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In the Zone

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Waiting for the New Normal

By *Gregory J. Kleiber*



The economic recovery has been slower and more uncertain than I, for one, had expected (much less hoped for), but the residential real estate market has been particularly troubled. Even as signs of a gradual recovery in the overall economy have grown more regular, the news on housing prices and sales levels has remained almost unrelievedly grim. In the past, hard times have given way eventually to renewed growth in both sales volume and pricing, often enough to make that result seem normal. This time, however, the disconnect between the overall economy and the housing market (especially new construction) has been greater and more resistant to change. It seems increasingly apparent that we are not, any time soon at least, returning to the old normal.

There are various factors – some more scary than others – that may be contributing to the state of the housing market. The uncertain state of the job market must be given pride of place as a source for the housing market doldrums. Buying a house, whether a first home, a trade-up or a vacation property, is an act of faith for most buyers – faith that the buyers' jobs will still be there tomorrow and next year and thereafter and will offer the regular salary bumps that make the uncomfortable financial stretch of the first

year after closing gradually less nerve wracking. Remove the foundation of this faith, as today's stubborn unemployment rates have done, and many would-be buyers find their apartments or smaller homes still serviceable for a little longer.

Under the old normal, one major counterweight to the understandable anxiety of buying a home has been the certainty that a house was a great long-term investment. In the worst case, a house could quickly be sold for more than you paid and your equity painlessly recovered. There are three assumptions built into this belief: (1) house prices at any given time were essentially correct; (2) houses would always rise in value; and (3) houses were liquid and could be sold reasonably quickly if necessary. All three of these have given way under the pressures of the recession. Houses often sit on the market for months or years, at asking prices that slowly decline toward (and often past) the seller's original purchase price. The notion that an asking price bore some reasonable resemblance to the "right" price has been replaced by the expectation that the decline in prices will continue, with no reason for a savvy buyer not to wait until that house of his or her dreams gets even cheaper.

In fact, it is difficult to know just how far housing prices need to fall to reach a new normal. In many areas, houses intended for owner occupancy still sell (or at least are

listed for sale) at prices well above their value if treated as rentals and analyzed as commercial properties. In other words, sellers expect a premium for houses sold for owner occupancy. The exact origin of this premium remains something of a puzzle to me, though doubtless it is related to the tax benefits extended to owners but denied to renters. Even factoring in those benefits, however, will not generally bridge the gap between asking price and rental value. Until those two numbers reach an equilibrium, it is hard to guess just what the final "right" price for a house may be. Of course, there is no guarantee that a new house can be built for that "right" price, as the cost of a new home incorporates factors not directly tied to buyer demand, such as commodity prices.

In short, the new normal for the housing market remains elusive. We can only hope the general improvement in the economy will start to work its magic on the housing market faster than it has to date and first-time buyers, more comfortable with their economic futures, will decide they cannot wait any longer and need to buy that beautiful house on the corner, whose seller is madly in love with that big home across town, whose owners are ready at last for the big step up....

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Fox Rothschild Partner M. Joel Bolstein Appointed To PA Cleanup Standards Scientific Advisory Board

Joel was recently appointed by PADEP Secretary Michael Krancer as one of the 11 members of Pennsylvania's Cleanup Standards Scientific Advisory Board (CSSAB). His four-year term will run until June 1, 2015. The CSSAB assists the PADEP and the Environmental Quality Board in developing statewide cleanup standards under Pennsylvania's Land Recycling and Environmental Remediation Standards Act, known as Act 2, and providing other technical and scientific advice needed to implement the provisions of the Act. Joel helped establish the Act 2 program when he served as Deputy Secretary of the PADEP under former Pennsylvania Governor Tom Ridge.

PA Commonwealth Court Decision Emphasizes Importance of Understanding Zoning Requirements

By **Brian J. Levin**



On March 23, 2011, the Commonwealth Court of Pennsylvania, in *Anter Associates v. Zoning Hearing Board of Concord Township*, affirmed the order of the Court of Common Pleas of

Delaware County, which had affirmed a decision of the Zoning Hearing Board of Concord Township (ZHB) denying Anter's application for special exception to erect a billboard on a 2.25 acre tract of land.

The ZHB found Anter failed to comply with four sections of the zoning ordinance, specifically stating Anter failed to (1) prove that allowing the special exception would not be contrary to the standards of law, (2) provide the required historic resource study, (3) provide for a planted screen buffer and (4) provide the proper engineering certification. The Commonwealth Court sided with Anter on the first three points but found for the ZHB on the issue of Anter's failure to provide the required engineering certification. Given that the requirement is set forth in the zoning ordinance, Anter could have, and likely should have, properly addressed that issue during the application and hearing process.

