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In the Zone

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Real Estate Tax Apportionment in Leases

By Melvyn J. Tarnopol

In *SPJ, Inc. v. W2005/Fargo Hotels (Pool C) Realty, L.P.*, 2010 WL 4237371 (N.J. Super. A.D.), a landlord and tenant litigated over the proper apportionment of real estate taxes. There are lessons to be learned from this case.

The landlord owned a single parcel of land upon which a hotel and parking lot were located. In addition, that same parcel of land contained an unimproved area that the landlord leased to the tenant pursuant to a long-term ground lease, upon which the tenant constructed a restaurant.

The ground lease provided that the tenant would pay "lessee's proportionate share" of real estate taxes and that "lessee's proportionate share" was determined by dividing the total square footage of the restaurant to be constructed on the ground lease land by the total square footage of all of the buildings on the parcel, which turned out to be 33 percent of the taxes.

In addition, the ground lease provided an alternative procedure (at Section VI (C) of the lease) for the allocation of taxes, by granting the tenant an option to seek a separate assessment for the leased land. However, this alternative did not provide a procedure for how to separately assess the leased land.

Shortly after the restaurant was completed, the tenant complained to the landlord that the assessment relating to the new building was too high, as the cost to build the restaurant improvements was $732,000 but the increase in the assessment for all of the buildings at the tax parcel was $1,583,000. The tenant requested the landlord appeal the tax assessment and also have the taxes separately assessed.

Several years passed without the landlord taking any action.

Four years later, the tenant informed the landlord that it would seek a separate assessment as provided for under Section VI (C) of the lease.

Around that same time, the tax assessor informed the tenant that if it wanted a separate tax bill for its leased land, it would have to effect a subdivision of the leased land from the balance of the parcel. Thus, if the leased land were subdivided from the balance of the parcel, there could be separate tax assessments for each of them.

However, neither the landlord nor the tenant proceeded with a subdivision application.

A few months later, the tenant obtained an appraisal from a private firm that concluded the tenant's improvements were overassessed by the tax assessor, and the tenant asserted to the landlord that, in light of this appraisal, the tenant's share of the real estate taxes should be reduced.

The landlord responded by stating the real estate tax allocation provision of the lease spoke for itself, providing for the tenant to pay 33 percent of the taxes, and the appraisal obtained by the tenant was irrelevant for purposes of the lease.

Within a year, the tenant brought a declaratory judgment complaint, asking the court to declare that the appraisal was controlling so that the 33 percent allocation would be adjusted downward.

Although the trial court elected to reform the tax allocation provisions of the lease as requested by the tenant, the Appellate Division reversed the trial court and refused to reform the lease in the manner requested by the tenant.

The court held that the allocation provision of the lease was clear and unambiguous. There were two choices: (1) the tenant could pay 33 percent of the real estate taxes or (2) the tenant could request a separate tax assessment pursuant to Section VI (C) of the lease, which, according to the tax assessor, would require subdivision.

Since the lease did not authorize the use of an appraiser to take the place of the tax assessor, the tenant's argument that the appraisal should be used was rejected by the court.

Although the court did not reach the question of the landlord's required cooperation in connection with a subdivision application, the court stated that since, in New Jersey, each contract contains an implied covenant of good faith and fair dealing, it is possible that the lower court on remand could find the landlord was obligated to pursue a subdivision in order to give effect to Section VI (C).

The court analogized the situation to a party having to pursue its administrative remedies before seeking redress with the courts. In this case, the court held the tenant was required to pursue its contractual remedies (i.e., a subdivision)

before it could seek a reformation of the lease by a court.

A lesson to be drawn from this case is that real estate tax apportionment provisions need to be carefully written. If the tenant in this case wanted the value of its restaurant improvements to be factored into the equation for its share of real estate taxes, it should have so provided, instead of providing for the apportionment to be based purely on square footage.

At a minimum, the clause in question could have been drafted to provide that Section VI (C) of the lease require a subdivision application that would have to allocate who would pay the cost of the subdivision. Further, a landlord would have to determine whether a subdivision would be acceptable to it prior to agreeing to such a clause. For example, a subdivision may be impractical if it would result in violation of zoning requirements, such as lot coverage.

Although a property may not be able to be subdivided, thus permitting a separate assessment, it is possible that an apportionment clause could provide that the tax apportionment be based on the value of the improvements based on specific assessment information made available by the municipal assessor relating to the respective improvements. If the assessor is not willing to give such information, the value of the improvements could be based on the amount by which the total improvements increase in value, assuming there is a record of the prior assessed values for each of the respective improvements already on the property.

In any event, the tenant could have saved itself a good deal of time and money by more carefully dealing with this issue at the time it entered into the lease.

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Mortgage Deduction on the Chopping Block?

By Herbert K. Sudfeld, Jr.

On December 1, 2010, the National Commission on Fiscal Responsibility and Reform (aka the Federal Debt Commission) released its "Moment of Truth" report highlighting various recommendations to bring the United States debt under control. The Commission, co-chaired by former Sen. Alan Simpson (R-Wyoming) and former Clinton Chief of Staff Erskine Bowles, was tasked by President Obama to explore policies that could achieve fiscal sustainability over the long run.

