Fox Rothschild LLP
ATTORNEYS AT LAW

In the Zone

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

August 2011

Sign of the Times? Property Owner Cooked by Borough's Sign Regulations

By Loren D. Szczesny

When a business or property owner is seeking to install a new business sign or update an existing or outdated sign, it is extremely important to review the local sign regulations applicable to the property and determine the usual interpretation of those provisions by the zoning official of the municipality. Sign regulations can vary significantly, but even similar sign regulations can be interpreted differently, and sometimes inconsistently, by the governing bodies of a municipality.

An interesting interpretation of a local sign ordinance was at issue in the recent Commonwealth Court case of *Richard Gulan and Tina Gulan v. Zoning Hearing Board of East Berlin Borough and East Berlin Borough*, 1616 C.D. 2010 (PA.Cmwlth. June 22, 2011), in which the Commonwealth Court affirmed the decision of the Court of Common Pleas and the East Berlin Borough Zoning Hearing Board that a barbeque smoker/cooker located on the street in front of Gulan's business was a sign that violated the borough zoning ordinance. In *Gulan*, the property owners operated a barbeque restaurant within the Borough of East Berlin, Adams County. The restaurant served chicken and pit beef barbeque, which was prepared on the premises. The chicken was cooked in an outdoor smoker/cooker, which was located on the sidewalk in front of the business along State Route 234 (also known as West King Street). The business has a free-standing sign mounted on a pole that hung over the sidewalk and a temporary A-frame sign placed adjacent to the front sidewalk. The smoker/cooker, which was on wheels for easy transport, was placed along the sidewalk in the front of the business.

Under the East Berlin Borough zoning ordinance, a business is limited to two business signs at the property. The borough zoning officer determined that although the smoker/cooker did not have lettering or pictures advertising the business, the smoker/cooker was a sign that promoted the business and, therefore, three signs were located upon the premises in violation of the ordinance.

At the zoning hearing, Gulan testified he used the smoker/cooker to prepare chicken barbeque every day as a part of his regular business and the location of the smoker/cooker allowed him to observe inside of the restaurant through the front window to monitor operations. Despite this testimony, the zoning hearing board determined the location of the smoker/cooker on the sidewalk in front of the business was in plain view of the public and was intended to bring attention to the business and/or convey information to the general public. Thus, the zoning hearing board determined the smoker/cooker fell within the definition of a "Billboard, Advertising Sign, or Poster Panel" as those terms are defined in the ordinance, and the property was in violation.

In the appeal to the Court of Common Pleas, the court took no additional evidence but reviewed the record before the zoning hearing board. Based upon the record, the Court of Common Pleas agreed with the zoning hearing board that the smoker/cooker was a "structure, demonstration or display" within the meaning of a "Sign" under the ordinance since it was placed conspicuously to draw attention to the business. The court also relied upon the testimony of a witness who testified at the zoning hearing that Gulan told him two years earlier the smoker/cooker was intended for advertising purposes only.

Since the Court of Common Pleas took no additional evidence, the Commonwealth Court's scope of review was limited to determining whether the zoning hearing board committed an abuse of discretion or an error of law. Under this standard, the Commonwealth Court found no abuse or error and affirmed the decisions of the Court of Common Pleas and the East Berlin Borough Zoning Hearing Board that the smoker/cooker was a sign at the premises in violation of the ordinance.

This decision underlines the importance of reviewing and considering the specific terms of the applicable sign regulations and the interpretation of those regulations by the local municipality. While the court did not address the issue, it would be interesting to know whether the zoning officer's initial decision was based more upon the nature of the use of the smoker/cooker rather than the specifics of the sign regulations. Either way, as a business or property owner seeking to improve an existing sign or install/construct a new sign, it is important to be aware of the regulations the municipality will apply to your property and the interpretations it has regularly applied to those regulations.

For more information, please contact Loren D. Szczesny at 610.397.7967 or lszczesny@foxrothschild.com.

A Potential Increase in Traffic Is Not Enough To Defeat a Conditional Use Request

By Carrie B. Nase

In *Joseph v. North Whitehall Township Board of Supervisors*, 16 A.3d 1209 (Pa. Cmwlth. 2011), decided March 11, 2011, the Commonwealth Court affirmed the decision of the trial court and the Board of Supervisors of North Whitehall Township granting the application of Wal-Mart Stores, East, L.P. seeking conditional use approval for a planned commercial development.

Wal-Mart acquired 40 acres of vacant land in North Whitehall Township, Lehigh County, which was within a PC Planned Commercial Option zoning district. Under Section 308.C of the township zoning ordinance, a planned commercial development in the PC zoning district is permitted as a conditional use. An applicant for conditional use approval for a planned commercial development must comply with the specific standards under the relevant zoning ordinances. Generally, the court noted, once an applicant has established compliance with the zoning ordinance, the applicant must be granted a conditional use absent an objector's demonstration of evidence that the proposed use will have a detrimental effect on the public health, safety and welfare.

The objectors in *Joseph* appealed the trial court's ruling affirming the board's grant of conditional use to Wal-Mart based on two relevant zoning issues. First, the objectors challenged the board's interpretations of the provisions of the zoning ordinance by failing to require Wal-Mart to present individual uses to be established in the proposed planned commercial development and to present evidence of compliance of specific standards for such uses. The objectors relied heavily on *Elizabethtown/Mt. Joy Assoc. v. Mount Joy Township Zoning Hearing Board*, 934 A.2d 759 (Pa.Cmwlth. 2007), to support this argument. In that case, the Commonwealth Court upheld a denial of a special exception application of a shopping center, finding a general plan and a promise to comply with the zoning ordinance was insufficient as the court wanted to see specific standards of uses for the shopping center. Here, however, the court struck down the objector's argument and distinguished the previous finding in *Elizabethtown/Mt. Joy Association*. The court noted that there, the conditional use application had already been approved and what the court was deciding was the second procedural step regarding specific uses located in the proposed development based on the multitier procedural scheme by the zoning ordinance. By contrast, all that Wal-Mart was required to do in this initial procedural step for conditional use approval was meet the criteria for a planned commercial development, not establish the individual uses to be established after their application was approved.

