Despite the uncertainties of the current economic climate, and perhaps as a result of them, there are ample opportunities for buyers to take advantage of bargain basement prices in the real estate market. Evaluating and selecting the right opportunities and investment models are as important as ever.

One investment model that has seen enormous growth is the short sale, which is a sale of real estate where the proceeds are less than the amount owed on the mortgage or mortgages securing the property. Short sales of both commercial and residential real estate have become common following the subprime mortgage crises and even more so with real estate values declining.

In a short sale, the owner of a property offers, and a secured party agrees to, the sale of a particular piece of real estate at a value less than what is owed on the property. Lenders typically consider short sales a viable option when properties have decreased in value and the property owner has defaulted on the debt. A lender absorbs a loss on the short sale transaction in order to avoid even greater losses and expenses if it were to utilize traditional remedies such as judicial foreclosure.

Judicial foreclosure on defaulting properties can be very costly to a lender and usually result in the lender taking ownership of the property following a sheriff’s sale many months after a default has occurred. This frequently leaves the lender in a position of having to expend more capital on maintaining and insuring the property, listing it for sale and usually realizing a loss on the transaction when the property is sold to a third party – a potentially long and uncertain process.

A short sale, however, offers the secured lender and seller with a more certain outcome. In a short sale, the existing property owner markets the property and obtains a buyer at a price the market will bear. Depending on the shortage, the lender will typically consent to the short sale if the purchase price is close to or at the property’s fair market value. Negotiating with multiple parties (first and second mortgage lenders, brokers, the buyer, other junior lien-holders such as homeowner associations) can add layers of complexity that can extend the time required to reach closing, however.

The seller’s motivation in a short sale, of course, is to get out from under an undervalued or overleveraged property. Armed with a buyer and a market value agreement of sale, a seller is also in a better position to negotiate debt forgiveness of the balance remaining on the mortgage or mortgages. Obtaining debt forgiveness requires a careful review of applicable laws and the specific details of any given transaction.

An opportunistic buyer can use the short sale process to secure attractive properties at bargain prices but should be aware the process of locating the right property and negotiating the deal can take on a life of its own – one that can be well worth it, however.

For more information, please contact Paul P. Padien at 610.458.4954 or ppadien@foxrothschild.com.

Comprehensive Plans Not Considered in Substantive Challenges


In Briar Meadows, the applicant filed a curative amendment application with the South Centre Township Board of Supervisors seeking to rezone its property from agricultural to commercial/industrial. After a hearing, the Board of Supervisors denied the curative amendment application. The applicant appealed the Board’s decision to the Northumberland County Court of Common Pleas. On appeal, the Commonwealth Court affirmed the decision of the Court of Common Pleas.

The appellant argued the zoning ordinance was invalid because it is inconsistent with the comprehensive plan. The Commonwealth Court rejected this
argument, relying on Section 303(c) of the Pennsylvania Municipalities Planning Code, which states:

“Notwithstanding any other provision of this act, no action by the governing body of a municipality shall be invalid nor shall the same be subject to challenge or appeal on the basis that such action is inconsistent with, or fails to comply with, the provision of the comprehensive plan.”

53 P.S. § 10303(c).

In addition, the Commonwealth Court relied on its prior decision in *CACO Three, Inc. v. Board of Supervisors of Huntingdon Township*, 845 A.2d 991 (Pa. Ct. Cmwlth. 2004) and stated as follows:

“[w]hile a comprehensive plan is a useful tool for guiding growth and development, it is by its nature, an abstract recommendation as to land utilization. Inconsistency with a comprehensive plan is not a proper basis for denying a land development plan. Similarly, it cannot be a basis for a substantive challenge to a zoning ordinance.”

In considering a curative amendment, the question for the court to determine is the validity of the zoning ordinance. The argument that the zoning ordinance is inconsistent with the comprehensive plan is not sufficient to prove the zoning ordinance is invalid.

