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In the Zone

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Real Estate Developers Can Look to Immigrant Investor Program for $1,000,000+

By Joshua L. Gayl and Catherine V. Wadhwani

Real estate developers looking for creative ways to obtain financing during the ongoing credit crisis should consider the Immigrant Investor or "Regional Center" Program. The Regional Center program for immigrant investors is a part of the EB-5 Employment Creation Program that came into existence in the early 1990s and is administered by the United States Citizenship and Immigration Services (USCIS). A Regional Center is an entity or economic unit, public or private, involved with the promotion of economic growth in specific areas within a defined geographic area. Of late, the Regional Center Program has become so popular that the total number of Regional Center applications filed during the first two quarters of this fiscal year has exceeded the total number of applications for all of fiscal year 2010.

Pursuant to the EB-5 Program, an eligible foreign national may acquire U.S. permanent residence by investing $1,000,000 or $500,000 in a qualifying for-profit enterprise that results in the creation or preservation of 10 full-time jobs for U.S. workers. The lesser amount applies if the investment is in a Targeted Employment Area or "TEA," which is a "rural" area or an area of "high unemployment" as defined under the EB-5 Program.

Under the Regional Center Program, not only can direct jobs be counted toward the foreign investors' job-creation requirement but also certain "indirect" and "induced" jobs. The foreign investors need not be involved in the day-to-day management of the investment enterprise.

Formation of a regional center is no easy task, but the access to capital resulting from a successful effort can be worth it. The combined talents of an immigration lawyer, securities/corporate lawyer, economist, business plan writer, bank/escrow agent and a marketing firm or commissioned agent are needed. This is because the regional center application must include such things as a business plan, identification of a geographic area and "industry scope," operational plan, economic report for job creation, marketing plan and capital investment offering instruments and agreements—all complying with EB-5 Program requirements and securities law. Regional center adjudications require many months, sometimes six months to a year.

Once formed, a regional center generally performs multiple functions, including but not limited to due diligence regarding each investor's source of funds and admissibility, preparing the appropriate filings and reports, obtaining signed subscription and escrow agreements, tracking the infusion of capital into job-creating enterprises, monitoring compliance with the business plan and foundation facts in economic reports and the like. The costs of creating and running the regional center can be daunting. Costs, however, can be recouped directly from the investors via a fixed additional fee or a percentage of the interest earned on their investment.

Instead of seeking approval of a regional center, another option for accessing capital under the EB-5 Program is to present a project for funding under an already-certified regional center. If an existing regional center includes the geographic location of the proposed development within its territory and project scope, this could save the developer the time and expense involved in establishing and marketing a new regional center.

There are some downsides to this approach. For example, some of the developer's profit may be siphoned off to the regional center operator. Also, the developer must conduct careful due diligence with respect to the regional center. If the regional center operators are less than scrupulous, provide incomplete information or have a bad track record, the developer may regret the affiliation. Additionally, the developer will have to work closely with the regional center operator to ensure that EB-5 Program requirements are met and will be ceding some control to the regional center operator. This could all lead to potential liabilities and negative "goodwill." Due diligence is definitely required.

Keep in mind that even if an existing regional center covers the geographic location of a project, the center's scope may nonetheless be limited in a way that doesn't permit inclusion of a particular type of real estate development. In such a situation, the regional center may seek to amend its certification with USCIS in order to incorporate the new project, but this would entail delay. Likewise, an approved regional center's territory may be amended to include a greater geographic area.

Real estate developers can also look to pooled investments to raise capital with individual EB-5 petitions in a commercial enterprise without the additional expenses involved in obtaining regional center certification and ongoing administration. While this may also eliminate possible time delays related to seeking approval of a new regional center, it will mean that only direct employees may be counted toward the job-creation requirement and the

investors will likely be more involved in the business.