The objectors next argued the board incorrectly found the use of the planned commercial development would not have a detrimental effect on the public by concluding first that the use will not result in or add to traffic hazards or traffic congestion, and second that Wal-Mart did comply with the wastewater treatment requirements of the zoning ordinance.

With respect to the traffic hazards and congestion, the court found the board properly determined that proposed commercial development will not result in or substantially add to a significant traffic hazard or traffic congestion. First, the court noted an increase in traffic due to a proposed use would not alone defeat a conditional use request. In order to deny a request based on traffic issues such as this one, it must be highly likely the use will create traffic patterns not normally generated by the proposed type of use and the traffic will pose a substantial threat to the health and safety of the community. The court affirmed the board's determination that the traffic would not be greater than what would be normally generated by the proposed use, based on Wal-Mart's project manner testimony at the trial court level. The project manager had previously stated that because the property is located near a congested highway and he examined the intersection near the property for traffic congestion issues, noting the former owner had made significant improvements for traffic issues, and he himself examined the congestion and traffic at the intersection, he determined the traffic would not be greater than what might be expected in normal circumstances. The court gave great deference to the trial court's reliance on this testimony.

As to the wastewater treatment requirements, the court found Wal-Mart did comply with the requirements of the zoning ordinance, which mandate the applicant, Wal-Mart, show the use will not have a serious threat of inability to comply with the performance standards of the ordinance in Article V, which requires wastewater disposal to meet state, township and sewage facility authority requirements. While objectors argued Wal-Mart intended to use a private sewer system instead of the public sewer system as required by performance standards set by the state, township and sewage facility, the record shows Wal-Mart's application expressly stated the public sewer facilities would be used. Thus, they complied with the zoning ordinance requirements.

The Commonwealth Court thus affirmed the trial court's order to affirm the board's decision, granting Wal-Mart's application seeking conditional use approval for a planned commercial development.

For more information, please contact Carrie B. Nase at 215.299.2030 or cnase@foxrothschild.com.

Case Summary: *Northeast Pennsylvania SMSA Ltd. Partnership v. Scott Tp. Zoning Hearing Board* - Height Relief for Cell Tower

By Robert W. Gundlach, Jr.

In *Northeast Pennsylvania SMSA Ltd. Partnership v. Scott Tp. Zoning Hearing Bd.*, 18 A.3d 1272 (Pa. Cmwlth. 2011), decided April 18, 2011, the Commonwealth Court examined an appeal by local neighbors regarding a dimensional variance that allowed NorthEast Pennsylvania SMSA Limited Partnership (Verizon) to construct a cell phone tower near the neighbors' properties.

The Scott Township zoning ordinance requires a communications tower have setbacks equal to one-and-a-half times the tower's height. The proposed tower by Verizon was set to be 198 feet tall in total—a tower measuring 190 feet with an eight-foot rod attached. Thus, the setback total according to the zoning ordinance requirements would have to be approximately 297 feet. Verizon applied for a dimensional variance to construct the tower to allow for setbacks, which would be less than the 297 feet required with respect to some of the neighbors' properties.

The Board subsequently held a hearing on the variance, which was advertised by sending notice to the majority of the local neighbors through the mail. However, due to street address renumbering, many neighboring landowners never received the mailed notices and thus did not attend the hearing. At the hearing, Verizon had experts in civil engineering and electrical engineering and a design engineer discuss the planned tower's structure and safety conditions with respect to withstanding weather conditions. After the hearing concluded, the township's zoning board unanimously approved Verizon's variance request.

However, once the board realized many residents who would be affected by the tower had not attended the meeting due to the faulty notice, they held a second hearing a month later where Verizon again represented various experts. The neighbors expressed their concern that because the planned tower would be only 55 feet away, in some instances, rather than the 297 feet required by the zoning ordinance, it would ultimately reduce the value of the properties, prevent the neighbors from subdividing property and impair the view. Moreover, other neighbors represented they feared for their health and safety if the planned tower was erected. The board determined that despite meeting four out of five requirements to grant a variance request, the variance would ultimately change the character of the township, impair the use and development of local properties and be detrimental to the public welfare, and thus the board denied the variance request.

Verizon then appealed the board's revised decision to the trial court. The neighbors sought to intervene, which the trial court granted but it limited the neighbors to argue Verizon's issue on appeal—that is, whether the variance would change the character of the township, impair the use and development of local properties and be detrimental to the public welfare. The trial court ultimately found for Verizon and reversed the board's denial of the variance, stating there was not substantial evidence to support the board's finding that the value of the homes would decrease or there would be a threat to the public welfare, for instance.

The neighbors then appealed to the Commonwealth Court, which found the trial court did err when it determined the board erred in denying Verizon's variance request and thus ultimately found for the neighbors. The court relied on section 611 of the zoning ordinance, which allows the board to grant a variance upon a showing of five requirements: (1) unique characteristics of the property; (2) strict conformity to the zoning ordinance would be impossible due to such unique characteristics; (3) unnecessary hardship is demonstrated, and not created, by the applicant; (4) the variance would not have adverse affects on the neighborhood, impair the use of neighboring property or be detrimental to the public; and (5) the variance will represent the minimum variance to afford relief. The court first noted it is the party seeking the variance—here, Verizon—that has the burden of proof to show all five requirements to grant the variance are met. However, the court found Verizon did not prove the fourth requirement regarding the variance's effects. Although Verizon presented engineer expert testimony with respect to design, construct and safety regarding weather conditions, Verizon did not demonstrate the neighbors' property values and ability to develop the properties would not be impacted. Moreover, the neighbors demonstrated their properties were within the fall radius of the tower should the tower ever collapse. Thus, the Commonwealth Court reversed the trial court's order and found for the neighbors.