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

IN THE ZONE

Third Circuit Ruling Leaves Open Questions Surrounding Section 1983 Actions Against Municipal Officials for Land Use Decisions

By Clair E. Wischusen


Third Circuit Ruling Leaves Open Questions Surrounding Section 1983 Actions Against Municipal Officials for Land Use Decisions

By Clair E. Wischusen


The standard courts apply in determining whether a municipal official’s conduct violates substantive due process is whether the official’s conduct “shocks the conscience.” See *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392 (3d Cir. 2003). Since the Third Circuit’s application of the “shocks the conscience” standard to land use decisions, §1983 substantive due process claims against municipal officials have enjoyed limited success.

In *Locust Valley*, the Third Circuit Court of Appeals affirmed summary judgment against owners of a golf course who brought a §1983 action against municipal officials who interfered with their efforts to develop the golf course property. In *Locust Valley*, the appellants entered into an agreement to sell their golf course (the property) in Upper Saucon Township (the township) to McGrath Construction (the developer) for construction of an age-qualified community (AQC). At the time of the agreement, a moratorium on new public sewer connections in the township was in place. The developer met with township officials to discuss possible options for sewer service to an AQC on the property. The township engineer suggested a “pump around” option and conducted a feasibility study that concluded the proposal was viable subject to further testing.

The developer then sought a rezoning to provide for an AQC District. After the township Board of Supervisors (the board) denied the request, the developer submitted plans for a single-family home project that did not require a rezoning but required the township to revise the Act 537 Plan to permit the “pump around” option recommended by the township engineer. In response, the board commissioned the township engineer to conduct a special study to fully assess the “pump around” option. After extended delay and expense, the township engineer ultimately concluded the “pump around” option was not viable. Without publishing the special study for public comment, as required by township procedures, the board accepted the findings of the special study and refused to amend the 537 Plan.

The appellants filed a §1983 civil rights action alleging the township officials violated their substantive due process rights by declining to rezone the property for an AQC by allegedly manipulating the results of the special study, failing to publish the special study for public comment and denying the developer’s proposed amendment to the Act 537 Plan.

In support of their claims, the appellants alleged that prior to his election, one of the supervisors twice attempted to purchase the property. When the appellants refused the supervisor’s offer the second time, the supervisor allegedly told the appellants, “This golf course will never be developed while I’m around.” In addition, the appellants provided vivid e-mails between the township supervisors showing their personal animus and opposition to the project. For example, another supervisor allegedly wrote: “Ahhrrrg!!! This … study better turn out the way we would like. Even if the authority supports a 537 change for technical reasons[,] I will ignore it on the basis of ill conformance to the comprehensive plan, etc.”
Despite clear evidence of personal animus and bias on the part of the township supervisors, including what appeared to be a personal conflict on the part of one supervisor, the district court granted summary judgment against the appellants. The court found although the supervisors’ actions were unprofessional, there was no evidence the supervisors were successful in their efforts to manipulate the results of the special study. On appeal, the Third Circuit Court of Appeals affirmed the district court, holding that as a matter of law, the conduct of the township officials was insufficient to “shock the conscience.”

The decision in Locust Valley leaves open whether §1983 actions against municipal officials for land use decisions are still viable under the “shock the conscience” standard. However, Locust Valley makes clear that vivid e-mails expressing bias and personal animus are insufficient for a substantive due process claim. The Third Circuit indicates that to survive a dispositive motion on a §1983 action against municipal officials, the claimant must provide well-documented allegations of self-dealing, conflict of interest and corruption.

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

Pennsylvania Case of the Month: Lower Makefield Township v. The Lands of Chester Dalgewicz, et al., No. 789 C.D. 2009, Commonwealth Court of Pennsylvania (September 1, 2010)

By Michael J. Kornacki

This case before the Commonwealth Court of Pennsylvania involved the condemnation by Lower Makefield Township of a 166-acre farm for the construction of a golf course on December 6, 1996. An earlier dispute involving this condemnation resulted in a Commonwealth Court ruling on July 11, 2001, that the taking was for a legitimate public use. The matter then went before a Board of View in May 2003. The Board of View valued the property at $3,990,000, and the Dalgewicz family (the condemnees) appealed to the Court of Common Pleas. After a six-day trial in November 2008, a jury awarded the condemnees $5,850,000. The township appealed to the Commonwealth Court, raising four issues. Three of the issues concerned items the court admitted into evidence, and the fourth concerned the granting of a jury trial even though the condemnees failed to request a jury trial when they filed the Notice of Appeal.