The court did not examine the substance of the issue of whether the special exception would be contrary to the standards of law, but rather stated Anter did not have the burden of presenting evidence relating to the criteria because "the ZHB did not request evidence on the criteria [nor did] an opposing party present evidence placing the criteria in issue." As neither the ZHB nor any opposing party triggered the obligation to present evidence, Anter was not required to do so,

and the ZHB should not have denied the application on the basis that granting the special exception would be contrary to the standards of law.

With regard to points two and three noted above, the court sided with Anter's position that the erection of the billboard was not "development." The court's ruling, and Anter's argument, were based upon the Pennsylvania Supreme Court holding in *Upper Southampton Township v. Upper Southampton Township Zoning Hearing Board*, 594 Pa. 58 (2007), wherein the Supreme Court held billboards are not land development. Under the applicable zoning ordinance (Section 210-183.10) cited by the ZHB, a historic resource study is required when a landowner files an application for approval of a subdivision or land development plan. Because Anter was seeking a special exception, not approval of a land development plan, that ordinance was not applicable and no historic resource study was required. Similarly, Section 210-129.A of the zoning ordinance requires, as a "special **development** requirement," a screen buffer planting strip at least 50 feet wide. As with the historic resource study, the court referred to the *Upper Southampton* case and found that because the erection of the billboard is not "development," the screen buffer was not required.

On the fourth and final point raised by the ZHB in denying Anter's application, the court held for the ZHB on the basis that Anter failed to supply, under seal and signature, the certification of a professional engineer stating the existence of the billboard meets all construction standards set forth in the township building codes. That requirement is clearly set forth in Section 210-210.L(8) of the zoning

ordinance, and Anter quite easily could have complied with it. However, they did not, and therefore the application for special exception was denied. At the hearing before the zoning board, Anter did present a sign location plan that contained the seal and signature of an engineer. However, that plan indicated that construction of the billboard would be "in accordance with approved structural plans signed and sealed by a licensed professional structural engineer." Anter provided such a plan to the ZHB, but that plan was dated March 20, 1989, 15 years before the township adopted the Uniform Construction Code applicable throughout Pennsylvania. Because that plan was outdated and Anter's engineer was not present at the hearing to offer his certification, the court affirmed the ZHB's ruling that Anter failed to provide the proper engineering certification required under the zoning ordinance, and thus Anter's application for special exception was denied.

This decision underlines the importance of reviewing and understanding all the requirements of the applicable zoning ordinance prior to commencing, and throughout, the application and hearing process. Had Anter taken the necessary steps to get the required certification (or arranged to have their engineer present at the zoning hearing), the court likely would have ruled in their favor and overturned the ZHB decision.

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PA Department of L&I Offers More Info on New Sprinkler Law

By Kimberly A. Freimuth



On April 25, 2011, Pennsylvania Governor Tom Corbett signed into law Act 1 of 2011 ([HB 377, PN 1520](#)), which makes a number of changes to Pennsylvania's Uniform Construction Code.

In an effort to clarify the impacts of Act 1 on various questions of permit timing and provision enforcement, the Pennsylvania Department of Labor and Industry issued a summary document to aid understanding. The Department's May 5th statement includes the following:

The sprinkler requirement for one- and two-family dwellings is repealed, and the repeal is made retroactive to January 1, 2011. See Section 901(g).

- Where building permits have been issued after January 1, 2011, and a sprinkler system was required, the system will only have to be installed if the owner requests the builder include the installation as part of the construction.
- An amended building permit application may or may not be required. Check with the building code official having jurisdiction.
- Municipalities with legally enacted local residential sprinkler requirements (adopted in a local building code ordinance in effect on July 1, 1999, or adopted per the Section 503 amendment process after the municipality elected to administer and enforce the UCC) may continue to enforce these requirements.
- The automatic sprinkler requirement for townhouses (that took effect on January 1, 2010) remains in effect.
- Section 901(g) obligates builders to provide certain info regarding sprinklers to customers before entering into construction contracts.

All new one- and two-family dwellings not sprinklered must comply with new fire protection requirements for floors, effective April 25, 2011. See Section 901 (h).

- Since this provision is not made retroactive, this should be imposed on all new one- and two-family dwellings that must comply with the International Residential Code 2009 and for which application for a building permit is made on or after April 25, 2011.

The wall bracing requirements in the International Residential Code 2009, in Sections R602.10 through R602.12.1.6, are deleted and replaced with the wall bracing requirements found in the International Residential Code 2006 (in Sections R602.10 through R602.11.3), effective April 25, 2011. See Section 901(i).

- Since this provision is not made retroactive, this should be imposed on all new one- and two-family dwellings that must comply with the International Residential Code 2009 and for which application for a building permit is made on or after April 25, 2011.

