwise satisfies the general requirements that a BFPP owner, EPA would not exercise its enforcement discretion against the tenant.

If, on the other hand, the owner is not a BFPP, under the new guidance a tenant who has executed its lease after January 11, 2002 can obtain its own BFPP status, provided that they comply with EPA guidance as if they were an owner. If that tenant has not polluted the property and has not impeded a response, it can be a BFPP even if the owner is not.

In limited instances, EPA will provide a "comfort letter' to a prospective tenant, if EPA decides it is "appropriate" in order to "further the public interest." Any prospective long term tenant of a property that may be contaminated should consult with counsel to see if it can obtain a "comfort letter." We have found that attorneys with EPA experience can assist in obtaining these letters from EPA.

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Delaware Court Upholds "Homeowners' Defense" in Mechanic's Lien Action

By Michael J. Isaacs

In the case of *Swift Flooring Contracting, LLC v. Zeccola Builders, Inc.*, the Delaware Superior Court upheld the "homeowners' defense" to a mechanics' lien action.

In this case, the defendants, Mr. and Mrs. Christ, entered into a contract with Zeccola Builders whereby Zeccola agreed to build a home on a lot and sell the house and the lot to the Christs. The plaintiff, a flooring subcontractor, supplied labor and materials during the construction of the house. Upon completion of the house, final settlement was held and, at that time, the Christs made final payment to the builder in exchange for the standard release of mechanics' liens.

Following settlement, the Christs took possession and occupied the home as their primary residence. Shortly thereafter, the plaintiff filed a mechanics' lien action claiming that it was still owed money for the work it performed.

The Christs defended the action and asserted the "homeowners' defense" which, pursuant to 25 Del. C. §2707, provides "payment of contractor by owner of residence as a defense; certification of payment for labor and materials or release of liens by contractor".

The plaintiff argued that the homeowners' defense was not available to the Christs as they were not the owners of the property at the time that the labor and materials were supplied. The Superior Court disagreed and found that the terms of the homeowners' defense as set forth in §2707 provides that the defense applies where an owner uses the structure solely as his residence and has made final payment in good faith to the contractor. The court further found that the defense does not require the owner to have owned the residence at the time that the labor and materials were being supplied by the subcontractor.

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Case Summary: Absent Egregious Official Conduct, No Violation of Applicant's Due Process

By Harris A. Dainoff

Absent official conduct that is so egregious as to "shock the conscience," municipal action with respect to zoning and land use matters, even when such action reflects an "improper motive," will not be considered a violation of an applicant's substantive due process. In *Honey Brook Estates v. Honey Brook Township*, Honey Brook Estates, a developer that owned an approximately 43-acre unimproved parcel in Honey Brook Township, submitted a subdivision and land development application for a new residential townhome development prior to the Township's adoption of a comprehensive plan update and amendments to its zoning ordinance and zoning map. The proposed amendments to the zoning ordinance and zoning map included the re-zoning of Honey Brook Estate's property from the Residential District to the Agricultural District, meaning that the proposed townhome development would no longer be permitted by right.

Honey Brook Estates submitted its first subdivision and land development application one day before the Township's public meeting to consider the comprehensive plan update and zoning amendments. Had that application been deemed complete by the Township, it would have been reviewed under the old zoning code. However, upon review of the application, the Township's engineer notified Honey Brook Estates that the application was incomplete and returned the application and all supporting documents without forwarding them to the Township Planning Commission for consideration. Thereafter, Honey Brook Estates submitted a second application that attempted to address the deficiencies noted by the Township engineer, which application was submitted before the proposed zoning amendments had been adopted; however, that application was again returned as incomplete. Following a series of appeals related to the zoning amendments, Honey Brook Estates filed a third application, which was denied by the Township's Planning Commission based on "lack of zoning entitlement." The Township's Board of Supervisors subsequently voted to deny the application "based on non-compliance with all ordinance provisions" since, at that time, the subject property had been re-zoned to the Agricultural District.