The United States' 2010 federal debt stands at 62 percent of the national Gross Domestic Product (GDP), or nearly $14 trillion. The Congressional Budget Office (CBO) projects that if the country continues on its current course, deficits will remain high throughout the rest of this decade and beyond and debt will spiral ever higher, reaching 90 percent of GDP in 2020.

The Commission's report advocates cuts to discretionary spending, reforming individual and corporate tax structures and addressing health and Social Security program costs. As part of the tax reform proposals, the Commission calls for elimination of the mortgage interest tax deduction for individual taxpayers.

At stake is a huge tax incentive widely used by homeowners. The Office of Management and Budget has estimated the federal government lost almost $92.2 billion in tax revenue from the mortgage interest tax deduction this year. That figure is expected to rise in coming years, reaching more than $104.5 billion in 2011.

Specifically, the report discusses transforming the current mortgage interest deduction into a 12-percent credit (the 12 percent is the percentage of the lowest income tax bracket of the commission proposal; it is 10 percent under present law) would certainly reduce housing demand, particularly for first-time homebuyers who typically spend a larger share of their family budget on mortgage interest (because they have less equity in the home than someone who has been paying on their mortgage for 10 or 20 years). The 12 percent rate also means that for all homeowners and homebuyers who face a higher than 12 percent marginal tax rate today, this change would be a tax increase. The resulting reduction in housing demand will drive home prices down.

An additional harmful proposal for housing prices and families' household wealth would be the elimination of the capital gain exclusion. If enacted, this change would reduce the value an older homeowner could extract from his or her home during retirement years. It could also reduce housing demand by increasing the time older homeowners remain in their homes in order to avoid a large tax bill. Under the proposal, capital gains would be taxed as ordinary income. So someone selling a home in which they have lived for 20 or 30 years would report a substantial amount of income, placing themselves easily in the top tax bracket for the year of the sale.

In an attempt to head off such a proposal from gaining political traction, the National Association of Home Builders (NAHB) has launched a newly designed, consumer-oriented web site, www.SaveMyMortgageInterestDeduction.com, to provide up-to-date information on the threat to the mortgage interest deduction.

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Cooperative Purchasing: What Is It, and What Does It Have To Do With My Building?

By Ellen M. Enters

Are you building, renovating, equipping or maintaining a building? Is your organization a local governmental entity; a nonprofit educational or public health institution; a nonprofit fire, rescue or ambulance company; or other similar type organization? If so, your organization may be eligible to purchase supplies, equipment, maintenance services and even construction services through a cooperative purchasing program. What is the benefit of utilizing a cooperative? It can save you money and time, and it can help you identify quality vendors and contractors with proven track records.

In Pennsylvania, there are various cooperative purchasing statutes. The most inclusive statute is Chapter 19, Intergovernmental Relations, of the Pennsylvania Commonwealth Procurement Code, 62 Pa.C.S. §§ 1901 et. seq., (the Pennsylvania Procurement Code). The Pennsylvania Procurement Code permits political subdivisions; public authorities; tax-exempt, nonprofit, educational or public health institutions or organizations; nonprofit fire companies; nonprofit rescue companies; nonprofit ambulance companies; and other entities that expend public funds to join together to purchase supplies, services and construction.

Most states have some form of cooperative purchasing statute. Not all states are as broad as Pennsylvania's Procurement Code with respect to the types of eligible organizations. Further, many states, including Pennsylvania, have cooperative purchasing statutes that allow eligible organizations from multiple states to join together, resulting in many cooperatives that operate on a national basis.

Many Pennsylvania school districts have been using cooperative purchasing in connection with their purchase of routine custodial, office and classroom supplies for decades. For more than 25 years, school districts and libraries have used cooperative purchasing to buy computers and other technology equipment through the PEPPM Technology Bidding and Procurement Program (PEPPM). More recently, school districts have been using cooperative purchasing in connection with their building, renovation and ongoing maintenance projects. For example, the Pennsylvania Education Purchasing Council (PEJPC), in conjunction with the national Association of Educational Purchasing Agencies (AEPA), has cooperative purchasing contracts available for installation of flooring materials, roofing services and HVAC services.

With the enactment of the Pennsylvania Procurement Code, a broader number of organizations – including select nonprofit organizations – are eligible to participate. Accordingly, cooperative purchasing is not just for school districts, municipalities and other local governmental entities any more.

As mentioned, the primary benefits of using a cooperative are to save time and money and obtain a quality vendor/contractor. Money is saved primarily in three ways: (1) volume, volume, volume discount, (2) decreased administrative expenses and (3) decreased advertising expenses (for those eligible organizations required to advertise for competitive bids). As more and more eligible organizations combine their purchasing power, they can demand a volume discount. Some cooperative purchasing programs, such as PEPPM, include "most favored customer" provisions in their bid solicitations, which assures your eligible organization that the same vendor is not selling the same product with similar quantity and terms to another eligible organization for a lower price. Most cooperatives either charge a nominal fee or no fee to join. To cover the cooperative's expenses, the cooperative generally receives a fee from the vendor when an eligible organization makes a purchase under the contract.

