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The Interaction of TCA, Local Zoning Ordinances and the Courts: Defining a "Significant Gap" in Wireless Service

By Michael J. Kornacki

The interaction of the Telecommunications Act of 1996 (TCA) and local zoning and land use ordinances is an area of law that continues to evolve. The recent case of *Liberty Towers, LLC v. Zoning Hearing Board of Falls Township, Bucks County, PA* (2011 WL 6091081(E.D.Pa.)), decided in December 2011, provides an analysis of the state of the law in this area and highlights some of the different ways courts have interpreted the requirements of the TCA.

In the *Liberty Towers* case, Liberty Towers sought a variance to construct a 150-foot telecommunications tower on land zoned for single family homes. Space on the proposed tower would have leased to four wireless telecommunications carriers. There was a single family home on the property at the time the variance was sought, and Liberty Towers sought a use variance to permit the construction of the tower.

At a hearing before the Falls Township Hearing Board, Liberty Towers presented three experts in support of the variance, who testified about the gaps in service coverage provided by certain of the proposed telecommunication carrier-tenants in the area of the tower. After the hearing, the board unanimously denied the application for the use variance. The board determined Liberty "did not introduce any testimony which would indicate that the property could not be used as zoned, nor that it was not currently being used as zoned." Specifically, the board found that Liberty did not show that because of physical characteristics of the property, there is no possible way to develop the property for a use permitted within the zoning district.

Liberty Towers then brought an action appealing the decision of the board, claiming the board's decision "has the effect of prohibiting personal wireless service in violation of the TCA" (specifically, 47 U.S.C. §332(c)(7)(B)(i)(11)). Liberty Towers went on to allege the board's decision was not supported with substantial evidence, which also violated the requirements of the TCA (specifically, 47 U.S.C. §332(c)(7)(B)(iii)). The parties agreed to rely on the record of the board hearing and then filed cross-motions for summary judgment.

Liberty Towers contended the board violated both the procedural and substantive requirements of the TCA. From a procedural standpoint, Liberty argued the position of the board was not supported by substantial evidence in violation of 47 U.S.C. §332(c)(7)(B)(iii). In support of its argument, Liberty claimed the board ignored Liberty's evidence that there was a significant gap in coverage in the area of the proposed facility. In response, the township stated there was substantial evidence to support the finding that Liberty did not meet the requirements for a use variance under the zoning ordinance. The court noted the arguments that Liberty Towers and the board made in addressing the procedural requirement that there be "substantial evidence" to support the board's decision were really addressing two separate issues. Liberty was applying the "substantial evidence" requirement of the TCA to the question of whether the board correctly determined if there was a significant gap in coverage. This was an incorrect analysis. Instead, the "substantial evidence" requirement of the TCA is applied to determinations made by the board "in the course of applying state and local zoning law." In other words, the TCA mandates the board must have substantial evidence when making a decision applying the requirements of its zoning ordinance. In this case, the board clearly had substantial evidence that Liberty Towers was not entitled to a use variance. Liberty provided no evidence to support a contention that the property could not be used for a single family home (the property was, in fact, being used for a single family home). Whether there is a "gap in coverage" is irrelevant to the question of whether there is substantial evidence supporting the decision to deny the use variance under the zoning ordinance.

Liberty Towers' second contention was that the board violated the substantive provisions of the TCA. Liberty alleged the decision of the board had the effect of "prohibiting the provision of wireless services." In order to support that claim, Liberty Towers would have to show that (1) there was "a significant gap in the ability of remote users to access the national telephone network;" and (2) that Liberty's plan to erect a tower was "the least intrusive on the values that the denial sought to serve" to fill that significant gap in service.

There is a split among courts on how to determine whether there is a "significant gap in services." The Third Circuit follows the "user-oriented approach," under which the applicant would have to show there are no carriers providing service in the area and this results in a significant gap in service. In contrast, the "multiple-provider approach" does not consider the

services provided by other carriers. A "significant gap" exists if only a carrier that seeks to benefit from the application has a gap in its service in that area.

According to supporters of the multiple-provider approach, that approach is consistent with the congressional intent of encouraging competition among service providers (which would in turn help to ensure better service). Liberty Towers argued the court should use the multiple-provider approach because it was recently adopted by the Federal Communications Commission (FCC) in one of its 2009 rulings. In fact, there is the beginning of a split among district courts in the Third Circuit, insofar as one court (*Sprint Spectrum LP v. The Zoning Board of Adjustment of Paramus*, (2010 WL 4768218)) endorsed the multiple-provider approach in deference to the FCC's 2009 ruling.

In the *Liberty Towers* case, the court did not reach the question of whether it should adopt the multiple-provider approach over the user-oriented approach currently favored by the Third Circuit because it determined no "significant gap" existed regardless of which approach was adopted. The court noted "there are no magic numbers or percentages that constitute a significant gap." Neither the TCA, the FCC, nor the courts have established the "significant gap" threshold. In order to determine if there is a significant gap in coverage, courts are required to consider "the quality of the service in the area and the effect on the users." This involves a number of factors, including call failure rates and the number of people impacted by the gap. In analyzing the evidence presented at the hearing by Liberty Towers, the court was unable to determine that a "significant gap" existed. While the experts presented by Liberty Towers showed evidence from some (but not all) of the carriers to be located on the tower that indicated there were areas of unreliable service, the court determined the evidence was not sufficient to show that there were significant gaps in the quality of the coverage or a significant number of people were affected by that unreliable service.