After Act 1 was signed into law, the Pennsylvania Association of Building Code Officials (PABCO) sent to its members the following interpretative guidance, which the Department agrees with:

For sprinkler requirements in one- and two-family dwellings:

- If permit was applied for prior to April 25 but not yet issued, sprinkler requirements do not apply.
- If permit was issued prior to April 25 and construction has not begun, sprinkler requirements do not apply.
- If permit was issued prior to April 25, construction was begun but sprinkler systems were not yet installed, sprinkler

systems are not required to be installed. The building code official MAY require amended plans to be submitted (as built).

For fire floor requirements in one- and two-family dwellings without sprinkler systems installed:

- If permit was applied for prior to April 25 but not yet issued, fire floor requirements DO NOT APPLY.
- If permit was issued prior to April 25, fire floor requirements DO NOT APPLY, regardless of whether construction has begun.
- If permit was applied for on or after April 25, fire floor requirements DO APPLY.

For wall bracing requirements in one- and two-family dwellings:

- If permit was applied for prior to April 25 but not yet issued, 2009 IRC wall bracing requirements will apply.
- If permit was issued prior to April 25, 2009 IRC wall bracing requirements apply whether construction has begun or not.
- If permit was applied for on or after April 25, 2006 IRC wall bracing requirements will apply.

Act 1 also substantially changes the triennial code adoption process. On May 17, 2011, the Pennsylvania Housing Research Center conducted a webinar outlining the major changes to Pennsylvania's Uniform Construction Code. The presentation as well as materials can be viewed at their [web site](#).

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Pennsylvania's Historic Preservation Plan Gets an Update

By Robert W. Gundlach, Jr.



Every five years, the Pennsylvania Historical and Museum Commission's Bureau for Historic Preservation (BHP) is required to develop a comprehensive Statewide

Historic Preservation Plan that encourages the consideration of historic preservation concerns within broader land planning environments at the federal, state and local levels. The plan is designed to take into account issues affecting the broad spectrum of historic and cultural resources within the state based upon broad-based public and professional input.

Beginning summer 2010, the BHP implemented a Community Preservation Values Survey, the results of which will help form the basis of a new statewide preservation plan. The current phase of the

planning process involves a series of regional public forums in which BHP staff and partners present the results of the survey to the public and moderate a discussion to identify how to best preserve those values through the Commonwealth's programs related to historic preservation.

The primary goal of the planning process is for the public to inform the Pennsylvania State Historic Preservation Office of what they value in their community. This plan will help the state identify, prioritize and address historic preservation needs over the course of the next five years.

The current 2006-2011 Preservation Plan identified [three general goals](#): (1) recognize, sustain and support historic resources as viable components of local community environments; (2) secure stable public policy and public funding support at all levels for the preservation of historic and

cultural resources; and (3) identify and celebrate preservation accomplishments. Each general goal contained a series of objectives and action steps.

Upcoming local regional forums on the 2012-2017 Plan include:

June 8, 2011, 1 to 4 p.m. – Delaware Valley Regional Planning Commission, 190 N. Independence Mall West, 8th Floor, Philadelphia, PA 19106

June 9, 2011, 12:30 to 3:30 p.m. – Ambler Theater, 108 E. Butler Ave, Ambler, PA 19002

[Registration information](#) can be accessed online.

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Ability To Repay Proposal Impacts Mortgage Underwriting

By Clair E. Wischusen



On April 19, 2011, the Federal Reserve Board requested public comment on a [proposed rule](#) under Regulation Z that would require creditors to determine a consumer's

ability to repay a mortgage before making the loan and would establish minimum mortgage underwriting standards.

The [revisions to the regulation](#), which implement the Truth in Lending Act (TILA), are being made pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. The proposal would apply to all consumer mortgages (except home equity lines of credit, timeshare plans, reverse mortgages or temporary loans).

Consistent with the act, the proposal would provide four options for complying with the ability-to-repay requirement.

1. A creditor can meet the general ability-to-repay standard by considering and verifying specified underwriting factors, such as the consumer's income or assets.
2. A creditor can make a "qualified mortgage," which provides the creditor with special protection from liability provided the loan does not have certain features, such as negative amortization; the fees are within specified limits; and the creditor underwrites the mortgage payment using the maximum interest rate in the first five years. The Board is soliciting comment on two alternative approaches for defining a "qualified mortgage."
3. A creditor operating predominantly in rural or underserved areas can make a balloon-payment qualified mortgage.

This option is meant to preserve access to credit for consumers located in rural or underserved areas where banks originate balloon loans to hedge against

interest rate risk for loans held in portfolio.

4. A creditor can refinance a "non-standard mortgage" with risky features into a more stable "standard mortgage" with a lower monthly payment. This option is meant to preserve access to streamlined refinancing.

The proposal would also implement the Dodd-Frank Act's limits on prepayment penalties.