Time is saved as the cooperative handles the administrative burden and expense of preparing competitive bid solicitations and specifications, advertising for bids and evaluating the bids. This can be an invaluable resource for participants – especially when dealing with an experienced cooperative – as the cooperative will have greater expertise and resources to prepare bid specifications and evaluate bids.

Some cooperatives award only to the lowest responsible bidder – such as AEPA, PEJPC and the Keystone Purchasing Network. Other cooperatives, such as COSTARS, operated by the Pennsylvania Department of General Services, award to all qualified bidders regardless of price – thereby pushing the burden of evaluating pricing back on the eligible organization. In either case, the eligible organization benefits because the cooperative is evaluating the bid responses and vetting the vendor's qualifications. Some cooperatives, such as AEPA and PEJPC, also require the vendors to post bonds to demonstrate their financial capabilities and commitment to the contract.

A word to the wise: Although cooperative purchasing is an important and valuable tool for eligible organizations to maximize their spending dollars, not all cooperatives are created equal. As with most services, some cooperatives provide richer and greater services, documentation, expertise and customer support than others.

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Pennsylvania Supreme Court Upholds Invalidation of Schuylkill Township Sprinkler Ordinance

By Kimberly A. Freimuth

Schuylkill Township v. Pennsylvania Builders Association, 2010 WL 4074488 (Pa. Commw. October 19, 2010).

Schuylkill Township in Chester County adopted Ordinance 2005-01, requiring sprinklers in all new structures or dwellings, including basements, additions and structural alterations. Because the Ordinance required standards beyond the minimum requirements of the Uniform Construction Code (UCC), the Pennsylvania Builders Association challenged the Ordinance.

Section 301 of the Pennsylvania Construction Code Act grants the Department of Labor and Industry the authority to promulgate uniform statewide construction standards, which the Department did by adopting the UCC. At the Department of Labor and Industry hearing, the township argued that local conditions or circumstances warranted the Ordinance's sprinkler mandate and thus justified an exception to the UCC. Specifically, the township argued the Ordinance was warranted due to population growth, which places a strain on its volunteer fire department, as mountainous topography and traffic congestion delay firefighter response time, and to modern construction, which utilizes rapidly burning wooden trusses. The Department determined that none of the township's evidence was atypical, and therefore the township failed to establish clear and convincing local climatic, geologic, topographic or public health and safety circumstances and conditions in the township to justify the enactment of the Ordinance or to justify an exception to the general rule of uniformity set forth in the UCC.

The township appealed to the trial court, which upheld the Department's decision to strike down the Ordinance. The township then appealed to the Commonwealth Court, which affirmed the trial court.

On appeal to the Pennsylvania Supreme Court, the court first noted that substantial deference to an agency's interpretation of a statute is given to the agency charged with implementing and enforcing it, such as the Department in the present case, which is charged with enforcing the UCC. The court then noted the concepts of uniformity and public health are underlying principles of the UCC, and only the conditions of the municipalities of Marcus Hook and Carroll Valley Borough have proven to exemplify the local circumstances justifying a UCC exception to require sprinklers. Specifically, Marcus Hook is a municipality of 1.1 square miles with the world's largest propane storage tank underlying it and oil pipelines passing through it. Carroll Valley Borough is carved into the side of a mountain, has many impassable roads, no public water supply, no fire hydrants and no volunteer fire department. After reviewing the two examples of Marcus Hook and Carroll Valley Borough, the court determined the Department was correct to require Schuylkill Township to show that conditions there were so different from the statewide norm that the uniform standards were not appropriate to use in the township. The township, however, failed to show the same potential for risk as Marcus Hook and Carroll Valley.

The court struck down the township's argument that the UCC is merely intended to set a floor, which municipalities may surpass when local conditions warrant it, and emphasized that, in adopting the UCC, the Legislature intended for uniformity to be the standard, not the exception. Thus the Pennsylvania Supreme Court upheld the Commonwealth Court's decision to invalidate Schuylkill Township's Ordinance requiring sprinklers beyond the requirements of the UCC.

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Delaware Supreme Court Clarifies Law Regarding Sealed Instruments

By J. Breck Smith

In *Whittington v. Dragon Group, L.L.C., et al.*, No. 392, 2009 (Del. Dec. 18, 2009), the Delaware Supreme Court resolved a split of authority in the trial courts regarding what constitutes a sealed contract under Delaware law. In a majority decision, the Delaware Supreme Court ruled that in the case of an individual, the presence of the word "seal" next to an individual's signature is all that is necessary to create a sealed instrument under Delaware law, irrespective of whether there is any indication in the body of the obligation itself that such obligation was intended to be a sealed instrument.