Finally, the court found that Liberty Towers was unable to show that its proposed solution (i.e., the new tower) was the least intrusive means of addressing any gap in coverage. The court noted there were other towers within one mile of the proposed tower and determined that Liberty Towers had not demonstrated why it could not use those other towers.

The *Liberty Towers* case provides a good analysis of how the TCA and local zoning ordinances interact and also shows areas where the law remains unsettled. In particular, how one determines whether a "significant gap" in service exists is an open question, with different courts applying different standards.

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The New Jersey Historic Tax Credit: Is Now the Right Time?

By Jeffrey M. Hall and Daniel V. Madrid

Sitting quietly in the bill queue for the 2012-13 session of the New Jersey Legislature, A1450 and S141 are companion bills, identical in content, that seek to spur redevelopment by incenting the rehabilitation of historic structures as well as structures located within historic districts and certified by the Pinelands or designated by New Jersey's State Historic Preservation Office (SHPO) as a significant resource. Phoenix-like, these bills are the progeny of A1851, which made its way to the Governor's desk last March only to be vetoed. This report is the first part of an analysis of the draft Historic Property Reinvestment Act (Act) as set forth in these bills, and thus focuses on the primary elements of the proposed legislation as it affects businesses.

The Act seeks to create a state counterpart to the Federal Historic Tax Credit, which was established in 1976. Administered by the National Park Service (NPS), the Federal Historic Preservation Tax Incentives Program bestows a 20 percent tax credit on developers of eligible projects. The NPS partners with the Internal Revenue Service and State Historic Preservation Offices, typically referred to as SHPOs. For the past 35 years, the Federal Historic Tax Credit program has assisted in funding tens of thousands of rehabilitation projects, representing billions of dollars in private investment. The Federal Historic Tax Credit applies to a broad range of structures used for a multiplicity of residential and commercial uses; the common denominator is a historic designation.

The Act targets both homeowners and businesses. They provide a tax credit for homeowners capped at $25,000 per property and a tax credit for businesses with no cap. Thus, these two programs offer incentives on a quite different scale. This article will focus on the business tax credit.

As presently drafted, the Act would offer a significant incentive to businesses that seek to rehabilitate a qualifying historic project. For a project to qualify, a property must be listed on the National Register of Historic Places or the New Jersey Register of Historic Places or be certified by the Pinelands Commission as located within a

district of historic significance. Also, properties can be identified for protection as a significant resource by the municipality, which designation would be approved by New Jersey's SHPO.

Upon successful application to the SHPO, a business entity will be allowed a tax credit for 25 percent of the cost of the rehabilitation of a qualified rehabilitation project. To be eligible, rehab expenditures must meet a threshold of greater than $5,000 or the structure's adjusted tax basis under IRS rules. Additionally, the Act would allow projects to be phased and thus a business can select a 24-month or 60-month rehab period for the completion of improvements.

A business may apply the tax credits toward corporate business tax or insurance premium tax liabilities accruing during the accounting period when the final payment for rehabilitation costs is made in the 24-month option or in any period when a specific project phase is completed if the business entity has chosen the 60-month option. Further, at the election of the business, unused credits can be carried over for nine accounting or privilege periods immediately following the period in which the credit was initially acquired.

Tax credits are transferrable if the applicant's tax liability is insufficient to take full advantage of the credit. As with many other New Jersey programs such as GROW NJ or the Urban Hub Tax Credit Program, the tax credits can be sold via a tax credit transfer certificate. Unlike other programs, the NJ SHPO administers the transfer program.

The draft legislation proposes the following caps for credits claimed under the program:

- $15,000,000 for 2012
- $25,000,000 for 2013
- $40,000,000 for 2014
- $50,000,000 for 2015.

There are also set aside requirements. At least 25 percent of the tax credits must be set aside for homeowners. Significantly, at least 65 percent must be set aside for business projects.

There are recapture provisions written into the Act in an event the property ceases to meet the Act's rehabilitation requirements. Recapture is 100 percent in year one but falls to 20 percent between years four and five. If a business entity's architectural plans change during the course of the project so that it no longer qualifies, then that entity's tax liability for the applicable accounting period would be increased by the full amount of the tax credit that had been previously granted. Any other credits would be voided.

A1851 of the 2010-11 legislative session, the precursor to A1540/S141, was vetoed by Governor Christie in March 2011. Extensive costs analyses were produced by his administration and the Office of Legislative Services, calculating that the program would generate a substantial revenue loss. In his veto message, the Governor stated:

> "These bills (A1851 and others) were combined and passed as a 'comprehensive package' that was touted by supporters in the Legislature as an effort to spur economic growth and job creation in this state. I applaud the intentions of the Legislature to make New Jersey a more business-friendly environment[.]
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> "The business climate in New Jersey has begun to show some early signs of improvement . . . In order to bring long-term, meaningful reform to New Jersey's business climate, coherent legislative action to revise the State's tax laws is imperative[.] However, by passing a package of bills that will cost the State over $600,000,000 in Fiscal Year 2012 by conservative estimates and billions over the next few years without identifying any corresponding reductions in the State's budget, the Legislature has acted prematurely, irresponsibly and (recklessly)[.]"