The Board is soliciting comment on the proposed rule until July 22, 2011. General rulemaking authority for TILA is scheduled to transfer to the Consumer Financial Protection Bureau on July 21, 2011. Accordingly, this rulemaking will not be finalized by the Board.

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Proposal Requires Registration of Appraisal Management Companies

By **Herbert K. Sudfeld, Jr.**



Legislation sponsored by Rep. Dick Stevenson (R-Mercer/Butler) that aims to protect consumers seeking appraisals by requiring appraisal management companies to register with

the Commonwealth recently passed the Pennsylvania House.

Stevenson's [House Bill 398](#) would require appraisal management companies (AMCs) to register with the Pennsylvania Department of State. Currently, individual certified real estate appraisers are licensed by the Commonwealth, but third-party management companies are not.

Appraisal management companies are business entities or individuals that manage the performance of real estate appraisals for a client by acting as a third-party

intermediary between the client seeking an appraisal and the appraiser or firm of appraisers that performs the appraisal. Oftentimes banks hire AMCs to hire a certified real estate appraiser to facilitate the process. Both banks and appraisers but not the intermediary AMCs are regulated.

“Although situations with less than forthright appraisal management companies may be infrequent, state law must not allow these companies to fall through the cracks or go unnoticed,” Stevenson said. “To ensure the integrity of the appraisal process, we must have the tools in place to require accountability and to appropriately respond to unlawful activity.”

Specifically, the legislation requires appraisal management companies to register with the State Board of Certified Real Estate

Appraisers and become subject to the board's regulation and oversight. AMCs owned by federally regulated financial institutions are exempt from state registration.

Under the bill, all AMCs must have a system in place to ensure all appraisals on property located in the Commonwealth are performed by certified appraisers in good standing with the board and the appraisal reviews are conducted by a certified or licensed appraiser.

The legislation, which has the support of the appraisal and banking industries, now goes to the state Senate for consideration.

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EPA and Army Corps Propose New Guidance on Federally Protected Waterways

By **M. Joel Bolstein**



On May 2, 2011, the U.S. EPA and the U.S. Army Corps of Engineers [announced](#) draft guidance for determining whether a waterway, water body or wetland is protected by the

Clean Water Act (CWA). The agencies believe that under this [proposed guidance](#), the number of waters identified as protected by the CWA will increase compared to current practice. When finalized, this guidance would supersede previously issued guidance on this matter.

The proposed guidelines seek to modify the current process for identifying waters protected under the CWA and implement the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (531 U.S. 159 (2001)) and its ruling in *Rapanos v. United States* (547 U.S. 715 (2006)).

The proposed guidance will help restore protections for waters by providing:

- Clarification that small streams and streams that flow part of the year are protected under the CWA if they have a physical, chemical or biological connection to larger bodies of water downstream and could affect the integrity of those downstream waters. Agencies would be able to evaluate groups of waters holistically rather than the current piecemeal, stream-by-stream analysis.
- Acknowledgment that when a water body does not have a surface connection to an interstate water or a traditional navigable water but there is a significant physical, chemical or biological connection between the two, both water bodies should be protected under the CWA.
- Recognition that water bodies may be “traditional navigable waters” and subject to CWA protections under a wider range of circumstances than identified in previous guidance.

- Clarification that interstate waters (crossing state borders) are protected.

This new guidance does not change any of the existing agriculture exemptions under the CWA. All of the act's exemptions from permitting requirements for normal agriculture, forestry and ranching practices continue to apply. The guidance also clearly describes waters not regulated under the act, including:

- Certain artificially irrigated areas
- Many agricultural and roadside ditches
- Artificial lakes or ponds, including farm and stock ponds

The draft guidance will be open for 60 days of public comment to allow all stakeholders to provide input and feedback before it is finalized.

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Several PA Bills Focus on Property Taxes

By **Carrie B. Nase**



A number of bills moving in the Pennsylvania General Assembly target the Commonwealth's property tax system.

On May 10, 2011, the Pennsylvania House

Finance Committee approved [House Bill 1326](#), also known as the Taxpayer Relief Act, that would make it more difficult for school districts to raise property taxes without voter approval. Specifically, the bill would remove all exceptions established under Special Session Act 1 of 2006, which allows school districts to increase property taxes above the state-set index in certain situations without seeking such approval.

Act 1 of 2006 was written to protect property owners from large property tax increases year after year. It requires voter approval if school taxes increase beyond state-set limits. However, current law provides districts with 10 legal exceptions to justify a property tax hike above the inflation rate without a referendum. These include special education cost increases, pension costs, health care cost increases under a contract and emergencies and disasters. A district must receive approval from the state Education Department or county court to use an exception.

HB 1326 seeks to eliminate all special exemptions. However, opponents express concerns over a school district's ability to

raise sufficient revenues, particularly in light of anticipated cuts in state education aid.