The first evidentiary issue involved the court’s admission into evidence of an agreement of sale the condemnees signed on December 16, 1998—two years after the taking—with Toll Brothers, Inc. for the sale of the property. Under that agreement, Toll agreed to pay a base price of $7,000,000 based upon 100 approved building lots. The purchase price would be adjusted in $70,000-per-lot increments if more or fewer than 100 building lots were ultimately approved, with a minimum purchase price of $6,650,000. Toll could terminate the agreement if fewer than 90 building lots were approved. The township argued the agreement should have been excluded because it was executed more than two years after the taking and was thus not proper evidence of the value of the property at the time of the taking.

The Eminent Domain Code provides agreements “made within a reasonable time before or after the condemnation” may be admitted as evidence of value of the property taken (26 Pa.C.S. §1105). Whether an agreement of sale is probative of the value of the property is within the discretion of the trial court. In this case, the Commonwealth Court found the trial court did not abuse its discretion in admitting the agreement. Issues concerning the fluctuation of the market value of the property between the date of taking and the date of the agreement were addressed in testimony at trial. The condemnees offered testimony from both their appraiser and one of the property owners as to the nature of the market, and the township cross-examined both witnesses on the issue of market fluctuations. Because the jury was provided sufficient evidence to put the agreement in context, the court ruled the admission of the agreement was not an abuse of the trial court’s discretion.

The next evidentiary issue concerned the admission of a 1998 letter of intent from Pulte Home Corporation, wherein Pulte offered to purchase the property for $8,000,000. The Pulte letter of intent was admitted through the testimony of one of the property owners, who confirmed the offer was for $72,700 per lot, assuming a minimum of 110 approved building lots. The property owner testified his family rejected the Pulte offer and instead accepted the Toll offer, only because “the family felt more comfortable with Toll Brothers’ ‘reputation’ and its ‘ability to deliver.’” The township argued the letter of intent should have been excluded because it did not result in an agreement of sale.

Under Pennsylvania case law, offers are not generally admissible to prove value because they usually constitute hearsay and are speculative in nature. However, in this case both parties stipulated as to the authenticity of the letter of intent. The court also found the letter of intent had probative value as to the fair market value of the property. The offer was from a national home builder, and there was no evidence of bad faith on the part of Pulte. In addition, because the Pulte offer was a “firm offer that Condemnees could have accepted upon receipt,” it was not merely
speculative. The Commonwealth Court therefore found the trial court did not commit an error in admitting the letter of intent as evidence of value.

The third evidentiary issue involved the introduction of the condemning appraiser’s testimony, which was authored for the township. William Mount was a prior appraiser which was authored for the township. William Mount was a prior appraiser retained by the township and not the appraiser testifying at trial. Generally, an expert report is inadmissible hearsay unless the expert who prepared the report can be cross-examined at trial. However, in this case the condemnee introduced the Mount appraisal in that he believed only 90 lots would be approved as opposed to the 112 lots reflected in the Mount appraisal’s calculations. The appraiser used the Mount appraisal to buttress his own conclusions, and because the township had adequate opportunity to address the issue of the Mount appraisal on redirect examination, the Commonwealth Court found the township was not prejudiced by the introduction of the Mount appraisal and therefore the trial court did not commit an error.