The Governor then noted that A1851 was part of a package of bills that was passed without being brought into the budget process. He invited the Legislature to work with him during that process as the number of bills embodied "elements of laudable and worthwhile reforms." After the veto message, certain bills in fact worked their way through the legislative process, were passed and then signed into law by the Governor.

There are numerous primary and co-sponsors who have endorsed A1450 and S141. At the present time, these bills have been assigned to the Environment and Solid Waste Committee of the Assembly and the State Government, Wagering, Tourism and Historic Preservation Committee of the Senate. Neither committee has scheduled hearings at the time this article was written.

For the March edition of *In the Zone,* Part II of our discussion of the New Jersey's Historic Property Reinvestment Act will focus on the merits of this legislation.

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Delaware Court Declines To Enforce Confession of Judgment Provisions in Spousal Loan Guaranty

By J. Breck Smith

In *RBS Citizens, N.A. v. Caldera Mgmt., Inc., et al.*, 2009 WL 3011209 (D. Del.), the U.S. District Court for the District of Delaware, in a memorandum opinion (Robreno, J.), ruled against RBS Citizens, N.A. in its attempt to enter judgment by confession against the guarantor spouse of a Sussex County developer and repeat borrower from the bank, holding that the financial institution failed to establish the spouse had effectively waived her constitutional due process rights to notice and hearing before the entry of judgment.

The central facts of the matter were not in dispute. RBS Citizens, N.A. (the bank), successor by merger to Citizens Bank, entered into a series of commercial real estate loans with entities owned and controlled by defendants Caldera Management, Inc., Mark G. McGreevy, and Daniel B. McGreevy. The loan transaction at issue in this case was a May 2006 commercial real estate loan in the amount of $6,535,098.31 to a land development single purpose entity owned or controlled by Caldera Management, Mark McGreevy and Daniel McGreevy. Defendants Caldera Management, Mark McGreevy, Daniel McGreevy and Margaret M. McGreevy (Guarantor McGreevy), the wife of Daniel McGreevy, guaranteed the loan pursuant to guaranty and suretyship agreements executed in favor of the bank. Each guaranty, including the one signed by Guarantor McGreevy (the guaranty), contained a confession of judgment clause. The borrower defaulted on the loan, and on April 28, 2008, the bank confessed judgment against the defendants, including Guarantor McGreevy, pursuant to the confession provisions in the guaranties, pursuant to Delaware Local Rule 58.1.1 as authorized by 10 Del.C. §2306. Defendants Caldera Management, Mark McGreevy and Daniel McGreevy stipulated to the judgment but reserved the right to contest execution on the judgment. Guarantor McGreevy objected to the entry of judgment, arguing that in signing the guaranty she did not knowingly, voluntarily and intelligently waive her right to notice and a hearing prior to entry of judgment.

In its opinion, the court noted that Guarantor McGreevy is a graduate of Widener University, with a four year bachelor's degree in nursing. She had worked for more than 25 years as a licensed nurse. Guarantor McGreevy did not participate in the business or operations of Caldera Management or any associated entities. However, Guarantor McGreevy had executed at least five other commercial loan documents containing confession of judgment provisions, in addition to the guaranty in question in this case. Guarantor McGreevy testified she did not remember executing the guaranty but she believed her husband presented the document to her at home and asked her to sign it. She also testified she believed she may not have reviewed the document because "she trusted her husband" but had she reviewed the document, she would not have understood it. The court's opinion noted that at the time Guarantor McGreevy signed the guaranty, she had "the opportunity to be informed about the waiver" through counsel, but no attorney nor representative of the bank was present, and the bank did not advise Guarantor McGreevy that she should retain or consult counsel in connection with the guaranty. In connection with the closing of the commercial loan and the execution of the required documentation, an opinion of counsel prepared by a Delaware attorney was delivered to the bank indicating that such attorney had acted as counsel to all of the guarantors, including Guarantor McGreevy, in connection with the guaranty. This legal opinion advised that the loan documents were legal, valid and binding obligations but did not specify or highlight the legal implications of the confession of judgment clause. Despite the contention of the Delaware attorney who prepared the legal opinion that he "acted as counsel" to the guarantors, Guarantor McGreevy testified she did not recall having been represented by such attorney, or any other attorney, in connection with the guaranty nor was she aware of the legal opinion given relating to this matter.