There are currently approximately 147 approved regional centers in 39 states. Estimates indicate that more than 90 percent of all EB-5 individual investor petitions for U.S. permanent residence relate to regional centers. Indeed, USCIS has recently proposed steps to make the Regional Center Program more user-friendly. These include creation of a direct line of communications between a regional center applicant and USCIS, implementation of premium or accelerated processing of at least some of the filings related to regional centers and the establishment of an interview process whereby regional center applications may appear before a panel of USCIS experts to resolve case issues. The first of these measures—the direct line of communication—may occur as early as late September. If this avenue for accessing capital is of interest to you, now seems to be the time to act.

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Legislative Update in Pennsylvania

By David H. Comer

Senate Bill No. 899 proposes to create an act to be known as the "Family Farm Initiative and Enterprise Land Development Act" (Act).

Of the purposes identified for the proposed Act, one is to "[r]elieve farm families who meet the standards established for land improvement and construction and use of buildings and structures supporting agricultural production, agricultural marketing and agritourism enterprises and activities from zoning, land development and construction standards, requirements and restrictions that would otherwise be imposed by local governments."

One of the interesting parts of the Act is that it would preempt various local ordinances. The proposed Act addresses the issue of preemption by stating the Act and its provisions "are of Statewide concern and occupy the whole field of regulation related to land development, construction and engagement and operation of supporting agricultural structures and facilities related to agricultural marketing and agritourism enterprises." The Act adds that "[n]o ordinance or regulation of any municipality may prohibit or attempt to regulate any matter relating to land development, construction or operation of supporting agricultural structures or agricultural marketing or agritourism enterprises in a manner that conflicts with this act."

The proposed definitions found in the Act appear to be broad in nature, as does the Act in general, in fostering agricultural-related enterprises. For example, the term is "agritourism enterprise" is defined as any of the following:

"(1) An enterprise that provides entertainment or education on a farm to tourists and other patrons in the promotion of farming or rural lifestyle or the promotion of agricultural products, including farm enterprises that:

(i) Provide for participation of patrons in farming or harvesting activities.

(ii) Allow patrons to interact with farm or rural animals or allow patrons to interact with agricultural products normally produced on the farm.

(iii) Promote the farm or products produced on the farm through tours, sampling and tasting of products or souvenir sales.

(iv) Provide bed and breakfast accommodations or similar farm lodging to patrons as part of the engagement in farming or harvesting activities or to acquaint patrons with the farm's agricultural character or aesthetic nature.

(v) Provide pastoral or family dining.

(vi) Provide games, rides and other entertainment activities normally engaged in by farm families or rural communities.

(vii) Engage in activities in conjunction with local seasonal festivals to promote the local availability of agricultural products.

(2) An enterprise in equine activity.

(3) An enterprise in agritainment, as defined in ... the Pennsylvania Farmland and Forest Land Assessment Act of 1974.

(4) Any other enterprise determined to be an agritourism enterprise by the board."

The Act would also establish a Farm Enterprise Standards Board that would, among other things, "identify supporting agricultural structures and agricultural marketing and agritourism enterprises that will be authorized to be constructed or performed on farms."

The Act also provides that enterprises meeting minimum standards pursuant to the Farm Enterprise Standards Board and in connection with land development, construction or operation of any supporting agricultural structure or any facility related to an agricultural marketing or agritourism enterprise performed in accordance with the minimum standards established under the Act shall be authorized absolutely, notwithstanding any municipal ordinance, public nuisance or zoning prohibitions to the contrary.

Finally, as would be expected, the Act also provides that it shall be liberally constructed to effectuate its purpose.

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Case Summary: *PPM Atlantic Renewable v. Fayette County Zoning Hearing Board*

By Robert W. Gundlach, Jr.

The case of *PPM Atlantic Renewable v. Fayette County Zoning Hearing Bd.*, — A.3d —, 2011 WL 1753018, Pa. Cmwlth., May 3, 2011 (No. 1431 C.D. 2010), demonstrates the application and effect of Section 1003-A of the Municipalities Planning Code (MPC), 53 P.S. § 11003-A, which allows a party to request a bond in Common Pleas Court after the court disposes of a land use matter and a party takes a further appeal. The Commonwealth Court reaffirmed that recent holding in *Takacs v. Indian Lake Borough, Zoning Hearing Bd.*, 18 A.3d 354 (Pa. Comm. 2011), that a bond entered after a Common Pleas Court disposes of a land use appeal is a final, appealable order. In *PPM*, the Commonwealth Court quashed an objector's appeal to the Commonwealth Court where the objector failed to post bond or appeal the bond order.