Finally, the Commonwealth Court found even though the condemnees did not properly and formally request a jury trial when they filed their Notice of Appeal (as required by §517 of the Eminent Domain Code), both the condemnees and the township prepared for trial as if it would be a jury trial and referenced the fact it would be a jury trial in correspondence. Only after the township changed attorneys in January 2006 did it raise the issue of the condemnees’ failure to properly request a jury trial. Because the township, in essence, acquiesced to a jury trial through its course of conduct, the Commonwealth Court found the township was not prejudiced in actually having a jury trial. The Commonwealth Court also found §517 of the Eminent Domain Code was not “meant to be construed so rigidly so as to deprive a party of a constitutional right; especially when, as here, the purpose of the provision was otherwise satisfied and the oversight was not a result of questionable conduct or bad faith.” In addition, the township was unable to demonstrate how it was harmed by having a jury trial. Since “there is no inherent prejudice in proceeding to trial by jury as opposed to trial before a judge,” the trial court did not commit an error in allowing a jury trial.

For more information, please contact Michael J. Kornacki at 215.299.2895 or mkornacki@foxrothschild.com.

Commonwealth Court Holds Failure To Raise Constitutional Issues in Initial Case Bars Litigant From Raising in Second Similar Case Under Res Judicata Doctrine

By Kimberly A. Freimuth


In 1999, a landowner erected a 9,750-square-foot non-accessory wall wrap advertising sign on its commercial building without first acquiring a zoning permit. When the landowner finally requested a permit, it was rejected by the city, and the landowner then applied to the Board of Adjustment for a variance. The board granted the variance, but the trial court reversed the board’s decision on the ground the landowner failed to prove an unnecessary hardship. The Commonwealth Court confirmed, noting when the sign was erected the building was 70 to 80 percent occupied by commercial tenants and thus was being put to profitable use, and the loss of sign revenue did not render the building valueless. Alternatively, the landowner also challenged the constitutionality of the city’s zoning code as a prior restraint on commercial speech and as exclusionary zoning. The Commonwealth Court held those arguments were waived because they were never raised before the board.

The subject litigation began in 2005 when the landowner again applied for a zoning permit to erect a 9,750-square-foot non-accessory wall wrap advertising sign on its commercial building. The permit was denied, and the landowner appealed to the board arguing that (1) the code created an unreasonable hardship, (2) the code is unconstitutional because it is exclusionary and restricts freedom of expression, and (3) a variance will not have an adverse impact on the public. The board denied the variance, finding the Commonwealth Court’s decision in the 1999 case was res judicata and the constitutional challenge was without merit. The trial court upheld the board’s decision.

The Commonwealth Court first noted the landowner was requesting a variance for the same size and type of sign that was at issue in the 1999 case. Although the landowner provided evidence that in 2005 the building
was only 60 to 65 percent occupied, as opposed to 70 to 80 percent occupied in 1999, the court determined the record did not demonstrate the existence of any substantial changes in the circumstances relating to the land itself and the building is now, as it was in 1999, occupied by commercial tenants and thus being put to profitable use. The court held the landowner’s entire challenge, including its constitutional arguments, was barred by the doctrine of res judicata. Despite the fact the merits of the constitutional challenge were never discussed in the 1999 case because that issue was deemed waived for failure to be raised at the board level, the court nonetheless held those issues could not be raised in the present litigation and were barred under the doctrine of res judicata because they could have been raised in the 1999 litigation.

The lesson to be learned from this case is that all possible challenges must be raised at the first opportunity to avoid the situation in this case where a landowner was barred from raising issues in a later case that could have, and should have, been raised in the initial case.

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

PADEP Clarifies That UECA Covenant Not Required When Meeting Act 2 Non-Residential Statewide Health Standard

By M. Joel Bolstein

In December 2007, Pennsylvania adopted the Uniform Environmental Covenants Act (UECA). Under UECA, a person remediating contaminated property in Pennsylvania is required to place an environmental covenant in the deed when the remediation requires an activity and use limitation to attain an Act 2 standard. The environmental covenant runs with the land and imposes restrictions on the future use of the property. Many property owners would prefer there not be any environmental covenant in the deed because PADEP typically includes periodic reporting obligations in the covenant that continue in perpetuity.