In this case, the plaintiff-appellant, Frank C. Whittington, II, filed a complaint in 2006 in the Court of Chancery seeking various declaratory and injunctive relief against defendants-appellees Dragon Group, L.L.C. and certain family members who were members of Dragon Group, seeking to enforce his rights as an alleged member of Dragon Group. Whittington based his

claims of membership in Dragon Group and entitlement to a proportionate share of Dragon Group profits upon a 2001 Agreement in Principle (the AIP) entered into by Whittington and various sibling defendants. The AIP constituted a global settlement of previous litigation in the Court of Chancery wherein Whittington sought recognition of his proportionate ownership in various business entities owned by the sibling defendants. The AIP was a single page document containing 11 numbered paragraphs that in relevant part detailed certain payments and actions that Whittington needed to take in order to carry out his obligations under the settlement and be entitled to membership in Dragon Group.

Claiming that Whittington had failed to perform under the AIP by the required time period, the sibling defendants filed a motion with the Court of Chancery seeking to enforce the AIP. In October 2001, the Court of Chancery held that the AIP should be enforced as a contract, expressly holding that the parties' inability up to that time to agree upon the form of certain documents contemplated in the AIP did not make the AIP unenforceable. Despite this ruling, owing to the continuing inability of the parties to work together cooperatively, significant time passed and the parties were not able to complete certain documentation required by the AIP. Thereafter in 2002, Whittington filed a motion seeking various relief, including court assistance in resolving the differences among the parties as to the form of various ancillary Dragon Group documentation. This motion was denied in March 2003, with the defendants thereafter never taking any action to include Whittington as a member of Dragon Group.

In the litigation below, the Court of Chancery denied Whittington's requests for relief, dismissing the action on the grounds of laches. As such, the court did not address the merits of Whittington's claims, but it did note that Whittington had stated a plausible claim that he was to be a member of Dragon Group pursuant to the AIP with an ownership interest as high as 23.65 percent and that the defendants had breached the AIP. For purposes of its opinion, the Court of Chancery assumed, without deciding, that but for the laches defense, Whittington would prevail on those aspects of his claims.

In its opinion, the Delaware Supreme Court discussed how both the doctrine of laches and statutes of limitation function as time bars to lawsuits, but that unlike a statute of limitations, the equitable doctrine of laches does not prescribe a specific time period as unreasonable. Noting that a statute of limitations always operates as a time bar to actions at law, statutes of limitations are not controlling in equity due to the application of the doctrine of laches. However, where a plaintiff seeks equitable relief, the Court of Chancery will apply the statute of limitations by analogy. Absent a tolling of the limitations period, a party's failure to file within the analogous period of limitations will be given great weight in deciding whether the claims are barred by laches. The Delaware Supreme Court noted that a statute of limitations will be applied by analogy to a suit in equity where it is determined that a claim at law is analogous to the equitable claim at issue.

The Court of Chancery had concluded that Whittington's claims were predicated upon the AIP and therefore his action was "based upon a promise" within the meaning of 10 Del.C. §8106, which provides for a three-year statute of limitations. Accordingly, the Court of Chancery held that the three-year statute of limitations was the analogous statute of limitations for purposes of its laches analysis. However, the Court of Chancery noted that one exception to the three-year statute of limitations for contract actions specified in 10 Del.C. §8106 is for contracts under seal, for which the common law 20-year limitations period would apply. In its opinion, the Court of Chancery, relying upon the case of *American Telephone & Telegraph Co. v. Harris Corp.*, 1993 WL 401864 (Del. Super. Sept. 9, 1993), ruled that while documents of debt such as mortgages or promissory notes escape the three-year limitations period if they contain the most minimal reference to a seal, actions arising from other types of contracts must show a clearer intent to enter into a contract under seal. Noting the AIP is neither a mortgage nor a promissory note and contains no reference to a seal other than the printed word "seal" next to each signature, the Court of Chancery held the evidence was insufficient to demonstrate an intent of the parties to the AIP to enter into a sealed contract.

Calling it a matter of first impression and acknowledging the conflicting prior Delaware cases, the Delaware Supreme Court set forth to clear up what evidence is necessary to establish a sealed instrument (that is not a mortgage or deed) under Delaware law as distinguished from an ordinary, unsealed instrument or contract. In its opinion, the Delaware Supreme Court, declaring it "a bright line standard that is easily applied," decided to follow the common law holding set forth in *In re Beyea's Estate*, 15 A.2d 177 (Orphan's Ct. 1940). In *Beyea's Estate*, it was found that a promissory note with the word "Seal" printed immediately to the right of the signature line on the note was an instrument under seal, notwithstanding that such note did not contain a testimonium clause nor any reference or indication of the parties' intention to render the note a sealed instrument. While reaching its decision, the Delaware Supreme Court noted many states have enacted statutes to address the issue of what constitutes a sealed instrument, but Delaware has not to date chosen to modify the common law by statute or otherwise provided legislative guidance on the issue. This opinion provides clarification as to what constitutes a sealed instrument under Delaware law and highlights the potential significant legal consequences in connection with such a determination.

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Lancaster Court of Common Pleas Rules on Permit Extension Law

By Robert W. Gundlach, Jr.