In its ruling, the court noted that the burden is on the party asserting the waiver to show that the defendant "effectively waived any right to notice and a hearing prior to the entry of judgment against the debtor." The execution and delivery of a document containing cognovits provisions waiving the right to prejudgment notice and hearing is constitutional if the waiver is knowing, voluntary and intelligent. *Pellaton v. Bank of New York*, 592 A.2d 473 (Del. 1991) (quoting D.H. *Overmyer Co., Inc. v. Frick*, 405 U.S. 174 (1972)). In order for a waiver to be knowing, voluntary and intelligent, it must be an intentional relinquishment or abandonment of a known right or privilege. *Id.* The effectiveness of a waiver is determined by the totality of the circumstances. *Mazik v. Decision Making, Inc.*, 449 A.2d 202 (Del. 1982). Under Delaware law, the following factors are considered: (1) The defendant's business sophistication and experience with similar documents; (2) whether the defendant consulted an attorney; (3) whether all bargaining parties took the necessary steps to ensure the terms of the agreement were read and understood at the time entered into; and (4) whether the defendant had the opportunity and time to review the document containing the confession of judgment. The court also noted that the foregoing factors were not necessarily an exhaustive list. In analyzing these factors against the circumstances surrounding the execution and delivery of the document in this case, the court noted that all the bank could prove was that Guarantor McGreevy signed the guaranty (a fact that Guarantor McGreevy did not dispute) but the bank failed to point to any evidence of Guarantor McGreevy's intentional abandonment or relinquishment of her right to notice and a hearing prior to the entry of judgment. The court noted that despite the fact it was

printed in bold letters, the confession of judgment clause itself is highly technical and not self-explanatory; although admitting she had the opportunity to review the document, without the assistance of counsel, Guarantor McGreevy's review of the document was uninformed.

The implications of this case for lenders, borrowers and guarantors and their counsel, are important.

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New Jersey Case of *Hillsborough Properties v. Township of Hillsborough* Demonstrates Difficulty in Challenging Zoning Ordinances

By Jack Plackter

In *Hillsborough Properties v. Township of Hillsborough* (Docket No.: HNT-L-14-08; decided: December 22, 2011), the landowner sought invalidation of the Hillsborough Township's Economic District (ED) Zoning.

Of the landowner's 334 acres of property, 308 were zoned ED and the remaining were zoned AG (Agricultural). The landowner's property was bordered to the north by active recreational uses, including a baseball field; to the south by a tract planned for recreational use; to the east by single family homes; and to the west by fields and vacant woodland. The property had limited vehicular access and is essentially a large flag lot with a convoluted access configuration.

The primary principal permitted uses in the ED zone are offices and office buildings, but corporate centers, restaurants, theaters, recreational facilities, fiduciary institutions or banks, libraries, museums, medical centers, hotels, motels, retail sales (but only in relation to a permitted product manufacturing of a company located on the site), childcare centers and schools are also permitted. Light manufacturing is allowed as a conditional use.

The record reflected that over the years, a number of developers made proposals to alter the zoning for the tract, including to permit warehouses and the introduction of mixed use development such as residential development. Moreover, the size of the ED zone became smaller over time, with the township rezoning much of the area, but not the landowner's property, to more restrictive uses allowed by the RD zone.

Finally, the tract had some wetlands affecting access to the site, as well as site contamination and environmental areas of concern, which needed to be addressed.

The court, in reviewing the existing legal framework, found that courts do not zone — localities do. The court's task (as previously stated in many prior cases) is not to determine what the judge or court in his or her wisdom *might* have decided but whether the municipal decisions and issues are arbitrary.

The court found that an ordinance did not have to be a perfect fit, or even a very good one, as long as it had some tendency to produce the desired result. Ordinances have a presumption of validity, which can only be overcome by a showing that the ordinance is clearly arbitrary, capricious, unreasonable or plainly contrary to fundamental principles of zoning. Municipalities are entitled to deference and the usual rule is that in cases where an ordinance has both a valid and invalid purpose, a court should credit the valid one.

The stated purpose of the ED zone is to recognize interrelationships between industrial and office park development and limited retail uses. Moreover, the ED zone is intended to generate an employment area designed and developed according to a plan as a single entity. The court then determined the ordinance must be sustained if it has some tendency to produce employment and nonresidential ratables.

The court found that neither the landowner nor the township was terribly clear about the palette of uses that would be appropriate for the property. While the landowner argued strenuously that a corporate user was unlikely given the remoteness of the property and the other site constraints, the landowner's experts never opined that, from a planning standpoint, nonresidential zoning was inappropriate.

While the township's expert conceded that large corporate users were unlikely, she defended the ordinance by asserting that small, incremental class-B type office buildings would be appropriate on the site because smaller developments do not require major visibility and may be accomplished in small pieces over time. Moreover, smaller developments would have less impact on the local roadway network.

The landowner objected to the township planner's opinions and argued her opinion was a net opinion.

The case contains an interesting discussion of the methods to attack an expert opinion but ultimately found that since the planner articulated the purposes of zoning to be served by the particular ordinance, the landowner's property was not the appropriate focus for residential development and the township expert's opinion was valid. Interestingly, the court felt that even if the development needed an extended period of time to take place, the zoning scheme was not arbitrary. The court further found that some of the delay in making the property desirable for development under the ED zone was because the landowner did not move forward with remediation or address the site contamination.

The court further found the record had no evidence of efforts to market the property

for nonresidential use. The court found the present real estate slow-down was a reason why the property had not been developed during a 22-year period.

The landowner further attacked the ordinance on the grounds that it violates the Municipal Land Use Law because the MLUL requires that a zoning ordinance shall be drawn with reasonable consideration to the character of each district and suitability for particular uses in order to encourage the most appropriate use of the land. The court, in discussing that argument, found there is no case law and the particular suitability must be reviewed in context of the overall rationality of the ordinance under the circumstances, including the principle that municipal decisions are entitled to significant deference. Where the validity of the ordinance is debatable, the validity must be upheld under the "no discernable reason" standard.