Meanwhile, in the Pennsylvania Senate, legislators are considering a bill that would require a super-majority vote for a school district to approve any property tax increase. Supporters of [Senate Bill 537](#) argue such protection is needed to shield taxpayers from potentially dramatic hikes to property taxes as districts scramble to cope with budget shortfalls. The legislation was approved by the Senate Education Committee on April 5, 2011.

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Legislative Update in Pennsylvania

By **David H. Comer**



House Bill No. 1273 proposes to amend the Pennsylvania Municipalities Planning Code (MPC) by adding a new section, Section 622, that would attempt to prohibit the

location of certain signs in certain locations.

The proposed legislation defines the term "off-premises sign" to mean a sign that is either (1) a freestanding sign that is (a) supported by one or more poles, uprights or braces, (b) consists of 32-square feet or more of gross surface area AND (c) is internally illuminated and visible from a public way that utilizes technology to permit the characters, letters or illustrations to be changed or rearranged by computer, electronically or mechanically, without altering the face of the sign; or (2) an outdoor, off-premises sign on which space is leased or rented by the owner thereof to others for the purpose of conveying a commercial or noncommercial message.

Interestingly, although the proposed legislation defines only the term "off-premises sign," it places restrictions on what it calls an "advertising sign" and then provides a procedure for obtaining approval for an "off-premises sign." It is possible the reference to an "advertising sign" should have been to an "off-premises sign," but I am not 100 percent certain.

Regardless, the proposal provides the following restriction: "Notwithstanding any other provision of law to the contrary and except as otherwise provided in subsection (b), an advertising sign shall not be placed within 1,000 feet from the property line of an existing school, public playground, public park, residential housing area, child care facility, church, meetinghouse or other actual place of regularly stated religious worship."

However, the aforementioned subsection (b) provides that "an off-premises sign may be located less than 1,000 feet from the property line of an existing school, public playground, public park, residential housing area, child care facility, church,

meetinghouse or other actual place of regularly stated religious worship if, by majority vote of the governing body for the municipality, the governing body gives necessary approvals."

The proposed legislation adds notice and procedural requirements, stating that at least 14 days prior to the governing body of a municipality voting on whether to allow an off-premises sign less than 1,000 feet from the property line of a school, public playground, public park, residential housing area, child care facility, church, meetinghouse or other actual place of regularly stated religious worship, one or more public hearings shall be held within the municipality following public notice. Additionally, the proposed legislation requires all owners of real property located within 1,000 feet of the proposed location be provided written notice of the public hearing at least 30 days prior to the public hearing.

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NJ Court Reaffirms Difficulty of Asserting Damage Claims Under Substantive Due Process in Land Use Cases

By Henry L. Kent-Smith



In *Rezem Family Associates v. The Borough of Millstone, et al.*, the New Jersey Appellate Division reaffirmed the difficulty of pursuing substantive due process damage claims

against municipal entities and individuals. The court held that to secure damages under a substantive due process claim pursuant to either the federal §1983 of the Civil Rights Act or New Jersey's Civil Rights Act, N.J.S.A. 10:6-1 and 2, in a land use context, governmental misconduct must both "shock the conscience," and the plaintiff must exhaust all remedies under New Jersey's Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.

The Rezem family owned 67 acres of vacant property in the Borough of Millstone in Somerset County. The subject property was the locus of the new Amwell Road Bypass, which construction created three new parcels, all still owned by the Rezem Trust. The property had been originally zoned Light Industrial, and for a period of almost 10 years, the borough and the Rezem Trust considered various rezoning options for the parcel.

During the course of considering the rezoning, various borough officials and planners allegedly made statements that were knowingly false and advised contract purchasers of the Rezem property that the borough rezoning would not permit their proposed developments. In 2006, the borough proposed a mixed use planned development for a portion of the Rezem property, subject to the Rezem family agreeing to preserve approximately 45 acres of its property for open space.

In 2009, the Rezem family agreed to sell the entire tract to Somerset County for \$6,850,000 for open space preservation. The Rezem family claimed the sale to Somerset County was essentially a "forced sale," as no developer would consider

purchasing the property due to the borough's actions over the previous nine years in thwarting any development proposal for the property. The Rezem suit sought to recover compensatory damages based on the difference between the value of the various contracts and the amount it had received from Somerset County for the sale of the entirety of the tract, as well as punitive damages and attorney's fees.

The borough defendants collectively filed a motion to dismiss for failure to state a claim, both on the basis for failure to exhaust available administrative remedies and for failure to assert a prima facie case for a claim of violation of substantive due process. The trial court granted the borough's motion.

The Appellate Division upheld the trial court dismissal for failure to state a claim. In so doing, the Appellate Division agreed that New Jersey's Civil Rights Act would apply the same "shock the conscience" standard as applicable under federal law related to land use disputes. While the trial court concluded the plaintiff alleged sufficient facts to meet the allegation of "shock the conscience" standards, the Appellate Division refused to address this aspect of the complaint.