The court additionally addressed the neighbors' argument regarding their ability to intervene in this matter. The court noted the trial court acted improperly by prohibiting the neighbors from arguing any other issues with respect to the variance other than the one in Verizon's appeal. Under Rule 2327 of the Pennsylvania Rules of Civil Procedure, intervention is mandatory unless there are grounds for refusal under Rule 2329, which provides that intervention can be refused if the claim or defense of the intervener is not in subordination to the propriety of the action. While the trial court found the other issues the neighbors wished to raise beyond that of Verizon's appeal regarding the other four requirements were not subordinate to the issue Verizon raised, the Commonwealth Court disagreed. Because the issue Verizon appealed was not merely

the challenge to the board's finding that the variance would change the character of the township, impair the use and development of local properties and be detrimental to the public welfare, but also more generally, Verizon's appeal was based on the denial of their request for a dimensional variance. Thus, the remaining issues with respect to the variance were, in fact, subordinate to these issues. Still, the court ultimately held that intervention, rather than appeal, was the proper manner to address the issues, and the court reversed the trial court's decision.

For more information, please contact Robert W. Gundlach, Jr. at 215.918.3636 or rgundlach@foxrothschild.com.

Commonwealth Court Addresses Right To Know Law Exceptions

By Kimberly A. Freimuth

In *Kaplin v. Lower Merion Township*, 19 A.3d 1209 (Pa.Cmwlth. 2011), decided May 5, 2011, the Commonwealth Court addressed the Right to Know Law (RTKL) and exceptions under that law, specifically under 65 P.S. § 67.708(b)(10)(i) (708 (b)(10)(i)), and how that exception interacts with provisions of the Pennsylvania Municipalities Planning Code (MPC). On appeal, Kaplin (the requestor), an attorney representing the Righters Ferry Association (RFA), argued the trial court failed to interpret the exceptions to the RTKL properly with respect to the MPC because the records sought were not deliberative and the communications were not internal as required under the exception.

RFA retained the requester to represent them in their development of nearly 600 apartments in Lower Merion Township. Pursuant to township policies, RFA filed a conditional use application with the Board of Commissioners (the board) regarding their development, and a hearing was held to examine the application. Prior to the board's decision on the application, the requester filed a request under the RTKL for access to all written and electronic communications between and among members of the board and township staff with respect to the application as well as regarding specific properties in the township.

Upon review of the request, the township stated that of the 1,215 total pages of documents that came up under the request, various pages fit an exception within the RTKL, under 708 (b)(10)(i), which provides that the exception covers:

> [I]nternal, pre-decisional deliberations of an agency, its members, employees or officials, or pre-decisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including…memos or other documents used in the predecisional deliberations. 65 P.S. § 67.708(b)(10)(i).

The township found that because the documents dealt with primarily internal, pre-decisional deliberations between and among board members and township staff, some 322 pages of communications fit the exception under 708 (b)(10)(i) of the RTKL and thus did not need to be disclosed. Moreover, other pages, the township asserted, were protected under attorney-client privilege. The requester thereafter appealed to the Office of Open Records, arguing first that under the definition of deliberation under the "Sunshine Act," none of the documents the township claimed were exempted could be considered deliberative because, as defined under the Sunshine Act, deliberations are "[t]he discussion of agency business held for the purpose of making a decision." The requester stated that because under § 913.2(b)(1) of the MPC, the period for deliberation on the application could not have begun prior to the end of the hearings, which was on December 9, 2009—a full three weeks *after* the requester filed the request—the communications prior to that time could not be considered deliberative, nor internal, particularly when the discussions requested included discussions with township staff and the board. Additionally, the requester argued any documents the township claimed to be protected by attorney-client privilege lacked the proof needed to show the elements of privilege applied.

After two determinations by the Office of Open Records, the Office of Open Records ultimately found that because the township and the board were separate entities, the communications between them could not be considered internal for purposes of determining whether the documents were an internal pre-decisional deliberative process, and the remaining documents were protected by the attorney-client privilege, but the privilege was waived when they disclosed those communications to a third party. Both sides appealed to the trial court.

The trial court found the exception under Section 708(b)(10)(i) included discussions between the township staff and the board and thus rejected the requester's argument that the communications were not deliberative because they failed to meet the definition of deliberation under the Sunshine Act. The trial court also held that various e-mails between the township staff and the board were subject to the pre-decisional deliberation exception because despite the fact that some staff and the board were separate parties, the communications were ultimately still internal to the township and thus fit the exception in 708(b)(10)(i).

The Commonwealth Court then addressed the requester's appeal, in which the requester first argued the trial court erred in holding the communications between board members could be subject to the exception under 708(b)(10)(i) when they occurred before the period for deliberation, as set out in the MPC, and second that the communications between the board and

township staff could meet the requirements of the exception under 708(b)(10)(i) when the communications were ultimately impermissible ex parte communications and not internal communications as required by the exception.