Finally, based upon the township's admission that smaller scale developments would be feasible on the property, the court struck down the 50-acre minimum lot area requirement and remanded the matter for consideration of an appropriate smaller, minimum-acreage size – more consistent with its own justification for the ordinance. The court then dismissed the attack on the ED zoning classification for the landowner's property and ordered a revision of the minimum lot size in the ordinance within 90 days.

In concluding, the court found that much of the landowner's case depended on the alleged lack of market for the zoned use and this argument requires a far higher degree of proof than was elicited in the case. The court found that ordinances cannot be valid one day when the market is good and then suddenly become invalid when the market turns sour.

The case demonstrates the difficulty in challenging a zoning ordinance. Municipalities are given substantial deference by the courts, and an ordinance will be invalidated only upon a clear showing that the ordinance is plainly arbitrary, capricious or unreasonable.

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Two Recent Delaware Cases Address Issue of Premises Liability

By Michael J. Isaacs

Two recent Delaware Superior Court decisions address the issue of a property owner's liability for injuries to third parties that occur on their premises. In *Baker v. East Coast Properties, Inc.*, Del. Super. Nov. 15, 2011, the plaintiff rented an apartment in a complex owned by the defendant, East Coast Properties, Inc. (East Coast). The plaintiff was legally blind. Without the permission of East Coast, the plaintiff had installed a motion-sensitive alarm that was activated only if the front door to the apartment was opened. The plaintiff installed this alarm because he felt East Coast maintenance personnel were often entering his apartment without permission.

On March 13, 2009, an East Coast maintenance man and a fire technician conducting maintenance and inspections of the apartment's fire system unlocked and opened the plaintiff's front door, and the alarm immediately sounded.

The plaintiff testified he was startled awake by the alarm, jumped out of bed, took three steps and fell to the ground and injured his head and neck. In his action, the plaintiff asserted that East Coast's unannounced and unauthorized entry into his apartment triggered the alarm and led to his injuries. East Coast moved for summary judgment.

The court granted the motion for summary judgment. The court noted that even if it did find the entry by the defendant was unauthorized and unannounced, the plaintiff failed to establish that his injuries were proximately caused by the defendant's conduct. The court held that the sounding of the alarm constituted an intervening cause that relieved East Coast of liability. The court stated the plaintiff's own contributory negligence (installing the alarm without notice to East Coast) was greater than any negligence allegedly committed by East Coast and therefore barred any recovery by the plaintiff.

In *Cooper v. IHOP Restaurants, Inc.*, Del. Super. Nov. 9, 2011, the plaintiffs, decedent's estate and next of kin brought an action alleging the property owners were liable for the death of a trespasser. The decedent (Jeavon Knott) was trespassing on the defendant's property at the time of his death. The plaintiffs allege the defendants were aware of ongoing criminal activity on the premises and therefore knew or should have known that such activity could lead to injuries to the public.

The plaintiffs presented newspaper articles describing the property, a parking lot, as a popular hangout after local bars and nightclubs had closed. Additionally, the plaintiffs offered the report of a liability expert who performed a crime risk analysis for the property. This analysis revealed that between April 21, 2003, and April 21, 2006, there were 100 reported incidents of criminal conduct in the parking lot.

For these reasons, the court found that genuine issues of material fact existed as to whether the defendants knew or should have known of ongoing criminal activities that occurred in their parking lot and, if so, whether the defendant's conduct was recklessly indifferent or willful. The court also noted there were genuine issues of material fact as to whether Knott's murder was reasonably foreseeable and preventable by the defendants and whether the death was a result of a superseding or intervening cause. Accordingly, the court denied the defendant's motion for summary judgment.

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PA Commonwealth Court Lessens Burden on Utility Companies To Prove or Establish Environmental Impact Associated With Proposed Projects

By Brian J. Levin

In a January 13, 2012, decision by the Commonwealth Court of Pennsylvania (*Board of Supervisors of Springfield Township v. Pennsylvania Public Utility Commission* (2012)[1]), the court affirmed the decision of the PA Public Utility Commission (PUC) granting a certificate of public convenience to PPL Electric Utility Corporation (PPL) to construct a new high voltage electric transmission line and substation. In the opinion, the court supported the PUC determination based in large part on the court's strict reading and interpretation of the applicable statutes and regulations, particularly the court's interpretation of the term "available alternatives."

In the case in question, PPL determined that it needed to significantly upgrade its electric transmission network in the Lehigh Valley area. In order to provide the needed upgrade, PPL identified and studied two possible configurations and selected one, known as the "PPL Functional Configuration."[2] The primary reasons PPL selected that configuration were cost and that it provided the most flexibility for future system expansion. After selecting the PPL Functional Configuration, PPL personnel performed a general review of the relevant area, including preliminary consideration of the environmental impact. As the PPL team determined that there would be no significant environmental impact, PPL then identified possible alternative routes for the transmission lines to implement the configuration. PPL analyzed three possible route options and selected the one known as the "Cross Country Corridor."