Section 1003-A of the MPC provides a powerful mechanism to prevent frivolous appeals from third-party protestants by authorizing the trial court to impose a bond as a condition of proceeding with the appeal. Pursuant to Section 1003-A(d) of the MPC:

> If the appellants [before the common pleas court] are persons who are seeking to prevent a use or development of the land of another ... the landowner whose use or development is in question may petition the court to order the appellants to post bond as a condition to proceeding with the appeal. After the petition for posting a bond is presented, the court shall hold a hearing to determine if the filing of the appeal is frivolous. At the hearing, evidence may be presented on the merits of the case. It shall be the burden of the landowners to prove the appeal is frivolous. After consideration of all evidence presented, if the court determines that the appeal is frivolous, it shall grant the petition for posting a bond. The right to petition the court to order the appellants to post bond may be waived by the appellee, but such waiver may be revoked by him if an appeal is taken from a final decision of the court. The question of the amount of the bond shall be within the sound discretion of the court. An order denying a petition for bond shall be interlocutory....

53 P.S. § 11033-A(d).

In this case, PPM Atlantic Renewable (PPM) filed 22 applications with the Fayette County Zoning and Hearing Board (ZHB) requesting special exceptions and dimensional variances for construction of wind turbines. The ZHB denied all 22 of PPM's applications, and PPM appealed to the trial court. The trial court remanded the case to the ZHB with specific instructions to grant all 22 special exceptions subject to conditions necessary to protect public health, safety and welfare. But on remand, the ZHB only granted 14 of the 22 special exceptions and attached onerous conditions to the special exceptions that were granted.

PPM appealed again to the trial court. The trial court sustained PPM's land use appeal, finding the ZHB erred in denying the dimensional variance requests and the eight special exceptions and the conditions imposed were unreasonable. Immediately thereafter, PPM filed a motion for bond with the trial court, which the objector answered with a motion to strike. The objector also filed two notices of appeal with the Commonwealth Court on the merits of the trial court's second order sustaining the land use appeal and the trial court's first order remanding the case. The trial court granted PPM's motion for bond, ordering the objector to file a bond as a condition precedent to continuing with the appeal filed. The objector then filed a motion in the Commonwealth Court to consolidate the appeals from the two trial court decisions, and PPM filed a motion to quash the appeals because the objector did not post the bond ordered or appeal the bond order. The Commonwealth Court granted the motion to quash, and the objector's motion to reconsider was granted to a panel of the Commonwealth Court, which issued the subject decision.

The Commonwealth Court panel ultimately affirmed the motion to quash the objector's merit appeal, relying heavily on its recent decision in *Takacs*. In that case, the court distinguished between a bond order entered prior to the trial court's disposition of the land use appeal as compared with a bond order issued after the Common Pleas disposes of the land use appeal. The court found a bond order directing the appellant in a land use appeal to post an appeal bound as a condition for proceeding with the appeal is an interlocutory order because at that point, the trial court has not disposed of the matter. Where, however, a bond order is issued after the trial court disposes of the land use appeal, the bond order is a final order ancillary to the merits appeal. Because the objector in *Takacs* appealed the trial court's bond order challenging its validity, the Commonwealth Court reviewed the trial court's determination that the objector's appeal was frivolous and affirmed that determination.

Unlike *Tackas*, the objector in *PPM* did not appeal the bond order. As a result, the Commonwealth Court held it was precluded from reviewing the merit appeal. Finally, the court rejected the objector's argument that the holding in *Takacs* should not be retroactively applied to this case because it announced a new rule of law. The court found that while the holding in *Tackas* involved an arguably new interpretation of Section 1003-A(d) of the MPC, it concerned a procedural matter.