With respect to the requester's first argument that the communications occurred prior to the period for deliberation as set out under the MPC and thus should not fall within the 708(b)(10)(i) exception, the court disagreed with the requester. The court stated that under Section 913.2(b)(1) of the MPC, a governing body must make a decision on a conditional use application within 45 days of the end of hearings on the application, but it does not specifically state whether the governing body can communicate prior to the close of hearings. The court found that in no way does the MPC prohibit the board from engaging in deliberative communications prior to the close of hearings. Furthermore, the court dismissed the requester's reliance on a Pennsylvania Supreme Court case, *Wistuk v. Lower Mount Bethel Township Zoning Hearing Board*, as misplaced. Despite the requester's interpretation that *Wistuk* stood for the secrecy of zoning and hearing processes such that board members are akin to jurors and cannot discuss the application prior to the close of a hearing, the court noted *Wistuk* simply stood for the proposition that a meeting for purposes of deliberation and discussion did not qualify as a hearing to toll the 45-day period set out under the MPC. As a result, the court affirmed the trial court's ruling on the first issue.

Regarding the second issue—whether the communications between board members and township staff could fall within the exception as internal communications or whether the communications were impermissible ex parte communications and represented a conflict of interest as described by the requester—the court disagreed with the requester. Because under 708(b)(10)(i), a communication need not be internal within one agency but can be between another agency with respect to pre-decisional deliberations, the court found the communications between the board and the township staff regarding the logistics of issuing a decision—even if the township was required to be considered a separate agency—would still be considered internal, pre-decisional communications between two agencies and thus covered under the exception.

For more information, please contact Kimberly A. Freimuth at 215.918.3627 or kfreimuth@foxrothschild.com.

A Note to Sellers - Is Your Mortgage a "Purchase Money Mortgage?"

By Michael J. Isaacs

In a recent Delaware Superior Court case, *Baffone v. Brady*, 2011 WL 2165136 (Del. Super. Ct. N2011), the Superior Court strengthened its preference for a strict application of the Parol Evidence Rule in mortgage priority disputes. In *Baffone*, the Bradys defaulted on their home mortgages with two private lenders, the Galantinos and the Baffones. The Galantinos, as "sellers," claimed their later recorded mortgage of $400,000 held the status of a "purchase money mortgage" and had priority over the Baffone's first recorded mortgage of $500,000. The Galantinos asserted they only agreed to increase their original loan offer of $200,000 to $400,000 on the understanding they would have priority. They also asserted that, as a purchase money mortgage, the loan qualified for a statutory exception under 25 Del. Code § 2108.

25 Del. Code § 2108 allows later recorded purchase money mortgages priority over other earlier recorded liens or mortgages. It provides that priority is given to subsequently recorded purchase money mortgages if such mortgages "are recorded within five days, after the deed is recorded." In this case, the court was required to decide if the mortgage granted by the seller, the Galantinos, qualified as a "purchase money mortgage" and would be given priority over the earlier recorded mortgage by the Baffones.

Although the court determined the extrinsic evidence favored priority for the Baffone mortgage, the court carefully noted its decision was not based on extrinsic evidence. Instead, the court determined it had to adhere to Delaware's Parol Evidence Rule. Thus, determination of the issue of whether this was a purchase money mortgage entitled to priority under 25 Del. Code § 2108 must be based on the terms of the mortgage alone. However, even after an evaluation of the mortgage alone, the court still found the Baffone's $500,000 had priority over the Galantino's $400,000. In reaching this decision, Judge Parkins noted the words "purchase money mortgage" never appeared in the Galantino mortgage, thus the mortgage could not be characterized as a "purchase money mortgage." Furthermore, the court found there was nothing to distinguish the Galantino mortgage from the Baffone mortgage. Consequently, the court determined it must rely on the general rule that priority is awarded to the first recorded mortgage.

Delaware real estate practitioners advising their clients in similar transactions should keep in mind the court's hesitancy to use parol evidence in lien priority disputes and should specifically identify a lien as a purchase money mortgage and record any information about lien priority directly in the mortgage.

For more information, please contact Michael J. Isaacs at 302.622.4213 or misaacs@foxrothschild.com.

Marcellus Shale Advisory Commission Releases Its Report

By M. Joel Bolstein

On July 22, Pennsylvania Governor Tom Corbett's Marcellus Shale Advisory Commission released its long-anticipated report (Shale Report), which was written in response to Executive Order 2011-01 calling for the formation of a Commission that would issue a report to the governor with recommendations to "develop a comprehensive, strategic proposal for the responsible and environmentally sound development of Marcellus Shale." A copy of the Shale Report is available at http://www.portal.state.pa.us/portal/server.pt/community/marcellus_shale_advisory_commission/20074.

A significant portion of the Shale Report deals specifically with proposals for new environmental regulations that would be imposed on natural gas drillers, including tougher civil and criminal penalties for violations. Other sections of the report concern new protections for public health, safety and natural resources.

I have tried to read through the Shale Report with an eye toward pulling out the findings and recommendations that would be of some interest to real estate developers and ancillary businesses who are not currently players in the Marcellus Shale industry. For those people, the most important thing to glean from the report is the fact that the Marcellus Shale is generating an enormous amount of new economic development activity in Pennsylvania. In that regard, the Shale Report finds the natural gas industry is "creating significant demands for housing, lodging, support business activity and transportation." In other words, if you are in the real estate business in Pennsylvania, if you go west or north (since there is no Marcellus Shale gas in southeastern Pennsylvania), you may find new opportunities awaiting that you will not find in areas not experiencing the growth spurred by the exploration and development of the Marcellus Shale formation. I have met with local economic development agencies across the northern tier of Pennsylvania, and their message, as confirmed by the Shale Report, is that they desperately need new single family housing, apartment buildings, hotels, motels and warehouses to keep up with the growing demands of the Marcellus Shale industry.