The Pennsylvania Legislature recently enacted Act 46 of 2010, which included language extending the life of various land development permits and approvals in the Commonwealth. However, one aspect of the legislation was not explicitly clear. Namely, are the affected permit and approval expiration dates tolled until July 2, 2013, at which time their remaining life is reinstated, or do all extended permits and approvals expire on July 2, 2013? In other words, if the permit or approval had, for example, six months remaining before its original expiration at the point of Act 46's effective date, is that permit or approval valid for six months beyond July 2, 2013 — until January 2014?

In a case brought before the Lancaster Court of Common Pleas, the bench considered this question as it impacted a condition use approval granted to a developer in Penn Township, Lancaster County.

On October 22, 2010, the court held that the Legislature's use of the phrase "suspended during the Extension Period" suggests the General Assembly intended Act 46 to toll the running of the expiration dates, rather than merely postpone all expiration dates until July 2, 2013.

Additionally, because the statute incorporated a formal process for approval holders to verify their approval's expiration date, Act 46 contemplates varying dates, rather than just one mass expiration date for all approvals. Such language further implies that permits and approvals should be honored beyond July 2, 2013.

While the Lancaster Court of Common Pleas decision offers precedential value only within Lancaster County, the ruling does lend persuasive authority in other parts of the Commonwealth for approval holders confronted with municipalities or agencies arguing for a uniform July 2, 2013, expiration date.

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PA Governor-Elect Tom Corbett Lays Out Environmental Priorities

By M. Joel Bolstein

Wasting no time following his election on November 2, 2010, incoming Pennsylvania governor Tom Corbett has begun laying out his plans for the Commonwealth's Department of Environmental Protection.

Specific plan highlights to refocus the agency to be more efficient include:

- Eliminating permit backlog.
- Creating the Permit Decision Guarantee Program to ensure timely permit decisions based on clear deadlines for each permit issued by the agency.
- Establish a DEP Legacy Corps enlisting retired DEP senior managers, who have vast experience and knowledge in implementing DEP's programs, to voluntarily mentor future DEP managers through a management trainee program.
- Reviewing DEP programs, regulations and guidance documents within the first three months.
- Creating a PA Environmental "Expert" Loan Program, allowing DEP to create relationships with academic and other institutions to allow individuals with expertise in pre-identified specialties to lend their skills to DEP for a specified period of time.
- Promoting environmental education as a key to the future.

In addition to removing environmental threats, a redeveloped brownfield or grayfield property often serves as the keystone of a community's successful economic revitalization. The governor-elect's proposals to revitalize brownfield and grayfield properties include:

- Refocusing and consolidating site remediation programs.
- Reinvigorating the Brownfield Action Team.
- Supporting reinvestment in brownfields programs by reallocating low-performing funds to yield a higher investment .
- Establishing the Pennsylvania Brownfield Reimbursement Program, a new performance-based brownfield funding program that would provide reimbursement for up to 75 percent of cleanup-related costs incurred at brownfield or grayfield sites in the form of a tax reimbursement.
- Reclaiming and revitalizing mine-scarred lands.
- Incorporating renewable energy through "brightfield" sites.

For more information on these and Corbett's plans for regulating the natural gas drilling industry and protecting the Chesapeake Bay, please visit Corbett's web site.

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EPA Strikes Onerous Numeric Limit From Stormwater Regulations

By Clair E. Wischusen

According the National Association of Home Builders, the EPA has acted to strike an onerous requirement from new national stormwater management regulations. On November 3, the agency issued a direct final rule to remove the numeric limitation of 280 NTUs (numeric turbidity units) from its new construction and development Effluent Limitation Guidelines (ELGs).

The move is an acknowledgement that, in setting the limit for the NTUs, which are a measure of water cloudiness, the agency failed to take into account the natural turbidity of streams and lakes throughout the country. In some cases, these have higher levels of NTUs than water discharged from construction sites.

As a result of the EPA's latest action, states in the process of adding the 280-NTU limit to their stormwater permits will have to issue those permits without the numeric limit.

Going forward, the EPA does plan to submit for public comment a proposed rulemaking to correct the numeric limitation within the next month. Meanwhile, it is important to understand that other provisions of the ELG rule remain valid and will require builders and developers to follow best management practices relating to erosion and sediment control, soil stabilization, dewatering, pollution prevention and prohibited discharges. These requirements in many cases are more stringent than before.

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Pennsylvania Stormwater BMP Revision Committee Moving Forward

By Carrie B. Nase

Stormwater PA reports the Stormwater Technical Advisory Workgroup (aka BMP Manual Revision Committee) continues to make progress on reviewing Pennsylvania's current Stormwater Best Management Practices Manual (2006). The group of engineers and stormwater professionals has been drafting changes to the manual with an eye on releasing the proposed alterations in early 2011.

The group has been meeting since early 2009 to discuss methods to edit and improve the current manual. Objectives of the group ranged from correcting typographical errors to changing the Recommended Control Guidelines to water quality concerns to site evaluation procedures.