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Lead Paint Rule Struggles with Implementation

By M. Joel Bolstein

In July 2011, the U.S. House Appropriations Committee adopted an amendment to the 2012 budget for the Environmental Protection Agency that would prohibit the agency from enforcing its Lead: Renovation, Repair and Painting Rule until the agency approves a reliable lead test kit as mandated by the agency's own regulations. The amendment was sponsored by Rep. Denny Rehberg (R-MT) and was approved by the committee.

The lead rule applies to homes built before 1978 and requires renovator training and certification, following lead-safe work practices, containing and cleaning dust and record keeping.

Under the lead paint rule, contractors have been required to wipe down the project area after completing remodeling or renovation work and match the result to an EPA-approved card to determine whether lead paint dust is still present – a process the EPA says is "effective at reducing dust lead levels below the dust-lead hazard standard."

When the EPA implemented the final lead rule, the agency was supposed to have approved a commercially available lead test kit that produced no more than 10 percent false positives and five percent false negatives. Currently, no such kit is available on the market and some new kits produce false positives as high as 60 percent of the time.

The Rehberg Amendment would lift the burden of compliance and its costs from thousands of consumers in homes that otherwise would have tested negative. The appropriations bill has moved to the full House of Representatives for consideration.

Meanwhile on a positive note, the EPA rejected a proposal to add third-party clearance testing to the lead rule following a federal review of its impact on small businesses and job creation.

The rejected proposal would have required contractors to hire EPA-accredited dust samplers to collect several samples after a renovation and send them to an EPA-accredited lab for lead testing. Because of the cost of this as well as the waiting period for test results and the limited number of accredited labs nationwide, professional remodelers were very concerned about homeowners' willingness to undergo the process.

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Homebuilders Sue To Block Chesapeake Bay TMDL

By Clair E. Wischusen

The National Association of Home Builders (NAHB) has challenged the Environmental Protection Agency's Chesapeake Bay Total Maximum Daily Load (TMDL) for violating fundamental procedural requirements and lacking a sound scientific basis, and it has asked the U.S. District Court for the Middle District of Pennsylvania to block its implementation.

According to NAHB, the TMDL could lead to onerous restrictions on new development in the bay's watershed, which is comprised of 64,000 square miles in Maryland, Virginia, West Virginia, Pennsylvania, Delaware, New Jersey and the District of Columbia.

"There are irregularities in the process used in this rulemaking and in the science that underlies this rulemaking," said Tom Ward, NAHB's vice president for litigation and legal services.

"The EPA has exceeded its authority with certain aspects of the TMDLs in this rule," Ward said.

"NAHB does not argue that the EPA cannot develop a TMDL," he said. "Rather, NAHB joined this litigation after the Chesapeake Bay Foundation and other groups joined the litigation in order to make sure our members are represented as the court works through the issues."

The litigation to block the EPA's plan was initiated by the American Farm Bureau Federation on January 10, 2011. NAHB's complaint notes the 45-day comment period on the proposed rule was not sufficient, given the size and complexity of the rule.

Home builders have been working with the EPA for several years to identify and implement best management practices that are cost-effective and reduce sediment runoff into the bay.

"These practices are helping to reduce impacts on bay resources. The EPA should give these practices time to work before it pushes through costly new regulations," he said.

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PennDOT Launching Online Permitting System

By Carrie B. Nase

Pennsylvania's Department of Transportation hopes to launch a new statewide, online permitting system for Highway Occupancy Permits (HOP) in October 2011. PennDOT aims to speed permit review turnaround times as well as increase the availability of application status information.

The new online system will be phased in over the next two years, beginning in October. The system will allow applicants to file HOP submissions through PennDOT's web site and permit them to view in real time a permit's status, including its internal location and anticipated completion dates. Department comments to the application will be available online along with all other related documents.

By utilizing the speed offered by electronic filing and reviews, PennDOT hopes to eliminate wasted time resulting from mailing paper documents back and forth. Additionally, it will assist applicants who need immediate access to comments or information related to their project.

PennDOT District 6-0 has had an online system available to certain applications seeking an expedited review at a premium fee. However, the new online system will be statewide in scope and available for all HOP applications.

In order to access the new online system, applicants will need to obtain proper online credentials from the department. Additionally, PennDOT intends to continue accepting traditional paper applications for HOP approvals.