Section 8.5.7 of the Shale Report specifically addresses the lack of affordable housing in north central Pennsylvania and how the growth of the Marcellus Shale industry has compounded the problem. The report states: "As the gas industry is expanding into communities, housing costs have risen to meet demand such that local residents can no longer afford housing." It further finds that while there are some gas companies that have constructed "company man camps for workers," many local residents, especially renters, have been forced to relocate "further away from their jobs and communities to find an affordable place to live." For real estate companies that have previously built affordable housing or worked within federal and state programs designed to increase the availability of affordable housing, such as the Pennsylvania Housing Finance Agency or the federal Low Income Housing Tax Credit Program, building new homes or rental properties in the areas of Pennsylvania experiencing the Marcellus Shale boom could represent a significant new growth opportunity.

With regard to land use and planning, the Shale Report notes "the substantial growth of natural gas activity was not an activity that communities could have reasonably anticipated." The report encourages communities that are potentially impacted by Marcellus Shale activities to modernize their comprehensive plans, zoning ordinances and subdivision and land development ordinances "to make certain that development is located where and at an intensity that meets both industry and community needs." The report further directs municipalities to work with local government associations that have already developed model ordinances to address Marcellus Shale impacts. One such model ordinance developed by the Pennsylvania State Association of Township Supervisors can be found at http://marcellusdrilling.com/wp-content/uploads/2011/03/PSATS_OrdinanceModel_20101208.pdf. The expectation is that communities where Marcellus Shale drilling activities occur will likely continue to take legislative steps that try to minimize the potential for local impacts.

Real estate developers will also find it interesting that the report recommends the Commonwealth "identify strategic locations" to construct new "regional business parks" capable of tapping into existing infrastructure. The idea is that as Marcellus Shale-related enterprises grow, the Commonwealth would like to channel that growth in the direction of brownfield sites or other properties close enough to existing roads, water and sewer services to minimize the need for new infrastructure. In addition, the Shale Report envisions specialty businesses, such as ethylene processing plants and co-generation facilities, being sited near gas sites to take advantage of natural gas byproducts that can be beneficially used for commercial purposes.

Finally, for those of you just waiting to buy a natural gas-powered car but realize there are no places to fill up, you will be happy to know the Shale Report recommends Pennsylvania develop "Green Corridors" for natural gas-fueled vehicles, including Compressed Natural Gas (CNG) and Liquefied Natural Gas (LNG) fueling stations, located at least every 50 miles and within two miles of designated highways. For now, I would recommend holding off on that purchase, but do not be surprised when you start seeing CNG and LNG fueling stations popping up along the Pennsylvania Turnpike probably in the not too distant future.

For more information, please contact M. Joel Bolstein at 215.918.3555 or jbolstein@foxrothschild.com.

Commonwealth Court Rules Municipality's Failure To Record New Zoning Ordinance on Its Books Renders Ordinance Ineffective

By Clair E. Wischusen

In *Bartkowski Inv. Group, Inc. v. Board of Com'rs of Marple Tp.*, 18 A.3d 1259 (Pa. Cmwlth. 2011), decided April 15, 2011, the Commonwealth Court addressed two issues regarding procedural challenges to a zoning ordinance. The first issue dealt with section 5571.1 of the Judicial Code, and the court relied on its previous decision in *Messina v. East Penn Twp.* to find ultimately that minor changes regarding renumbering of statutory provisions of a new ordinance alone did not demonstrate an impermissible deprivation of constitutional rights, as required under § 5571.1, for a procedural challenge brought after 30 days. With respect to the second issue, the court held the challenger's complaint regarding the township's failure to record the new zoning ordinance in the official township ordinance book did not constitute a procedural challenge, and thus, the 30-day time period to bring procedural challenges under section 5571.1 of the Judicial Code did not apply.

Bartkowski Investment Group, Inc. (BIG) is a billboard advertising company that leased property from various owners in Marple Township to construct billboards. BIG submitted applications to the zoning board for approval to erect the billboards. However, the township's zoning ordinance did not allow for any billboard advertising. The township published notice that it would conduct a public hearing to consider adopting the amendment allowing for billboard advertising. After the hearing, the zoning board ultimately adopted a municipal cure to allow for the construction of billboards in the township. However, the ordinance it adopted renumbered statutory provisions from the ordinance as previously advertised to the public. Moreover, the adopted ordinance did not permit the use of the billboards that BIG proposed in its applications for zoning approval. Thus, BIG was informed that its applications for zoning approval were denied. Although the amendment to the ordinance was adopted, under § 1502 of the First Class Township Code, the township was required to record the ordinance in the official township ordinance book within one month of the date of passage, which it failed to do.

In response, BIG filed a procedural challenge to the ordinance under § 5571.1 of the Judicial Code as well as a complaint for declaratory and mandamus relief. Additionally, BIG filed a substantive challenge to the validity of the original ordinance, prohibiting the erection of any billboards, prior to the enactment of the ordinance at issue.

The basis of the procedural challenge was that the adopted ordinance differed from the ordinance advertised to the public and sent to the planning commission for approval in that the statutory provisions were renumbered in the adopted ordinance. The basis for the complaint for declaratory and mandamus relief was that the township never recorded the billboard ordinance in the official township ordinance book within one month of passage, as required under the First Class Township Code. For that reason, BIG argued the new ordinance did not become effective and therefore could not be retroactively applied to BIG's substantive challenge to the original ordinance that did not allow for the erection of any billboards.

The trial court first found the procedural challenge was time-barred by the 30-day period under § 5571.1 of the Judicial Code because BIG did not establish there would be an impermissible deprivation of constitutional rights so as to allow it to challenge the ordinance after the 30-day limit. The trial court noted there was no deprivation of constitutional rights because the renumbering alone did not amount to any sort of prejudice, since the ordinance was advertised and the public was given an opportunity to attend the hearing. Second, with respect to the complaint for declaratory and mandamus relief, the trial court found this issue was indistinguishable from the procedural challenge and thus held the issue was also time-barred.