Honey Brook Estates brought suit in the United States District Court for the Eastern District of Pennsylvania alleging a violation of its rights to substantive due process and equal protection under federal law (2012 WL 2076985 (E.D. Pa.). Thereafter, Honey Brook Township moved for summary judgment. In granting summary judgment, the court held that municipal conduct violates substantive due process only when it is so egregious as to "shock the conscience." The court cited examples of action that would "shock the conscience," such as corruption or self-dealing, decisions motivated by hostility to constitutionally-protected activity on the premises or bias against an ethnic group. While the Township may have had an "improper motive" with respect to its review of Honey Brook Estates' subdivision and land development application, and also likely engaged in delay tactics in an effort to postpone review of the application until after the zoning amendments had been adopted, such conduct in and of itself is not sufficient to "shock the conscience" and result in a violation of the applicant's substantive due process. The court also granted the Township's motion for summary judgment on the equal protection claim, noting that other applicants were subjected to similar reviews by the Township and denied. Since Honey Brook Estates could not demonstrate that it was treated any differently from other applicants, its equal protection claim failed.

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New Jersey Courts Continue to Support Unsuspecting Mortgage Lenders

By John L. Grossman

Mortgage priority lawsuits continue to attract the attention of the New Jersey courts. In that context, the theory of equitable subrogation continues to play a pivotal role. Under that theory, a new mortgage, the proceeds of which are used to pay off an old mortgage, essentially jumps over an intervening mortgage to the extent of the payoff, and stands in the shoes of the old mortgage so long as the new mortgage lender has no actual knowledge of the intervening mortgage. This is true even in the presence of negligence on the part of the new mortgage holder in failing to discovery the existence of the intervening mortgage.

The Appellate Division of the Superior Court of New Jersey continues to hold as such. See, *Palladino v. Melchionna, et al.*, Docket No. A-4877-10T2 (unpublished). The facts there were not in dispute. The Melchionnas purchased an investment property in Linden, New Jersey on March 14, 2006 and financed the purchase with a mortgage of approximately $373,000 from Accredited Home Lenders, Inc. (Accredited). This mortgage was not recorded for over four months, until July 20, 2006. In the interim, on April 10, 2006, the Melchionnas took out a second mortgage from Plaintiff-Palladino. The Palladino loan was secured by a $75,000 mortgage, recorded two days later on April 12, 2006, three months before Accredited recorded its mortgage. When Palladino made his loan, he knew that Accredited was the first mortgage holder on the property.

Thereafter, in September 2006, the Melchionnas refinanced the Accredited mortgage with loans from SouthStar Funding, LLC (SouthStar) totaling almost $400,000. SouthStar's title search revealed the Accredited mortgage but failed to reveal the Palladino mortgage. SouthStar paid off the Accredited mortgage of approximately $373,000 as part of the refinancing; its mortgage was then promptly recorded after the closing.

By January 2011, both Palladino and SouthStar had begun foreclosure proceedings against the Melchionnas. The parties filed cross-motions asking the court to declare the mortgage held by each as superior to the other. Although New Jersey is a race-notice state[1], the lower court applied the doctrine of equitable subrogation, granted SouthStar's motion for priority and denied Palladino's motion for priority. The lower court rejected Palladino's argument that the negligence of SouthStar in not finding Palladino's lien deprived SouthStar of its equitable position. The lower court held that, even though SouthStar's security was defective, i.e. by virtue of its having been recorded after the Palladino mortgage, SouthStar, as the refinancing lender, was subrogated by equitable assignment to the position of the lender whose lien was discharged by the proceeds of the loan. This finding was affirmed on appeal. The Appellate Division's statements on the viability of the doctrine of equitable subrogation are significant: a refinancing lender whose security turns out to be defective is subrogated by equitable assignment to the position of the lender whose lien is discharged by the proceeds of the later loan, there being no prejudice to or justified reliance by a party in adverse interest; equitable subrogation is a remedy highly favored in the law; it is an equitable doctrine applied only in the exercise of the court's equitable discretion; and, equitable subrogation may only be imposed if the cause is just and enforcement is consonant with right and justice.

Equitable subrogation may be afforded even though lack of knowledge on the part of the new mortgagee occurs as a result of negligence. On the other hand, the new lender is not entitled to subrogation, absent an agreement or formal assignment, if it possesses actual knowledge of the prior encumbrance. In this case, while negligence was present, the new lender had no actual knowledge of the Palladino encumbrance. Palladino shouldn't be unjustly enriched on the basis of SouthStar's mere negligence; Palladino's initial intent, to be in second position, was not frustrated.[2] Accordingly, SouthStar was granted to priority, not to the extent of its loan, but to the extent of the proceeds used to pay off the Accredited mortgage.