Rather, the Appellate Division held there existed available administrative recourse for the Rezem family to pursue a challenge to borough actions through the period of time where the alleged improper activity occurred. The Appellate Division applied the same logic found in *OFPP v. State*, 395 N.J. Super. 571, aff'd 197 N.J. 418 (2009), wherein the New Jersey Highlands Act was challenged on the basis of a Fifth Amendment takings basis. In *OFPP*, the court sustained a motion to dismiss for failure to exhaust available remedies and required the landowners to pursue potential waivers from Highland Master Plan regulations before raising any takings claims. In this regard, the *Rezem* case

continues to uphold the difficulty of raising any Fifth Amendment federal or New Jersey state takings claim, as all takings claims, both federal or state, require the exhaustion of all available administrative remedies from state zoning or other regulatory agency prior to asserting a taking.

The Rezem family asserted the exhaustion requirement does not apply where the allegation is a violation of substantive due process, due to official conduct that "shocks the conscience." The Appellate Division disagreed and held that, notwithstanding the "shock the conscience" standard, the landowner/plaintiff must still exhaust available state land use prerogative writ relief. In this instance, either Rezem or its prospective buyers could have pursued a prerogative writ challenging the borough council's actions as it relates to either the zoning change or denial of any specific site plan relief associated with development of the property. The court held that:

The alleged substantive due process violations might have been remedied through appropriate applications, followed by an action in lieu of prerogative writs to challenge any unfavorable local decisions. Nothing in plaintiff's complaint demonstrates that judicial remedies to address the recalcitrance of Borough officials would have been futile. *Rezem* at Pg. 21.

In this regard, the Appellate Division reaffirmed both state and federal court reticence to transform zoning cases into civil rights litigation.

Finally, the Appellate Division dismissed claims against the individual planning defendants for misrepresentations on the basis of failure to demonstrate any reliance and/or duty owed by the municipal planning defendants to the Rezem family.

As there was no showing of detrimental reliance, nor any affirmative duty on the part of the municipal defendants as it relates to the Rezem family, no claim could be raised against the Rezem family.

The *Rezem* decision reaffirms and strengthens the judicial reluctance to apply substantive due process protections in the land use arena. The *Rezem* decision leaves local landowners and developers with the primary, and for all due intent sole remedy, of prerogative writ litigation to challenge the alleged municipal misconduct. State claims must be brought to full conclusion before a substantive due process claim would be made available. The result is to

effectively bar substantive due process claims, insofar as to meet a substantive due process challenge, the plaintiff must show conduct that “shocks the conscience,” which is essentially arbitrary, capricious and unreasonable. If such conduct is arbitrary, capricious and unreasonable, then under state law, the trial court would find that such action would be in violation of the Municipal Land Use Law and grant either affirmative relief or remand for further proceedings.

The *Rezem* case creates a virtually insurmountable bar to substantive due process claims. Civil rights protections for individual landowners are limited to

invalidation of the municipal action, without any monetary damage claim. Without a recourse to monetary damage claims, municipal illegal conduct will simply continue in one form or another, through one prerogative writ action after another, until such time as the landowner or developer is either effectively bankrupt or dead. We submit this standard is too draconian as it relates to the rights of landowners to due process protection in the land use arena.

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New ASTM Standard for Commercial Building Energy Efficiency

By **Philip L. Hinerman**



ASTM has recently adopted a Standard Practice for Building Energy Performance Assessment for a Building Involved in a Real Estate Transaction.

This standard, E-2797-11, was developed over a two-year period and is designed to identify energy efficiency of buildings for prospective sellers and buyers of commercial property. The standard is a way of determining the energy efficiency of buildings to review if operating costs create more value in the marketplace.

The standard sets out criteria for collecting reliable building energy use data and ways to develop consistent standards. The appendices include sample commercial building survey checklists and listings of building characteristics that have impacts on energy use.

The standard is being used in a number of ways. In asset management, the standard helps evaluate the properties in the real estate portfolio, generally in combination with an energy audit. Prospective purchasers can also review the operations costs of owning buildings by using calculations from the standard.

The standard has significant legal implications as well. Many cities are beginning to enact green building requirements. As more requirements are enacted, we expect the ASTM standard to provide the framework for evaluating the energy performance of buildings.

For example, New York City, in 2010, passed several laws designed to improve energy and water efficiency of existing building stock in the city. One of the ordinances is the Energy Audits and Retro-Commissioning Law, which requires “each covered building” to perform an energy audit at least once every 10 years. The law requires the identification of retro-commissioning measures that would reduce energy use and operations costs and, if implemented, ways to calculate annual energy savings for each identified measure and to benchmark the results of improvements.