On appeal, the Commonwealth Court affirmed the trial court with regard to the procedural challenge, finding the renumbering of the statutory provisions in the enacted ordinance, compared to the ordinance that was advertised to the public and sent to the planning commission, did not result in an impermissible deprivation of constitutional rights. The court looked to key factors set out in *Messina*, such as multiple hearings on the proposed zoning ordinance and several proofs of publication proving the township provided notice to the public, finding there was sufficient notice to the public of impending changes. In applying the Code and the *Messina* factors to this case, the court found the township's published notices substantially complied with the procedures for enactment of an ordinance amendment. Thus, the court affirmed the trial court's conclusion that the procedural challenge was, in fact, time-barred by § 5571.1 of the Judicial Code.

The Commonwealth Court did not agree with the trial court's finding that the complaint for declaratory and mandamus relief with respect to the township's failure to record the new ordinance was indistinguishable from the procedural challenge. The court first looked to § 1502 of the First Class Township Code, which requires an ordinance be recorded within one month after its passage. The court additionally found persuasive § 1601 of the Second Class Township Code, which provides, in pertinent part, that "the failure to record within the time provided shall not be deemed a defect in the process of enactment or adoption of such ordinance." Accordingly, the court held that where the ordinance was not recorded, it did not become invalid but rather was ineffective, and based on the ordinances' ineffectiveness at the time BIG filed its substantive challenge, the ordinance could not be retroactively applied to the substantive

challenge. As a result, the court held the ordinance was valid but remanded in part to determine when and if the new ordinance became effective.

Bartkowski Investment Group demonstrates the difficulty of raising a procedural challenge beyond the initial 30-day time limit under § 5571.1 where such challenge is premised on a municipality's failure to readvertise and recirculate a proposed ordinance amendment after minor changes are made to the proposed ordinance prior to enactment. However, in holding that the failure to record renders an ordinance ineffective rather than procedurally defective, the court carved out a narrow exception to the application of § 5571.1 where a municipality fails to record a new ordinance on its books.

For more information, please contact Clair E. Wischusen at 215.918.3559 or cwischusen@foxrothschild.com.

Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 1718 proposes to amend several sections of the Pennsylvania Municipalities Planning Code (MPC) by changing the manner in which subdivision and land development applications are reviewed and amending requirements stemming from subdivision and land development approvals.

First, House Bill No. 1718 proposes to amend Section 503 of the MPC by requiring municipalities to designate by resolution or ordinance three approved professional consultants "from different firms in each discipline who are readily available to provide services in the municipality and the applicant may select a professional consultant from among the approved consultants and such professional consultant shall be the municipality's consultant for that particular application." (Please note the MPC defines "professional consultants" 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.")

The proposal further provides that if an applicant selects a professional consultant, only review fees by the selected consultant may be charged to the applicant.

The proposal also suggests an amendment to Section 509 of the MPC, which addresses completion of improvements or guarantee thereof as a prerequisite to final plan approval. House Bill No. 1718 proposes to limit a municipality—in situations where the governing body accepts dedication of all or some of the required improvements following completion—to requiring the posting of financial security to secure the structural integrity of said **dedicated** improvements as well as the functioning of said **dedicated** improvements [...].

House Bill No. 1718 also proposes to amend Section 510 of the MPC by requiring a municipality to designate three approved engineers from different firms "who are readily available to provide services in the municipality and the developer may select an engineer from this list to perform the inspection of the improvements on behalf of the municipality." Furthermore, if the developer selects an engineer pursuant to the foregoing, the municipality may be required "to reimburse the governing body only for inspection fees of the selected engineer."

Finally, House Bill No. 1718 also proposes to amend Section 510 of the MPC in order to give a developer more time to challenge bills in connection with the inspection of the improvements.

For more information, please contact David H. Comer at 610.397.7963 or dcomer@foxrothschild.com.

Possible Tax Windfall in Philadelphia County - If You Appeal

By Herbert K. Sudfeld, Jr.

The tax appeal deadline in the City of Philadelphia is the first Monday in October: October 3, 2011. In 2010, the State Tax Equalization Board (STEB) established the city's "common level ratio" or "STEB ratio" at 32 percent. This ratio is the ratio of assessed value to actual market value. The tax assessment law for the city states that if the common level ratio differs by more than 15% from what the city says it utilizes, then the board's ratio must be used when an appeal is filed.

In 2011, the city has used a ratio figure of 18.1 percent, which would mean the overall market value of properties used in the data sent to the board was much higher than last year. Since most property values were declining or stagnant, this presents questions as to the validity of the city's figures.

The city, therefore, appears to be in violation of the common level ratio, and an adjustment of values to the downside would seem to be appropriate. In order to achieve such a reduction, property owners need to appeal by the October 3 deadline.

For more information or if you would like us to analyze your property for such an appeal, please contact Herbert K. Sudfeld, Jr. at 215.918.3570 or hsudfeld@foxrothschild.com. We will have one of our tax assessment appeal attorneys get in touch with you and provide answers to your questions or aid in your appeal.

Case Summary: *Pohlig Builders, LLC v. Zoning Hearing Board of Schuylkill Township* - Variance To Allow Steep Slope Disturbance

By Robert W. Gundlach, Jr.

In *Pohlig Builders, LLC v. Zoning Hearing Board of Schuylkill Township*, 15 A.3d 563, 2011 WL 2084174, Pa. Cmwlth, March 17, 2011 (No. 782 C.D. 2010), the Commonwealth Court addressed the Schuylkill Township Board of Supervisors' zoning appeal based on a variance granted to Pohlig Builders (the developers) to disturb an area of steep slopes such that the developers could construct their proposed residential development. The court affirmed the variance, reasoning that because a steep slope variance is not a traditional dimensional variance and is not seeking a use for the property outside of the uses set out in the ordinance, the variance is characterized as a hybrid variance and thus subject to less stringent hardship requirements to obtain a variance.