Training for the new online permitting system has been scheduled across Pennsylvania. PennDOT will be holding sessions in King of Prussia on October 24 and October 25.

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Legislation Targets Enviro-Activist Lawsuits

By Robert W. Gundlach, Jr.

U.S. Representative Cynthia Lummis (R-Wyo.) and Senator John Barrasso (R-Wyo.) jointly introduced the Government Litigation Savings Act, legislation that prevents abuse of the Equal Access to Justice Act (EAJA), 5 USC Sec. 504, by large environmental groups and others who frequently challenge the federal government in court.

The Government Litigation Savings Act will reduce the taxpayer's burden to pay for attorney's fees. The legislation also returns EAJA to its original intent by instituting targeted reforms on who is eligible to receive EAJA reimbursements, limiting repeated lawsuits and reinstating tracking and reporting requirements to make EAJA more transparent. Under the Government Litigation Savings Act, veterans, Social Security claimants, individuals and small businesses will still enjoy full access to EAJA funds.

EAJA was passed as a permanent appropriation in 1980 in order to help individuals, small businesses and nonprofit organizations with limited access to financial resources defend themselves against harmful government actions. EAJA allows for the reimbursement of attorney's fees and costs associated with suing the federal government. When operating correctly, EAJA allows plaintiffs who sue the federal government to recover part of their attorney's fees and costs if they "prevail" in the case. However, Congress and the agencies halted tracking and reporting of payments made through EAJA in 1995.

Some of the legislation's key provisions include:

- Requires EAJA filers to show a "direct and personal monetary interest" in the action to be eligible for payments. Direct and personal interest includes personal injury, property damage or unpaid agency disbursement.
- Removes the net worth eligibility exemptions granted to 501(c)(3) organizations and agriculture cooperatives for access to EAJA funds. With this provision, any organization, regardless of tax status filing for EAJA reimbursements, must have a net worth of less than $7 million, and individuals must have a net worth of less than $2 million.
- Establishes a cap of $175 per hour for attorney's fees, pegged to inflation. All additional multipliers are removed.
- Requires an agency to disallow EAJA reimbursements if the claimant "unreasonably protracted the proceedings, or acted in an obdurate, dilatory, mendacious, or oppressive manner, or in bad faith."
- Requires agencies to reduce reimbursements based on pro bono work.
- Caps total EAJA reimbursements to $200,000 for any single action and allows no more than three EAJA awards in a calendar year.
- Establishes reporting requirements anytime taxpayer money is paid out for attorney's fees – including in confidential settlement agreements and consent decrees. Creates an online, searchable database for funds paid out of EAJA and to whom the funds were paid.

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Data Quality Act Now Law in Pennsylvania

By Robert W. Gundlach, Jr.

Pennsylvania Governor Tom Corbett signed into law Senate Bill 263, also known as the Data Quality Act. The law, now Act 60, was sponsored by State Senator Ted Erickson (R-Chester) and supported by various home builder and business advocates as a mechanism to improve the overall quality and transparency of proposed state regulations.

Act 60 amends Pennsylvania's Regulatory Review Act, P.L. 73, No. 19, to require that state agencies support their proposed regulatory packages with "acceptable data" – which the law defines as "[e]mpirical, replicable, and testable data as evidenced in supporting documentation, statistics, reports, studies or research."

Currently, most regulatory agencies in Pennsylvania must submit their proposed regulatory changes to Pennsylvania's Independent Regulatory Review Commission (IRRC) for analysis and approval. As part of this vetting process, agencies must now disclose the data upon which new regulatory requirements are based and justify why such data is valid. The acceptable data evaluation joins existing review criteria, including economic and fiscal implications; effects to public health, safety, welfare and natural resources; and the regulation's clarity, feasibility and reasonableness.

Affected agencies include the Department of Environmental Protection, the Department of Transportation and all those agencies whose rule-making process occurs through IRRC. However, while most state agency regulatory proposals are subjected to IRRC review, some are not. For example, Pennsylvania's Fish and Boat Commission maintains an internal rule-making process and as such will not be subject to the Data Quality Act.

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