On February 14, 2008, PPL filed its application with the PUC for approval of the PPL Functional Configuration and the Cross Country Corridor, among other things, including approval to exercise the power of eminent domain to acquire rights of way and easements for the proposed construction. Springfield Township and numerous other parties filed protests to the application and petitions to intervene based largely on environmental concerns. Four public hearings were held before an administrative law judge (ALJ) who recommended to the PUC that PPL's application be approved. In so doing, the ALJ took issue with the township's position and stated "there exists no regulation, statute or case precedent requiring PPL to consider the environmental impacts of the [alternative] configuration." The PUC adopted the ALJ's recommendation and granted PPL's application. The township then filed a petition to the court for review of the PUC's decision.

The township's primary concern was that PPL did not evaluate the environmental impacts of the three proposed routes and the PPL Configuration created more of an adverse environmental impact than the alternative "Springfield Functional Configuration." The primary issue for the ALJ, the PUC and ultimately the court was whether PPL and the PUC were required by the applicable regulations to consider the potential environmental impacts of the Springfield Functional Configuration as that was not the configuration selected by PPL and submitted as the proposed configuration in PPL's application. Pursuant to 52 Pa. Code §57.76(a)(4): "The Commission will not grant the application, either as proposed or as modified, unless it finds and determines [that] **the proposed HV Line** ……will have minimum adverse environmental impact, considering the electric power needs of the public, the state of available technology and the **available alternatives**." The court held that PPL was not obligated to do an analysis of the environmental impact of the Springfield Configuration because the applicable regulations require the PUC to consider only the "proposed HV line" (i.e., configuration), not alternative configurations. The court did not interpret the words "available alternatives" to mean alternative configurations but rather alternative **routes** only. Since PPL's application was for approval of the PPL Functional Configuration, the PUC has no obligation to consider evidence of any other configuration. In support of its holding, the court cited several places in the regulations that specifically reference the "proposed HV line," including 52 Pa. Code §57.76(a)(4) and 52 Pa. Code §57.72(c) dealing with the form and content of the application.

The court took a strict reading of the regulations by limiting the PUC review to the **proposed configuration**, notwithstanding the words "available alternatives." The court emphatically stated this point in holding that "contrary to the Township's contention that the Commission is required to consider alternative configurations, nowhere in this regulation [57.72(c)] is there a requirement that the Commission consider anything but the **proposed** HV line." Because the PUC determined that the proposed PPL Functional Configuration met its regulations, the court would not substitute its discretion for the discretion exercised by the PUC and therefore affirmed the PUC's decision.

The dissenting opinion disagreed with the court's finding, particularly as it related to the PUC's obligation to consider "available alternatives." The dissent's reading of the regulations and the intent of the drafters in

[1] As of the date this article was written, only the Westlaw citation is available.
[2] A "functional configuration" is simply an electrical solution that addresses reliability issues. It does not identify or evaluate possible locations or routes for the transmission lines.

writing the regulations was that "available alternatives" did not mean "alternative routes" but should be read more broadly. The dissent argued that the court's limited definition of "available alternatives" gives utilities an "easy, and somewhat perverse, path around the regulation's command." Without considering available alternatives under a broader definition, the dissent held that the PUC can not really determine if the proposed configuration will have a minimum adverse environmental impact.

As the dissent points out, while the PUC regulations clearly require that the environmental impact be considered, the court's holding essentially limits that requirement and "creates the illusion of environmental protection."

The key issue in this case is that the regulations applicable to the PUC have been interpreted by the Commonwealth Court in a way that is favorable to the utility companies. By taking a narrow view of what the PUC is to consider when reviewing an application from the utility company, the court has lessened the burden on the utility company to prove or establish the environmental impact associated with its proposed project. The case is on appeal to the Pennsylvania Supreme Court.

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Minor Advance for the Wireless Industry: S2989 Becomes Law in New Jersey

By Jeffrey M. Hall

During the lame duck session, a bill designed to speed up the land approvals process for the wireless industry advanced through the New Jersey Legislature. As initially passed, the bill appeared to offer a significant advance in the approvals process by proposing to eliminate site plan review for many applications involving collocation wireless installations. What ultimately became law represented a retrenchment from the piece of legislation that landed on the Governor's desk for signature.

S2989, as initially crafted and passed by the Assembly and the Senate, exempted wireless installations from site plan review if certain conditions were met. It provided that applications to collocate wireless communications equipment on a support structure or to install equipment within an existing equipment compound were not subject to site plan review if:

- The support structure had been previously granted all necessary approvals by the appropriate approving authority;
- The proposed collocation did not increase the overall height of the support structure by more than 10 percent of the original height of the structure, the width of the structure was not expanded and the equipment compound was not expanded to an area greater than 2,500 square feet; and
- The proposed collocation complied with the final approval for the structure and all conditions attached to the approval.

When it reached his desk, Governor Christie conditionally vetoed the legislation. He recognized it was an advance that made sense given the importance of wireless communication facilities and their growth; nonetheless, he thought the legislation wrested too much control from local control. Noting his concern that the bill did not retain the requirement for site plan review when the application called for a deviation from zoning standards, he recommended in his veto message that the following language be engrafted onto the bill at the end of section 1a(3):

> "[a]nd does not create a condition for which variance relief would be required pursuant to P.L. 1975, c. 291 (C. 40:55D-1 et seq."), or any other applicable law, rule or regulation."