The developer, the equitable owner of property in Chester County, sought a variance to create a residential development on the subject property. The property was divided into segments by a reservoir owned by Aqua Pa., Inc., a drinking water provider in the township. The only access between the two segments of the property was a strip of land 50 feet wide, which the developer contends is insufficient to support access by a roadway as required for the proposed project. Thus, Aqua and the developer created an easement whereby Aqua would allow the developer to create a bridge and culvert over the reservoir on the property, as well as a roadway, such that the developer could create access between the northern and southern segments of property divided by the reservoir.

The portion of Aqua's land and reservoir on which the bridge, culvert and roadway would lie was within the township's Flood Hazard District, which is the subject of the zoning ordinance providing for steep slope regulations to prevent run-off and erosion. Due to these conditions, the developer sought the variance from the zoning hearing board (ZHB) to permit construction of the bridge, culvert and access road on Aqua's land.

Section 1925 of the zoning ordinance provides, in relevant part,: "[t]here shall be no erection of buildings or streets on land sloping greater than twenty-five feet vertical in one-hundred feet horizontal, or a 25% slope." Upon hearings with respect to the developer's variance request, the ZHB granted the developer's request for the variance from Section 1925 to allow construction of the bridge and culvert on slopes greater than 25 percent. The trial court affirmed the ZHB's decision with respect to the grant of variance. The township appealed the variance on four grounds, relying on the requirements of a grant of variance set out in Section 910.2 of the Municipalities Planning Code (MPC). First, the township argued the developer failed to demonstrate unnecessary hardship based on the physical conditions of the property. Next, the township asserted because there was no unnecessary hardship, the developer could make reasonable use of the property without the variance on the northern end of the property alone and thus should not be entitled to extraordinary grant of variance relief. Third, the township argued the only hardship the developer would face would be financial, which is insufficient to satisfy the hardship criterion provided for in the MPC. Finally, the township argued any hardship suffered by the developer would be self-inflicted, and thus the variance was improperly granted.

On appeal, the Commonwealth Court affirmed the grant of variance. As an initial matter, the Commonwealth Court noted the nature of a steep slope variance is neither a use nor traditional dimensional variance and thus constitutes a hybrid, as determined by the trial court. The court relied on its previous decision in *Zappala Group v. Zoning Hearing Board, Town of McCandless*, 810 A.2d 708, 711 (Pa.Cmwlth. 2002). There, the court found the stringency of the standard in proving unnecessary hardship for a grant of variance depends on whether use or dimensional variance is sought, and, with respect to steep slopes, because they are not traditional dimensional variances such as setbacks and use of the property regarding the steep slopes would not be outside of the uses enumerated in the ordinance, a steep slope constitutes a hybrid. *Id*. at 711 n.4. Where a steep slope variance constitutes a hybrid, the stringency of the unnecessary hardship is more relaxed. As a result, the court examined the township's challenges to the grant of variance with this frame of reference.

With respect to the township's argument that the developer failed to demonstrate unnecessary hardship, the court agreed with the trial court's determination that the 50-foot strip of land as the sole access between the two segments was sufficient to satisfy the hardship criterion. The court also added that because the developer's proposed use of the property is permitted as of right and the variance from the steep slope requirement amounts to a hybrid, it allowed for the finding that the hardship criterion was satisfied.

Next, the court rejected the township's argument that the developer could simply make reasonable use of the property on the northern segment alone and thus not require a variance. The court relied on the trial court's determination that the area of steep slopes for which the variance was granted only impacts a minor portion of the property, and, if only permitted to build on the northern segment of the property, the developer would be compromised from using two-thirds of the total property. The court also pointed out the township's argument fails on its face because even if the developer were to solely use the northern segment for the project, it would require subdivision from the southern segment, and since the pre-existing 50-foot access does not comport with the township's ordinance, it would thus require a variance regardless.

Finally, the court rejected the township's argument that any hardship suffered by the developer would be self-inflicted because the court stated that pre-purchase knowledge of zoning restrictions, without more such as too great of a purchase price, does not amount to a self-inflicted hardship.

Here, there was no evidence presented that the developer planned to pay an excessive price for the property subject to receiving the variance. As a result, the court affirmed all of the trial court's findings.

Pohlig Builders thus follows Pennsylvania Commonwealth precedent, finding that steep slopes fall within a gray area and are considered a hybrid with respect to a variance request. As a result of the hybrid status, there is a lower standard of proof with respect to unnecessary hardship.

For more information, please contact Robert W. Gundlach, Jr. at 215.918.3636 or rgundlach@foxrothschild.com.

Township's Denial of Sewage Repair Permit Not Abuse of Discretion Where Inconsistent With Property Land Development Plans

By Kimberly A. Freimuth

The Pennsylvania Commonwealth Court recently held in *In Re Rainmaker Capital of Chestnut Hill, LLC* (June 15, 2011) that a township's denial of a developer's sewage repair permit was not an abuse of discretion where (1) the permit violated a prior agreement between the developer and the township and (2) the permit was inconsistent with the developer's land development plans for the property.

The developer owned a small shopping center containing two onsite sewage systems, one of which malfunctioned. As a result, the developer advised the township of its plans to develop a new off-site sewage system on a separate lot. Prior to constructing the new system, the developer submitted a preliminary land development plan for the property, proposing the construction of a Dunkin' Donuts, additional parking in the location of the existing malfunctioning sewage system and proposing the relocation of the existing primary sewage system to an off-site location. The township granted conditional approval of the preliminary plan, and the developer then submitted a new sewage planning module to the Pennsylvania Department of Environmental Protection (PADEP) in order to relocate the sewage system in accordance with the approved preliminary plan. The planning module was ultimately approved by the PADEP.