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Pennsylvania Case of the Month

By David H. Comer

The case of *Miravich v. Township of Exeter*, 2010 WL 4242559 (Pa. Commw. Ct. 2010), addresses the issue of standing in matters involving subdivision and land development applications.

In this case, the protestants own land adjacent to and near a proposed 34-lot development. The Exeter Township Board of Supervisors approved the landowner's preliminary subdivision and land development application for 26 of the lots in question. (The remaining eight lots are located outside of Exeter Township and were not subject to this appeal.) The protestants appealed the board's approval of the preliminary subdivision and land development application to the Court of Common Pleas of Berks County, where the court held the protestants lacked standing to appeal the township's approval.

The protestants appealed the decision of the Court of Common Pleas to the Pennsylvania Commonwealth Court, which reversed and found the protestants did in fact have standing to appeal.

By way of background, in 2005, an application for preliminary subdivision and land development approval was submitted to the township. The township's planning commission reviewed the application at several meetings, and the board reviewed the application at one meeting. The board approved the application in 2008. There is no indication in the record or in the arguments of the parties that the protestants received notice of the meetings,

nor is there any indication the protestants attended any of the meetings.

Within 30 days of the board's approval, the protestants filed an appeal to the Court of Common Pleas. The Court of Common Pleas found the protestants lacked standing, and the protestants appealed to the Commonwealth Court, where they argued the Court of Common Pleas erred in finding they lacked standing.

The Commonwealth Court pointed out the Court of Common Pleas found the protestants lacked standing because they had not appeared before the board or the township's planning commission and the Court of Common Pleas relied on cases analyzing standing in matters involving zoning hearings boards (ZHB).

The Commonwealth Court provided that standing comprises two concepts: (1) substantive standing ("whether the putative litigation has a sufficient interest in the outcome of the litigation to be allowed to participate") and (2) procedural standing ("whether one has asserted his right to participate sufficiently early").

The Commonwealth Court found it was an error for the Court of Common Pleas to apply the procedural rule of standing to this matter. The Commonwealth Court stated the procedures identified in the Pennsylvania Municipalities Planning Code (MPC) involving matters before the ZHB and matters before a governing body - such as for an application for subdivision and land development approval - are so different "that applying the same procedural standing rules to such appeals is inappropriate."

The Commonwealth Court stated the MPC provides specific procedural requirements for ZHB hearings, but the MPC has virtually no procedural requirements for a governing body considering subdivision and land development applications.

The Commonwealth Court concluded it understands the reasoning for the rule requiring an appearance before the ZHB before a party is granted standing in a zoning appeal and held that "because similar procedural protections are not required in subdivision and land development proceedings, it would be manifestly unfair, if not a denial of due process, to impose such a stringent rule as a prerequisite to subdivision and land development appeals."

The Commonwealth Court did state that if the Board had voluntarily followed the procedures required of a ZHB and provided notice and a hearing on the record with a clear procedure for entering an appearance, it would agree with the Court of Common Pleas that the protestants were required to meet both the substantive and procedural standing requirements.

However, the Commonwealth Court held the only applicable standing requirement in this case was substantive, and it reversed the decision of the Court of Common Pleas and remanded the matter for further proceedings on the protestants' appeal.

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PA Commonwealth Court: DOT Satisfied Burden To Establish Taking of Agricultural Lands for Transportation Use

By Clair E. Wischusen

In *DOT v. Agricultural Land Condemnation Bd.*, 5 A.3d 821 (Pa. Commw. 2010), the Commonwealth Court reversed a final order of the Agricultural Lands Condemnation Board (the board) denying the Department of Transportation's (DOT) request to convert productive agricultural lands to transportation use by condemnation. The court held that the DOT had satisfied its burden of establishing that no reasonable and prudent alternative to the use of agricultural lands existed, and testimony by protestants, standing alone, was insufficient to refute the expert engineering evidence presented by DOT.

In the case, the DOT filed an application with the board seeking approval to use productive agricultural land for the Lebanon County, Schaefferstown Bypass Project (the project). In its application, the DOT identified three project needs: (1) reduce congestion along S.R. 501 within the Village of Schaefferstown, citing deficient levels of service (LOS); (2) improve safety along S.R. 501; and (3) improve regional system continuity. At the hearing before the board, the DOT presented the testimony of the DOT district project manager and several engineers. Owners of the agricultural land (the protestants) testified in opposition but did not present any expert testimony or reports.

In its review, the board was required to consider the Commonwealth's Agricultural Land Preservation Policy, 4 Pa.Code §§ 7.301-7.308, which calls for the protection and preservation of agricultural land that is and has been in active agricultural use for the preceding three years. The DOT application presented seven alternatives as a means to develop the project. If an alternative's impact is found to be excessive, the alternative is considered unreasonable. If an alternative is determined not to meet project needs, it is considered not prudent. During the hearing, DOT's experts dismissed all alternatives except Alternative 1 because the others did not meet the project needs and/or were unreasonable due to excessive environmental impacts. The DOT presented expert testimony and traffic studies that concluded Alternative 1 would satisfy DOT's stated project needs while presenting the best balance of impacts to

the environment compared to the other alternatives.