One of the three remediation standards available to a remediator under Act 2 is the Statewide Health Standard (SWHS), a set of charts that provides cleanup standards based on the media (soil or groundwater) and the property use (residential or non-residential). If a property owner can demonstrate through sampling that the levels of contamination present on a site are at or below the residential SWHS, then under Act 2, no deed notice is required and no covenant is required under UECA because no activity and use limitations are needed to meet the standard. Prior to UECA, when a property met the non-residential SWHS, a notice would need to be put into the deed noting the property had been remediated to the Act 2 non-residential SWHS and restricting future property use to non-residential, absent additional efforts to remediate to the residential SWHS. That notice is considered an institutional control. When PADEP originally interpreted UECA, it decided any institutional control, including a deed notice put in place after an Act 2 remediation to the non-residential SWHS, would be considered “an activity and use limitation” that triggered the need for a UECA covenant. That interpretation has been continually objected to by property developers and the business community.

In August, PADEP revised its fact sheet on UECA and, for the first time, noted a UECA covenant is not required when a remediator uses an institutional control to meet the Act 2 non-residential SWHS. The facts sheets can be found on the UECA page of PADEP’s web site at http://www.portal.state.pa.us/portal/serve r.pt/community/land_recycling_program/ 10307/uniform_environmental_covenants _act/552045.

I expect the UECA regulations, which should be issued in final form very shortly, may further clarify this. The bottom line is you no longer have to submit an environmental covenant when the levels of contamination on a property exceed the residential SWHS but are at or below the non-residential SWHS and you have demonstrated attainment of the Act 2 non-residential SWHS. If one of PADEP’s regional offices directs you to submit an environmental covenant in these circumstances, you should refer them to the revised fact sheet. I am not sure if this means property owners who previously submitted UECA covenants for such properties can remove those from the deed and no longer be obligated to comply with any reporting requirements imposed in the covenant. If you fall into that category and you would like to pursue that, please contact me and I can follow up with Troy Conrad, the Director of the Act 2 Program in Harrisburg.

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

IN THE ZONE

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IN THE ZONE

Timely Appeals Critical With Conditional Deadlines

By Robert W. Gundlach, Jr.

In Coventry Park LLC, et al. v. Robinson Township Board of Supervisors, the Commonwealth Court, in an unpublished opinion, confirmed an applicant is entitled to final subdivision plan approval if the final subdivision plan depicts the same layout as in the “deemed approved” preliminary subdivision plan.

In this case, the applicant obtained a deemed approval of its preliminary subdivision plan. The final subdivision plan was then denied by the Board of Supervisors, as determined by the board, because (1) the plan did not properly depict future phases in compliance of township ordinances, (2) the plan was substantially different from the preliminary plan, (3) the plan did not properly depict the location of an intermittent stream and (4) the length of the proposed cul-de-sac was in violation of township ordinances.

Citing to a Commonwealth Court case from 1993, Annand v. Board of Supervisors, the court held the “final plan need only to be the same plan as the deemed-approved preliminary plan with the additional engineering details required by the subdivision ordinance.”

This case sheds light on an interesting concept when a preliminary subdivision or land development plan is deemed approved. That is, if the applicant requested waivers in the submission of the preliminary plan and such preliminary plan was deemed approved, then the waivers are deemed approved and an applicant need not request those same waivers when submitting the final plan.

We all should be so fortunate as to be able to obtain at least one “deemed approval” of a subdivision or land development plan in our lifetime.

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

Proposed Legislation in Pennsylvania

By David H. Comer

House Bill No. 1394 proposes to expand what is commonly known as Act 319, which allows preferential assessments for land devoted to agricultural use, agricultural reserve use or forest reserve use. The proposed legislation would expand the definitions of “agricultural use,” “agricultural reserve” and “forest reserve use” by allowing the inclusion of “land devoted to the development and operation of an alternative energy system, if a majority of the energy annually generated is utilized on the tract.”