The specific language he recommended was spliced into a substitute bill and passed by the Legislature by the affirmative votes of each chamber on the same day as the veto. Accordingly, on January 17, 2012, S2989 became P.L. 2011, c. 199.

The new law will have some limited benefit in eliminating site plan review in a few instances. As an example, however, an application that simply adds a couple of dishes to an existing tower even without increasing its height and installing equipment in an existing structure will still require site plan review if the use is not permitted and a "d" variance for enlarging a pre-existing nonconforming use is needed. While a need for site plan review is not present in that case despite what the Governor says, the savvy applicant will be required, as before, to request a waiver of site plan review. In most instances, that waiver should be granted under a reasonableness standard.

Can this new law be seen as a victory for the wireless industry? Perhaps, but this law is more like a bunt single, not a home run.

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PA Marcellus Legislation Brings Several Hammers Down on Local Ordinances

By M. Joel Bolstein

A lot has been said about the preemption of local ordinances contained in the amendments to the Pennsylvania Oil and Gas Act (HB 1950) recently signed into law by Governor Corbett. But not much has been said about the multiple hammers given to the oil and gas companies for invalidating those ordinances, including private rights of action and the ability to collect attorneys' fees from local governments.

Under Section 3302 of the new law, all local ordinances purporting to regulate oil and gas operations governed by the new Chapter 32 of the Oil and Gas Act are "superseded." The law states that "no local ordinance adopted pursuant to the Municipalities Planning Act or the Flood Plain Management Act shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas operations regulated by Chapter 32 or that accomplish the same purposes as set forth in Chapter 32." Let there be no mistake. The state has preempted the local regulation of oil and gas operations. If that is not clear enough, the law includes several hammers that oil and gas operators can use against municipalities that might be tempted to pass ordinances to test what statutory authority they may have left to impose roadblocks on oil and gas development.

First, an owner or operator of an oil and gas operation who is aggrieved by the enactment or enforcement of a local ordinance is given the right to request that the PA Public Utility Commission (PUC) review the local ordinance to determine if it is subject to the preemption set forth in the new law.

Second, that same owner or operator of an oil and gas operation can jump over the PUC and immediately bring a private action in Commonwealth Court to invalidate or enjoin the local ordinance. If the PUC reviewed and found the ordinance invalid, that finding becomes part of the record before the court. Since this is a civil action, the municipality has to incur legal fees to defend its ordinance before the Commonwealth Court.

Now here's a big hammer. If the court determines that the local government enacted or enforced the ordinance "with willful or reckless disregard," it can order the local government to pay the successful plaintiff "reasonable attorneys fees and other reasonable costs incurred . . . in connection with the action." So, hypothetically, say the municipal solicitor is asked for his or her legal opinion on a proposed local ordinance to be voted on by the supervisors who regulate oil and gas operations. The solicitor reviews the proposed ordinance and opines that it is preempted, but the supervisors, giving in to public pressure, go ahead and vote for the ordinance anyway. (It wouldn't be the first time something like that happened). The oil and gas operator then brings an action in Commonwealth Court to invalidate the ordinance. To me, it would not be that much of a stretch for the court, in that situation, to find the municipality acted with "willful or reckless disregard" and hold the municipality responsible for paying the oil and gas company's attorneys' fees. I assume that hammer may get some municipalities thinking that it may be best just to steer clear of the entire issue.

But if that hammer is not enough, the law requires that municipalities that already enacted local ordinances before the passage of the latest amendments review and amend those ordinances within 120 days to ensure they are in compliance with the preemption limitations. If they do not go back and amend those offending local ordinances, the same procedures apply (PUC or Commonwealth Court review) and the oil and gas operators have the power to collect attorneys' fees if they are successful in showing willful or reckless disregard. Interestingly, when those ordinances were being passed, I do not suspect any supervisors worried about that. They may even have made statements in the newspaper such as, "We just don't want any of that here." It may make sense for some of them to go back and read their own clippings. Those statements could be costly if the ordinances are not amended or revoked.

The law does say that if the municipality wins, it can collect attorneys' fees from the oil and gas operator who brought the action to invalidate the ordinance if the court determines the action was "frivolous or brought without substantial justification." But in order to receive reimbursement of its attorneys' fees, the municipality would have to take the case all the way to a judgment and then get a determination from the court that the action was frivolous. That could be expensive, and it is unclear if municipalities with limited budgets will be willing to hang in there that long defending these ordinances.

Here is the final hammer: If the PUC, the Commonwealth Court, or for good measure, the Supreme Court, issues an order that a local ordinance is preempted, the law states that "the municipality enacting or enforcing the local ordinance shall be immediately ineligible to receive" Marcellus impact fee money "until the local government amends or repeals its ordinance or the determination that the local ordinance is unlawful is reversed on appeal." Ouch. So, if you are the only municipality that passed an ordinance prohibiting the development of Marcellus wells, you run the risk that all your neighboring communities can receive the impact fee money while you are left out.

There is a lot in the new legislation that has not been addressed yet in most reporting. These hammers are just one example.