The protestants testified in opposition to Alternative 1 because it would require the condemnation of several acres of the protestant's active crop land and pasture farmland. While the protestants advocated for other project alternatives, they did not present any expert testimony or refute the testimony given by DOT's experts that these alternatives failed to address the project's needs.

Ultimately, the board denied DOT's request to condemn productive agricultural land to construct Alternative 1. The board found the DOT failed to offer testimony or other documentation regarding: (1) the 20-year projected LOS as a result of the utilization of agricultural land; (2) the potential for increased traffic to S.R. 419 and 897; and (3) whether the LOS at the western intersection of the project study, which has the lowest LOS, will improve. The board also found, among other things, there was insufficient evidence that Alternative 1 would improve safety along S.R. 501, and the improvement proposed for the areas on S.R. 501 with the highest crash rates did not require utilization of agricultural lands. Based on these findings, the board concluded the DOT failed to present sufficient evidence that Alternative 1 satisfied all project needs. Additionally, the board concluded that based upon the testimony of protestants, other alternatives could be further developed and refined to meet the project needs.

The Commonwealth Court reversed, finding the DOT met its burden of establishing by a preponderance of the evidence that there was no reasonable and prudent alternative to the utilization of agricultural lands other than Alternative 1, and the protestant's testimony, standing alone, was insufficient to refute the expert engineering evidence presented by the DOT. The court found that the board's findings that Alternative 1 did not meet certain project needs were improper in that they imposed new project needs not established by the DOT. Moreover, the court found the board had exceeded its statutory authority by ignoring the record and concluding on its own there were alternatives that might be reasonable and prudent.

This case establishes that while the burden falls on the condemnor to establish by a preponderance of the evidence that there is no reasonable and prudent alternative to utilization of productive agricultural land, once that initial burden is satisfied, the burden of production shifts to protestants. Expert testimony is required to satisfy the protestant's burden of production where the issues before the Agricultural Lands Condemnation Board require scientific or specialized knowledge, as will often be the case in such matters.

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

Update: Effective January 1, 2011, Delaware To Require Withholding of Income Tax on Sale or Exchange of Delaware Real Estate by Nonresidents

By J. Breck Smith

House Bill No. 349, signed by Delaware's Governor on June 11, 2010, and effective for tax periods commencing after December 31, 2010, requires every nonresident individual, nonresident pass-through entity and nonresident corporation that sells or exchanges Delaware real estate to declare and pay their estimate of the tax due on such transaction prior to the recording of the deed.

To implement the new law, the Delaware Division of Revenue has proposed a new form "Return of Declaration of Estimated Income Tax – Real Estate Tax" that would need to be completed and submitted to the Recorder of Deeds, along with the estimated tax reported due, at the time of recording of the deed. The proposed declaration form as currently drafted does offer the tax preparer completing the form the option to declare the transferor/seller presently has insufficient information to determine if the sale or exchange is subject to withholding, with the caveat that once sufficient information is available, payment of tax may be due and the appropriate return must be timely filed. For purposes of the new law, "nonresident individual" is an individual who is not a resident of Delaware for the individual's entire tax year, "nonresident pass-through entity" is a pass-through entity having one or more members who are nonresident individuals or nonresident corporations, and "nonresident corporation" is a corporation not organized under Delaware law and not qualified or registered with the Delaware Secretary of State to do business in the state. With respect to nonresident pass-through entities, the requirement under the new law is that such entity cause to be completed and filed with the Recorder of Deeds the required declaration form, together with any tax estimated due, for and on behalf of each of its nonresident members. Any estimated tax that is remitted in compliance with this new law shall be deemed to have been paid to the Delaware Division of Revenue on behalf of the nonresident transferor, and such nonresident transferor shall be credited as having made such payment on the date remitted to the Recorder of Deeds.

The statute expressly provides that neither the transferee, title insurance producer or insurer, closing attorney, lending institution, nor the real estate agent or broker in a transaction subject to this new law, shall be liable for any amounts required to be collected and paid under the statute.

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Pennsylvania Creates Housing Trust Fund

By Robert W. Gundlach, Jr.

On November 23, 2010, Pennsylvania Governor Rendell signed into law House Bill 60, which establishes the Pennsylvania Housing Affordability and Rehabilitation Enhancement Program to provide funding for housing projects to benefit older adults, people with disabilities and low-income residents.

The trust fund legislation passed with broad bipartisan support in both the House and Senate, making Pennsylvania the 39th state with a housing trust fund.

House Bill 60, introduced by State Rep. Peter Daley (D-Fayette), will create the affordable housing trust fund that will enable the Pennsylvania Housing Finance Agency to build or rehabilitate and preserve housing for low- to moderate-income people, the elderly and people with disabilities.

House Bill 60 currently has no appropriations attached but will rely on the National Housing Trust Fund, which is poised to distribute $1 billion to the states, of which Pennsylvania will receive $35 million. 30 percent of the money is targeted to those at 50 percent of area median income (about $30,000 a year or less).