House Bill No. 1394 defines “alternative energy system” as “a facility or energy system that utilizes a Tier I energy source to generate alternative energy. The term includes a facility or system that generates alternative energy for utilization onsite or for delivery of the energy generated to an energy distribution company or to an energy transmission system operated by a regional transmission organization.”

The proposed legislation also provides that “portions of land subject to preferential assessment may be leased or otherwise devoted to a wind power generation system.” Furthermore, while House Bill No. 1394 states roll-back taxes would be imposed upon the portions of land actually devoted by the landowner for wind power generation system purposes and the fair market value of those portions of land shall be adjusted accordingly, the utilization of a portion of land for a wind power generation system would not invalidate the preferential assessment of land that is not so utilized.

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

Merger of Adjoining Undersized Lots and the Absolute Exemption: Landowners, Be Cautious

By Paul P. Padien

The Chester County Court of Common Pleas, in its recently published decision in McCullin v. Zoning Hearing Board of East Bradford Township, 58 Ches. Co. Rep. 203 (2010), has again restated for the benefit of all, the doctrine of merger and the concept of the so-called “absolute exemption” as it relates to undersized lots and the common requirement of the maintenance of single and separate ownership. Common ownership of adjoining lots alone is not sufficient to establish merger...
merger occurs depends upon the facts and circumstances.

Under the doctrine of merger, two adjoining lots may be treated as one lot for zoning purposes “when a zoning ordinance provision causes one or more of the adjoining lots to become undersized.”


The issue presented itself in McCallin, as it has in many other cases around the Commonwealth, when small building lots, legally existing under a prior zoning scheme or in the absence of zoning, become undersized by the imposition of a minimum lot size under a new or amended zoning code. The fate of those building lots and the ability of a current or future owner to build on them are tied inextricably to the terms of the zoning code, whether the new code provides for an exemption for previously existing lots and whether that exemption is a so-called “absolute exemption” that would allow the lot to be used as a building lot in its own right without respect to the common ownership of adjoining lots, or whether the exemption is inapplicable due to its ownership, at the time of the ordinance’s passing or thereafter.

In McCallin, the court considered the fate of an undersized lot, ½ acre in size, that had been in existence prior to the enactment of the township zoning code in 1955. The ordinance passed in 1955 and still in existence requires a minimum of ¾ of an acre size to construct a dwelling, but provided for an exemption that permitted the construction of a “single family dwelling and customary accessory structures to be erected on any single lot of record in existence at the effective date of the ordinance provided that . . . such lot must be in single and separate ownership…. “

The appellant, Mrs. McCallin, and her husband acquired the lot in 1959 and a smaller adjacent one in 1960. After her husband died, Mrs. McCallin transferred one of the lots to her daughter and made application to construct a dwelling on one of the undersized lots.

McCallin made a fairly common argument to the zoning hearing board and on appeal, that the lots were entitled to an “absolute exemption” under the terms of the ordinance and therefore could never lose their status as separate lots and would always qualify for building permits.”

Unfortunately for McCallin, the reliance on the merger doctrine and the so-called absolute exemption was misplaced.

The court rejected McCallin’s argument based on a clear reading of the ordinance and an application of doctrine of merger. Relying on the record below, the court found that title to both lots was in the appellant’s name and before that with her husband, and the lots had been treated as a single lot and utilized as if the lot line separating them did not exist. Despite the appellant’s reliance on the absolute exemption theory, the clear reading of the ordinance required an undersized lot to be in single and separate ownership in order to preserve the exemption.

On the facts, the exemption was arguably lost at the earliest in 1960 when the lots became commonly owned, but certainly when the McCallins commenced their joined use.

The lesson for owners of undersized lots is to read the applicable ordinance and its history precisely, do your due diligence on the ownership history and seek appropriate legal counsel when necessary.

For more information, please contact Paul P. Padien at 610.458.4954 or ppadien@foxrothschild.com.