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[1] Absent other circumstances, a party whose document is recorded first typically attains priority.

[2] An intervening mortgagee's knowledge of the first mortgage is not a prerequisite for applicability of the doctrine, but it doesn't hurt.

Recent Pennsylvania Decisions Solidifying the Difficulty of Succeeding on a Procedural Challenge of a Zoning Ordinance

By Julia D. Perkins

Two recent Pennsylvania cases confirm that bringing a procedural challenge to a zoning ordinance will be difficult, absent bringing such a challenge within thirty days of the date that the ordinance becomes effective.

In *Streck v. Lower Macungie Township Board of Commissioners*, Nos. 1804 C.D. 2011, 1809 C.D. 2011, 2012 WL 6217379 (Pa. Commw. Ct. Dec. 14, 2012), the Commonwealth Court heard an appeal by the Township of Lower Macungie (Township) and property owners, David M. Jaindl and Jaindl Realty, L.P. (Jaindl), after the trial court found in favor of the challengers, and invalidated the 2010 amendments made to the Zoning Ordinance of the Township based on the fact that the amendments were not enacted in accordance with the public notice requirements set out in Pennsylvania's Municipality Planning Code (MPC). The Ordinance at issue allowing Jaindl to construct a quarry became effective on July 2, 2010. The Township published two notices to inform the public that Ordinance had been enacted – one on July 7, 2010, and one on July 14, 2010. (The second post-enactment ordinance is permitted, although not required, under Section 108 of the MPC). The notices stated the deadline to challenge the new ordinance on Procedural grounds was 30 days from the second publication: July 14, 2012. The court found that the challengers did not bring their appeal within the 30-day period required under Section 5571.1 of the Judicial Code because, although Section 108 of the MPC allows an additional post-adoption notice, an additional notice does not abrogate the deadline to appeal within 30 days of the date the Ordinance becomes effective. Therefore, despite the Township's notices stating otherwise, the challengers' appeal filed on August 13, 2010 was not within the 30-day time limit from the date the Ordinance became effective: July 2, 2010. Moreover, the court also found that the Township's notices distributed in advance of the enactment of the Ordinance were not procedurally defective, as the trial court had erroneously found, because they did provide reasonable detail as required by Section 610 of the MPC — therefore, the Township did comply with the requirements of the MPC and Section 5571.1 of the Judicial Code, and the procedural challenge was ultimately reversed.

In *Messina v. East Penn Township*, No. 71 MAP 2010, 2012 WL 6569913 (Pa. Dec. 17, 2012), the Pennsylvania Supreme Court affirmed the Commonwealth Court and the trial court before it, finding that a 1996 zoning ordinance was valid because the Township substantially complied with the statutory requirements under the MPC and Section 5571.1 of the Judicial Code. The Messinas and Lehigh Asphault Paving Co. (Challengers), asserted that the initial enactment of a zoning ordinance in 1996 by East Penn Township (Township) which prevented the expansion of a mining and excavation operations in the Township's Rural and Rural Residential Zone, was void *ab initio* because the Township failed to strictly adhere to the MPC's requirements under 610(b) in adopting the ordinance. Specifically, the Challengers asserted that the Township made last minute changes to the zoning map on the night of the Ordinance's adoption, and thus the Township failed to provide the requisite 45-day notice to the public of these changes. The court found that the Challengers had failed to show a substantial change was made on the night of the Ordinance's adoption, and also determined that the claim was time-barred. In so finding, the court applied the multi-tiered standard of Section 5571.1 of the Judicial Code, and determined that because the appeal of the Ordinance was filed more than 12 years after its enactment, the Challengers were required to meet the burden of rebutting the presumption that the Township and its residents have substantially relied upon the validity and effectiveness of the Ordinance, and failed to do so. Moreover, the court cautioned against any challengers attempting to use a sweeping void *ab initio* challenge, noting that while the doctrine is still in effect, an overly aggressive application of the doctrine, as put forth by the Challengers here, would create uncertainty. The court emphasized that citizens have to rely on zoning classifications, and constant invalidation of ordinances based on the void *ab initio* doctrine would incite chaos.

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