This past February, San Francisco enacted the Existing Commercial Buildings Energy Performance Ordinance, which requires companies to conduct annual benchmarking using EPA’s Energy Star Portfolio Manager to calculate energy use of commercial space in excess of 10,000 square feet. In addition to the annual

benchmarking, energy audits will be required every five years. The results must be shared with the public through the City’s Department of Environment.

The State of California enacted Assembly Bill 1103, which also mandates energy benchmarking and disclosure for nonresidential buildings involved in sales transactions. The statute mandates disclosure of energy data to prospective buyers and lessees of the entire building or disclosure to lenders financing an entire building. The California Energy Commission is in the process of devising a disclosure schedule for this information. Expect benchmarking to soon become a cost factor in the marketing of commercial properties.

Given the political and economic environment, energy efficiency will continue to be a favorite area for lawmakers addressing energy issues. The ASTM Standard will provide a reliable starting point for disclosure-related issues and potential liabilities. Good legal advice from knowledgeable attorneys could be critical in future real estate transactions.

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PA Commonwealth Court Upholds Revocation of Zoning Permit, Finding No Vested Rights Where Valid Appeal Is Filed More Than 30 Days Following Issuance of Permit

By Kimberly A. Freimuth

The case of *In Re: Appeal of Broad Mountain Development Co.*, 2011 WL 768655 (Pa. Commw. Mar. 7, 2011) underscores the importance of timely public notice of the issuance of zoning and building permits. Doing so assures the permit holder of the date on which the appeal period for the permit runs and secures the holder's rights in the permit.

In this case, the developer sought to develop a wind turbine project in the Woodland Conservation zoning district of Butler Township, Schuylkill County. The developer met with the township zoning officer and described the proposed project, which would consist of the erection of 20 to 28 wind turbines on approximately 11 acres of land. At the meeting, it was clear the wind turbines would exceed the maximum height permitted in the Woodland Conservation district. Despite the fact the township zoning ordinance did not permit the wind turbine use in any zoning district, the zoning officer approved the zoning permit application, specifically noting a "wind energy facility is an allowable activity in a Woodland Conservation Zoning District."

Four months after the permit was issued, the developer erected a meteorological tower, approximately 60 meters high, on the property for the compilation of wind data as part of a feasibility study for the construction of the wind turbines. Eight months after erection of the tower and more than a year after issuance of the zoning permit, the developer filed a preliminary land development application and plan for the project, which was revised and resubmitted twice after receiving comments from the township engineer.

Three months after the preliminary plan application was submitted and 15 months after the zoning permit was issued, neighboring landowners filed an appeal of the permit with the township zoning hearing board. Hearings were held, at which conclusion the board revoked the

zoning permit, reasoning that (1) the developer failed to timely construct the wind turbines within the six-month permit expiration period; (2) the zoning permit did not grant any zoning relief other than relief from the height limitations; and (3) windmill farms are not permitted uses in the Woodland Conservation district.

The developer appealed to the trial court, which concluded the board properly revoked the zoning permit because the zoning officer had no authority to issue a permit for a wind farm in a Woodland Conservation zoning district. The developer then appealed to the Commonwealth Court, arguing it had a vested right in the zoning permit and, therefore, the trial court erred in affirming the board's revocation of the permit. In addition, the developer argued the neighboring landowner's appeal of the permit was not timely filed.

The Commonwealth Court first noted that both the township zoning ordinance and Section 914.1(a) of the Pennsylvania Municipalities Planning Code provide that no person shall be permitted to file any proceeding with the zoning hearing board more than 30 days following approval of an application if such proceeding is designed to secure reversal or limit the approval "unless such person alleges and proves that he had no notice, knowledge or reason to believe that such approval had been given." Therefore, where an objector proves he or she lacked notice of the issuance of a permit, the 30-day appeal period is tolled until the objector possesses knowledge or a reason to believe the approval was granted.

The developer argued the board and trial court focused on **when the landowners first learned** of the issuance of the permit rather than **when the landowners had reason to believe that such approval had been given**, claiming the intervenors had constructive notice of the issuance of the zoning permit when the meteorological tower was constructed,

because that construction provided notice of some form of use not consistent with the narrowly restricted uses permitted in the Woodland Conservation district. The developer also argued newspaper articles and Board of Supervisors and Planning Commission meetings related to the land development plans also provided constructive notice of the issuance of the permit. The Commonwealth Court rejected all of the developer's arguments, noting the developer did not point to any evidence suggesting the issuance of the permit was revealed at any meeting prior to a May 11, 2009, Planning Commission meeting, which is the date the court determined the intervenors had notice of the issuance of the permit. The court noted it would be extreme to give credence to the developer's argument that the construction of the meteorological tower on 1,100 acres, which tower does not bear resemblance to a windmill turbine, and minor land clearing would provide the public with notice that a zoning permit was granted for the placement of 27 wind turbines.