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NJ Supreme Court Issues Decision on Tideland Claims

By John L. Grossman

A very recent New Jersey Supreme Court decision, City of Long Branch, et. al. v. Jui Yung Liu, et. al., 2010 N.J. Lexis 910 (S. Ct. 2010), decided on Sept. 21, 2010, held that the now-dry land, previously submerged and flowed by tidal waters and replenished with sand during a government-funded beach restoration project (a project that extended the dry land seaward from the previous mean high water mark), remains in trust for the benefit of the people of New Jersey and does not belong to the owner of the contiguous beachfront property. In response to a condemnation action instituted by the municipality, the property owner rejected the municipality’s monetary offer, contended that it owned the now-dry land and sought additional compensation for the now-dry land and for an increase in value of certain personal property attributable to the now-dry land. Those claims were denied by the court for the reasons expressed in the opinion.

The case contains an excellent recitation of the common law principles governing the ownership of tidally flowed lands.

For more information, please contact John L. Grossman at 609.372.2322 or jgrossman@foxrothschild.com.
On June 24, 2010, the Pennsylvania Department of Transportation (PennDOT) released a policy regarding who can be a Highway Occupancy Permit (HOP) applicant for stormwater facility modification or construction within Commonwealth right-of-way.

To aid the regulated community, PennDOT is offering a series of seminars and online webinars to discuss the policy’s impact to certain categories of HOPs involving driveways, surface drainage, subsurface facilities connected to existing drainage facilities that accommodate the roadway and construction of new stand-alone subsurface facilities. The presentations will cover specifically to whom PennDOT can legally issue a HOP under each category.

The major change with this policy is that PennDOT will no longer accept a developer as sole HOP applicant for proposed facilities being attached onto existing drainage facilities within the state’s right-of-way. Municipalities will now be responsible for coordinating these applications. Proposed changes to PennDOT’s Maintenance Manual Drainage Policy will also be briefly discussed during the presentation.

PennDOT encourages local government managers and engineers to attend this webinar to avoid delays in the permitting process. The presentation will be offered at various times during October 2010 in district offices throughout the Commonwealth as well as via the Internet. Pre-registration is required.

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

On August 31, 2010, Pennsylvania’s Environmental Hearing Board (EHB) rendered an adjudication clarifying calculations relative to the Nitrate Mass Balance Equation (MBE) used when determining groundwater impacts caused by the installation of on-lot septic systems.

High levels of nitrates in drinking water are believed to potentially cause health issues for children and pregnant women.

The EHB sustained the Department of Environmental Protection’s disapproval of a land use development planning module that provided for use of on-lot sewage disposal. The EHB found the Department’s approach in analyzing the plaintiff’s planning module and denying it using its MBE was appropriate.

Among other things, the plaintiff unsuccessfully challenged the Department's numerical inputs to the MBE calculations. Namely, the applicant argued the gallons of wastewater produced by a typical home are significantly lower than those proposed by the Department due to population trends indicating reductions to the number of household occupants. Additionally, the concentration levels of the effluent produced were called into question.

Furthermore, the plaintiff attempted to make the case that a change in land use from an actively farmed parcel into a residential development consequently produces lower levels of nitrate contribution to the groundwater.

The EHB found the Department’s numerical inputs to its MBE were all appropriate and reasonable under the circumstance and well-supported by the evidence. In addition, the EHB held the mitigating factors articulated by the plaintiff were rightfully ignored by the Department in reviewing the applicant’s module.

The result of this EHB decision is to validate the methodology the Department has used in evaluating planning modules proposing on-lot septic systems.

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

PA EQB Proposes New Stream Designations

By Robert W. Gundlach, Jr.

The Pennsylvania Environmental Quality Board recently approved proposed regulations that seek to reclassify the water quality of a number of streams in Pennsylvania. The proposal was published in the Pennsylvania Bulletin on September 18, 2010.

This proposal modifies Chapter 93 to reflect the redesignation of the listed streams. The changes include streams being considered for redesignation as High Quality (HQ) or Exceptional Value (EV) waters. The changes provide the appropriate designated use for these streams to protect existing uses. Upon implementation, the changes will result in more stringent treatment requirements for new and/or expanded wastewater discharges to the streams.