A few months later, the developer and the township entered into an agreement whereby the township agreed to issue zoning and building permits to allow construction of the proposed Dunkin' Donuts; the developer was permitted to use the smaller, non-malfunctioning onsite sewage system, subject to the developer's agreement to relocate the system off-site upon final PADEP approval; and the developer agreed to submit a final land development plan prior to the issuance of a certificate of occupancy for the Dunkin' Donuts. As a result of the agreement, the developer submitted a final land development plan and proceeded to construct the Dunkin' Donuts.

Thereafter, the developer decided **not** to pursue construction of the new off-site sewage system and submitted a revised final land development plan eliminating the off-site sewage system and proposing reconstruction of the malfunctioning onsite sewage system in the area previously proposed for additional parking, thereby resulting in a decrease in parking that was not in compliance with the township zoning ordinance. The developer then submitted an application with the township for an on-lot sewage system "repair" permit for the malfunctioning system.

Upon receipt of the sewage "repair" permit application, the township sewage enforcement officer (SEO) sent the developer three letters advising the permit would not be issued as the permit application was incomplete because the plan submitted with the application was not a current plan of record. The developer had submitted the existing recorded 1987 plan for the property with the permit, which did not include the newly constructed Dunkin' Donuts. The SEO also advised the developer of its right to a hearing regarding the SEO's decision that the application was incomplete. The developer requested a hearing before the Board of Supervisors, which denied the developer's appeal from the SEO's decision. The developer appealed to the trial court, which reversed the board's decision.

On appeal to the Commonwealth Court, the township argued the SEO properly determined the SEO was prohibited from issuing the permit based upon the parties' prior agreement regarding relocation of the sewage system, the 1987 record plan, which was the only plan of record for the shopping center and did not include the Dunkin' Donuts, and the approved PADEP planning module.

The Commonwealth Court began by noting that municipalities have broad discretion in requiring sufficient information to support the grant of a sewage permit. The court determined the township did not abuse its discretion in enforcing the SEO's decision to deny the permit, since the township's decision was based on two essential reasons: (1) the developer's request to rebuild the malfunctioning system was inconsistent with the agreement between the developer and the township in which the developer agreed to construct a new off-site sewage system; and (2) the developer's revised final land development plan, which conflicted with the developer's approved preliminary plan and its PADEP approved sewage planning module, violated the township zoning ordinance by failing to provide the required amount of parking. Thus, the court held there was no abuse of discretion in refusing to issue a permit where the developer had no approved land development plan of record that was consistent with the permit application.

For more information, please contact Kimberly A. Freimuth at 215.918.3627 or kfreimuth@foxrothschild.com.

Request for New Variance May Not Be Evaluated in Light of Prior Relief Granted by Zoning Board of Adjustment

By Carrie B. Nase

Although an applicant receives a variance from the Zoning Board of Adjustment (ZBA), it may be required to seek new variances if the character of the project and/or the zoning of the property changes, even if the relief being requested is less than what was previously granted. In a memorandum opinion in *Manayunk Neighborhood Council, Inc., et al. v. The Philadelphia Zoning Board of Adjustment, et al.*, (No. 1083 C.D. 2010, filed June 14, 2011), the Commonwealth Court determined the applicant was required to seek new variances from the ZBA after the subject property was rezoned. In *Manayunk Neighborhood Council*, the applicant filed an application with the City of Philadelphia Department of Licenses and Inspections (L&I) for zoning and use permits to construct 270 apartment units with accessory and public parking. L&I refused the application because the proposed project failed to comply with certain dimensional regulations in the zoning code.

The applicant filed an appeal to the ZBA seeking variances to such dimensional regulations, which were granted. In 2005, the applicant submitted a letter to the ZBA requesting administrative permission to amend the plan originally submitted by reducing the number of units and parking spaces. The ZBA approved the revised plan. Sometime between 2005 and 2008, the property was rezoned from G-2 Industrial to RC-1 Residential. In August 2008, the applicant submitted another application to L&I showing minor changes from the 2005 plan approved by the ZBA. L&I refused the 2008 application because it failed to comply with other dimensional requirements in the zoning code. The applicant filed an appeal to the ZBA requesting variances to the dimensional requirements.

In presenting its case, the applicant argued "L&I should have evaluated the application against the ZBA's previous grant of relief as distinguished from the current regulations. Since the application is for a smaller building within the footprint and massing allowed by the ZBA, approval should have been granted." *Manayunk Neighborhood Council, Inc., et al. v. The Philadelphia Zoning Board of Adjustment, et al.*, (No. 1083 C.D. 2010, filed June 14, 2011). The ZBA granted the variances. The Manayunk Neighborhood Council appealed the ZBA's decision to the Philadelphia County Court of Common Pleas, which affirmed the ZBA's decision. On appeal, the Commonwealth Court reversed the ZBA's decision. In rendering its decision, the Commonwealth Court noted the zoning of the property changed from G-2 Industrial to RC-1 Residential and the floodplain was remapped. As such, the Commonwealth Court found the applicant had "to prove that its project met the criteria from the zoning provisions in the RC-1 residential district because the variances that were previously granted were from zoning regulations that are no longer applicable." *Manayunk Neighborhood Council, Inc., et al. v. The Philadelphia Zoning Board of Adjustment, et al.*, (No. 1083 C.D. 2010, filed June 14, 2011).

For more information, please contact Carrie B. Nase at 215.299.2030 or cnase@foxrothschild.com.

Fox Rothschild LLP
ATTORNEYS AT LAW