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PA IRRC Approves New Dam Safety Regulations

By Clair E. Wischusen

In 2008, Pennsylvania Auditor General Jack Wagner released a performance audit of the Commonwealth's dam safety regulations. Wagner's audit had seven findings and made 29 recommendations. It called on the Division of Dam Safety to take immediate action to tighten up its oversight policies and procedures and inform the public. Specifically, Wagner said, the DEP should:

- Require dam owners to prepare and submit timely emergency action plans.
- Confirm the plans are distributed to appropriate county and local agencies.
- Communicate dams' potential danger to all special-needs facilities located in flood areas and verify the posting of public notices to ensure public awareness of dams' potential danger.
- Evaluate and monitor conditions of federal dams in Pennsylvania.
- Ensure all high-hazard dams are inspected annually.

In response, the Department developed new Title 25 Chapter 105 regulations to address many of the concerns raised by the audit. Additionally, permit applications, design and inspection requirements for dam construction, modification and/or operation have been modified.

On November 18, 2010, the Independent Regulatory Review Commission approved the Department's final-form regulations. The amendments will go into effect upon publication in the *PA Bulletin* as final rulemaking.

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Chairman's Message: Residential Sprinkler Installation in Pennsylvania

By Robert W. Gundlach, Jr. and Kimberly A. Freimuth

The 2009 International Residential Code (IRC) mandates the installation of automatic fire sprinkler systems in new townhouses and in new one- and two-family dwellings. The compliance date for new townhouses is January 1, 2011. There are two exceptions to these requirements: (1) if a design contract or a construction contract for the construction of these dwellings was signed prior to December 31, 2009, the work will comply with the 2006 International Residential Code; and (2) if an **application** is submitted for a UCC building permit prior to either of the effective dates of the sprinkler requirement, the residential construction will not be subject to it. The specific requirements for the design and installation of sprinklers in townhouses are found in section P2904 in the IRC. The design and installation of sprinkler systems in one- and two-family dwellings can comply with P2904 or NFPA standard 13D.

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Condominium Associations Should Take Care To Carefully Draft Documents

By Melvyn J. Tarnopol

In *Breakwater Cove Condominium Association v. Mary Chin, et al.*, 2010 WL 4878779, N.J. Super. A.D., December 2, 2010 (No. A-1420-09T3), the Appellate Division dealt with a question of interpretation of condominium documents.

Breakwater involved a dispute between a condominium association and the owner of one of the units. The master deed contained the following restriction relating to animals kept in condominium units:

> No bird, reptile, or animal of any kind shall be raised, bred, or kept in any Unit or anywhere else upon the Property except that dogs, cats or other household pets are permitted, not to exceed two in the aggregate, provided that they are not kept, bred or maintained for any commercial purpose, are housed within the Unit and abide by all applicable Rules and Regulations. No outside dog pens, runs or yards shall be permitted.

Chin had two birds in her unit.

The first question presented by the case is whether the two birds were in violation of the restriction.

The restriction is ambiguous and can be read two ways. The first way, which is the way the condominium association read it, is that no birds may be kept in any unit and the reference to "household pets" is not intended to include birds.

The other way the restriction can be read is that birds are not prohibited since they fall within the definition of "household pets" and, in this case, were only two in number.

In addition, the association presented testimony that the birds were noisy and disturbing neighboring unit owners. The noise was characterized as a "nuisance." The association's bylaws provided that no "obnoxious or offensive activities shall be carried on … which may be or become an annoyance or nuisance to the other residents." Thus, the association argued that the birds were a nuisance because of the noise resulting in complaints from the neighbors.

After much litigation, including the imposition of significant fines on Chin, the trial court ruled in favor of the association, and this dispute ended up in the Appellate Division.

The Appellate Division held that ambiguous language in a master deed is to be construed strictly "in favor of the owner's unrestricted use." Thus, the Appellate Division held the ambiguity must be construed in favor of the defendant unit owner, allowing the birds to remain as household pets.

However, the Appellate Division, while reversing the decision of the trial court, which had ordered the birds removed, did not deal with the question of whether the birds constituted a nuisance. The Appellate Division stated the "remaining issues presented by defendants are without sufficient merit to warrant discussion."

It is not clear what the Appellate Division meant by this. It would seem the prohibition on creating a nuisance contained in the bylaws would be an independent requirement. For example, even though dogs were explicitly permitted to be kept in a unit, if a dog created a nuisance by constantly barking, it would seem reasonable for a condominium association to order the dog to be removed—not because dogs were prohibited, but because the dog's parking constituted a nuisance.

In this case, at least some of the neighbors in the condominium complained that the noise created by the birds constituted a nuisance. For whatever reason, the Appellate Division was not willing to address this issue.

The bottom line in this case is that when drafting condominium documents, the draftsman must exercise care in what those documents provide. Had the draftsman intended to prohibit birds, it could have easily defined "household pets" as not including birds. Its failure to do so resulted in this case.

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