Finally, as to the developer's vested rights argument, the court began by noting that, generally, a municipal permit issued illegally or in violation of the law, or under a mistake of fact, confers no vested right or privilege on the person to whom the permit has been issued, and it may be revoked notwithstanding the person may have acted on the permit. In determining whether vested rights exist, five factors must be considered: (1) due diligence in attempting to comply with the law; (2) good faith throughout the proceedings; (3) the expenditure of substantial unrecoverable funds; (4) the expiration without appeal of the period during which an appeal could have been taken from the issuance of a permit; and (5) the insufficiency of evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use of the permit. Because

the court already determined the intervenors timely filed an appeal, the court found the developer did not have a valid claim for vested rights.

This case serves as a lesson for all that it is very important the public be notified in an

appropriate manner of the issuance of zoning and building permits so that the permit holder may have assurance as to the date on which the appeal period for the permit runs, thereby securing the permit holder's rights in such a permit.

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Study Indicates Americans Prefer Smart Growth Communities

By Robert W. Gundlach, Jr.

According to the recent [Community Preference Survey](#) of the National Association of REALTORS®, Americans favor walkable, mixed-use neighborhoods, with 56 percent of respondents preferring smart growth neighborhoods over neighborhoods that require more driving between home, work and recreation.

Walkable communities are defined as those where shops, restaurants and local businesses are within walking distance from homes. According to the survey, when considering a home purchase, 77 percent of respondents said they would look for neighborhoods with abundant sidewalks

and other pedestrian-friendly features, and 50 percent would like to see improvements to existing public transportation rather than initiatives to build new roads and developments.

The survey also revealed that while space is important to home buyers, many are willing to sacrifice square footage for less driving. Eighty percent of those surveyed would prefer to live in a single family, detached home as long as it did not require a longer commute, but nearly three out of five of those surveyed – 59 percent – would choose a smaller home if it meant a commute time of 20 minutes or less.

The survey also found community characteristics are very important to most people. When considering a home purchase, 88 percent of respondents placed more value on the quality of the neighborhood than the size of the home, and 77 percent want communities with high-quality schools.

The survey of 2,071 adult Americans was conducted by Belden, Russonello and Stewart from February 15-24, 2011.

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Settlement Announced in Endangered Species Litigation

By Clair E. Wischusen

The United States Fish and Wildlife Service (FWS) announced a [settlement agreement](#) with the Wild Earth Guardians over the agency's implementation of the Endangered Species Act (ESA) and its related listing program. However, the implications for landowners and local government may prove problematic.

In the past four years, the [Wild Earth Guardians](#) and another environmental advocacy group have filed petitions seeking to list more than 1,000 additional species as endangered. By way of comparison, over the course of its 37-year existence, FWS has only listed approximately 1,300 species in total, receiving only about 20 new petitions a year prior to the recent blitz. Failure to act in a timely fashion on many

of the petitions has produced subsequent legal battles. After numerous lawsuits were filed with respect to these petitions, FWS initiated the consolidation and transfer of pending lawsuits from a number of different district courts to the U.S. District Court for the District of Columbia.

On May 10, 2011, this onslaught of litigation ultimately resulted in a settlement agreement between FWS and Wild Earth Guardians, essentially calling for a “cease-fire.”

Passed in 1973, the [ESA](#) provides a program for the conservation of threatened and endangered plants and animals and the habitats in which they are found. The law ensures various activities do not jeopardize the continued existence of any listed

species or result in the destruction or adverse modification of designated critical habitat of such species. However, the law cannot protect a species unless it is formally listed as “endangered” or “threatened.” The FWS maintains a list of endangered species as well as a candidate list of those species awaiting a final determination.

In its settlement agreement, FWS agreed to either protect all the species on the candidate list by 2016 or determine such protection is not warranted. It will also make listing decisions on a number of species involved in the recent litigation. In return, Wild Earth Guardians agreed not to sue over delays in processing petitions until 2017 and to limit new petitions to 10 species a year until that time.

IN THE ZONE

FWS's [work plan](#) proposes the agency systematically, over a period of six years, review and address the needs of more [than 250](#) species now on the list of candidates. The FWS has laid out a schedule for making listing determinations for species that have been identified as candidates for listing, as well as for a number of species that have been petitioned for protection under the ESA. If the FWS determines

that listing is warranted for a species, it will advertise the proposal and allow the public to review and comment before making a final determination.

The result of the settlement agreement and the subsequent determination of candidate species is the likely considerable expansion of protected plants and animals. The candidate list includes several species in

Pennsylvania, New Jersey and Delaware. If added to the endangered species list, these new species could adversely impact a landowner's ability to develop his or her property.

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