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PA Building Code Committee Not Adopting 2012 I-Codes

By Herbert K. Sudfeld, Jr.

The Pennsylvania Builders Association web site reports that the Commonwealth will not be adopting the latest 2012 ICC Codes. After considerable discussion and debate, Pennsylvania's Uniform Construction Code (UCC) Review and Advisory Council (RAC) voted 11 to 5 at its January 18 meeting to NOT adopt any of the 2012 ICC code changes in Pennsylvania.

The ICC Codes are revised and republished every three years. Pennsylvania's UCC RAC is charged with reviewing the revisions and making recommendations to the Department of Labor and Industry. Currently, Pennsylvania building codes are based upon provisions contained in the 2009 ICC Codes that were adopted by the Commonwealth in January 2010.

The RAC held three separate public hearings around the state to receive input from the community on the 2012 ICC Code revisions. Additionally, commenters who could not attend the hearings had the opportunity to submit their input electronically. Feedback received by the RAC overwhelmingly opposed updates to the 2012 codes.

During the course of its examination of the triennial code revisions, the RAC was required to evaluate the building code changes with three criteria in mind: (1) what impact will the provision have upon public health, safety and welfare; (2) what are the economic and financial impacts of the provision; and (3) what is the technical feasibility of the provision.

Only triennial code revisions that were adopted by a two-thirds vote of RAC membership were eligible for inclusion.

Additionally, the RAC voted to send a recommendation to the state legislature further amending the UCC to extend the code adoption cycle from every three years to every six years.

Per Act 1 of 2011, the RAC is now charged with writing a report to indicate its position to the Secretary of Labor and Industry by July 1, 2012 — the result of which would be Pennsylvania's UCC remains at the 2009 codes for another three years.

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Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 484 proposes to amend the Pennsylvania Municipalities Planning Code (MPC) by revising the provisions that subdivision and land development ordinances may include in connection with requirements regarding the imposition of fees in lieu of the public dedication of land. Currently, such ordinances may include provisions requiring the dedication of land or, in the alternative, for example, the payment of fees in lieu thereof.

This proposed legislation would enhance the requirements that a municipality may proffer if it were to impose a fee in lieu of a public dedication of land. For example, the proposed legislation would add a provision whereby the fees in lieu could be used for "the acquisition, operation or maintenance of park or recreational facilities, whether operated or maintained by the municipality or by another municipality, as a condition precedent to final plan approval."

Another proposed change would provide that "[t]he land or fees, or combination thereof, are to be used only for the purpose of providing, acquiring, constructing, operating or maintaining park or recreational facilities accessible to the development." Currently, the foregoing provision reads only as follows: "The land or fees, or combination thereof, are to be used only for the purpose of providing park or recreational facilities accessible to the development."

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PA Governor's Office Publishes Its Regulatory Agenda

By Carrie B. Nase

On February 11, 2012, the Pennsylvania Governor's office published its regulatory agenda in the Pennsylvania Bulletin, as required by Executive Order 1996-1. The agenda represents the Administration's present intentions regarding future regulations.

Included within the advance notice of regulatory activity was the Department of Environmental Protection's intent to propose in Winter 2012 revisions to Title 25 Pa. Code Chapter 93, Water Quality Standards. The proposed rulemaking will include revisions to the Commonwealth's water criteria and standards to reflect the latest scientific information and federal guidelines for criteria development, as required by the triennial review requirements in the Federal Clean Water Act.

Authorized by the Pennsylvania Clean Streams Law, Chapter 93 governs anti-degradation requirements, water quality criteria and designated water uses in the Commonwealth.

Not only does Chapter 93 establish the qualifications for special protection waters (High Quality and Exceptional Value), it also outlines other protected uses such as for aquatic life, water supply, recreation and others. Additionally, the regulation sets forth the petition process for those challenging a water's designated use before the Environmental Quality Board.

Amendments to the Water Criteria section of Chapter 93 could impact the designation of a surface water's use if the acceptable parameter levels are significantly adjusted or if the methodology of evaluation is radically altered. Depending upon the nature of adjustment, it could increase the water quality protection measures required for land development projects.

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Announcement of New Market Tax Credit Allocation Awards Scheduled

By Jeffrey M. Hall and Daniel V. Madrid

The latest allocation is expected to be released this month for the federal New Markets Tax Credit (NMTC) program. The program was created through the Community Renewal Tax Relief Act of 2000 to encourage economic development in distressed communities by providing investors with a 39 percent tax credit for making "qualified equity investments." An investor may then apply the earned tax credit towards its federal income tax liability over a seven-year period. Monies generated by qualified equity investments are then deployed by community development entities (CDEs) to urban and low-income communities with other capital sources for qualified business projects.

The NMTC program is currently in its eighth round and was approved for a $3.5 billion award for 2011. CDEs will know soon whether they are chosen to receive a 2011 allocation as an announcement is projected to be made **prior to the end of February**. For property owners with holdings in inner city and low-income communities, the NMTC program provides an opportunity to attract significant equity capital to development projects.

To secure NMTC financing, property owners should be scheduling meetings with CDEs to discuss proposed projects **before** the awards are announced to maximize their likelihood of receiving an investment. For more information about the NMTC program, please click here.

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