The stream redesignations impacted include, in part:
- Buck Hill Creek (Monroe County) from HQ-CWF to EV
- Upper Lehigh River (Lackawanna, Monroe, Wayne, Luzerne Counties) from HQ-CWF to EV
- French Creek (Chester County) from HG-TSF (parts) to EV
- Fishing Creek (Lancaster County) from HQ-CWF to EV
- Little Falls (York County) from WWF to CWF

(See proposed regulations for specific descriptions of redesignations.)

The new regulations will likely result in higher treatment costs for discharges to the respective streams and/or basins. The increased costs may take the form of higher engineering, construction or operating costs for wastewater treatment facilities.

The proposed new designations are currently before the Independent Regulatory Review Commission for consideration. The public comment period is open until November 2, 2010. If finalized, the new designations could take effect in early 2011.

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

EPA Issues Draft Chesapeake Bay “Pollution Diet”

By M. Joel Bolstein

On September 24, 2010, the U.S. Environmental Protection Agency released a draft Chesapeake Bay Total Maximum Daily Load (TMDL), a mandatory “pollution diet” designed to restore the Chesapeake Bay and its vast network of streams, creeks and rivers.

The draft TMDL – which EPA is legally required to produce – sets limits on the amount of nitrogen, phosphorus and sediment pollution discharged into the bay and each of its tributaries by different types of pollution sources. It is designed to meet water quality standards that reflect a scientific assessment of the pollution reductions necessary to restore the health of the bay ecosystem.

The draft TMDL calls for 25 percent reductions in nitrogen and phosphorus and at least a 16 percent reduction in sediment to achieve a healthy bay and local rivers. These reductions, which the science indicates are necessary to achieve a healthy watershed, would be achieved by a combination of federal and state actions.

Development of the draft TMDL followed careful EPA review of pollution reduction measures proposed by the states and the District of Columbia earlier this month in their Watershed Implementation Plans.

As a result, the draft TMDL allocations reflect a combination of defined state commitments and supplemental EPA measures that tighten controls on permitted “point sources” of pollution, such as wastewater treatment plants, large animal agriculture operations and municipal stormwater systems.

The release of the draft TMDL begins a 45-day public comment period that will include 18 public meetings in all six watershed states (Virginia, Maryland, Pennsylvania, Delaware, New York and West Virginia) and the District of Columbia. A full public meeting schedule, including registration links for online broadcast, is available on the Bay TMDL web site.

The TMDL is designed to ensure all pollution control measures to fully restore the bay and its tidal rivers are in place by 2025, with 60 percent of the actions completed by 2017. The final TMDL will be established December 31.

For more information, please contact M. Joel Bolstein at 215.918.3555 or jbolstein@foxrrothschild.com.
Permit Extension Legislation May Help Postpone Need for Mandatory Sprinklers

By Kimberly A. Freimuth

On January 1, 2011, Pennsylvania’s statewide building code will require the inclusion of sprinklers in new single family homes. Mandatory residential sprinklers are included in the 2009 International Residential Code, which contains a phase-in for single family homes beginning 2011. However, for those home builders nearing the construction phase, the recently enacted Act 46 of 2010 — also known as the Permits Extension Legislation (see Section 1601-I) — may offer some minimal relief. Act 46 extends the permit conditions for approvals and permits issued during its so-called “extension period,” which covers the time period from January 1, 2009, through July 1, 2013. Any building permits issued during this time period are relieved until July 2013 from the typical building code requirement to begin and maintain construction activities within 180 days of permit issuance.

Therefore, if a building permit is issued prior to the January 1, 2011, phase-in of mandatory sprinklers for single family homes, permit holders are held to the current building code standards until July 2013. This provision translates into an applicant’s ability to potentially receive a building permit under today’s no-sprinkler requirement and hold it for several years without risk of the permit lapsing or the incorporation of mandatory sprinklers.

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