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In the Zone

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Philadelphia Stories: Three Steps Toward the New Historic City

By Gregory J. Kleiber



In the past few months, we have had the opportunity to represent clients in three very different ventures, each of which sheds light on the history, and the future, of the City of Philadelphia and the entire Delaware Valley.

The longest-running of the three is the acquisition and redevelopment of portions of the former Philadelphia Civic Center site by our client, The Children's Hospital of Philadelphia. CHOP is widely recognized as the finest children's hospital in the United States, and with that recognition has come major growth and a pressing need for clinical, research and office space. CHOP's main hospital campus abuts the Hospital of the University of Pennsylvania, and space for growth nearby has hence been hard to find. Directly across Civic Center Boulevard from both institutions was the Philadelphia Civic Center, a collection of tired, older buildings that fell into total disuse when the Pennsylvania Convention Center was completed in 1993. Working closely with the Philadelphia Authority for Industrial Development, CHOP and the University of Pennsylvania each acquired a portion of the Civic Center site. Many months of hard negotiations were needed before CHOP and the University could close on the acquisition of their respective portions of the site. The old buildings then took more months to demolish, followed by yet more months of construction, with CHOP's state-of-the-art medical research building, the Colket Translational Research Building, formally opening in June 2010.

The entire process—acquisition, development, financing—was spearheaded by Fox lawyers. In coming years, CHOP plans to build a new ambulatory center adjacent to the Colket Center, and with the University actively developing next door, the entire Civic Center property will have been transformed into one of America's finest medical campuses. Meantime, with an eye to further growth opportunities, CHOP has acquired a string of properties located across the Schuylkill River just south of the South Street bridge for future development.

The second major venture is taking place across the City in Frankford, in Northeast Philadelphia, at another old Philadelphia landmark undergoing radical reinvention: the Frankford Arsenal. The Arsenal was founded in 1816 by the U.S. Army following the War of 1812 to produce ordinance for the armed forces of the United States. It grew steadily over the years, and by the 1940s played a leading role in manufacturing munitions for the Allies in World War II. But by 1980, the Arsenal had outlived its utility for the Army, and the entire enormous site—83 acres with more than 60 buildings—was acquired by Arsenal Associates. In the recent past, the southern side of the Arsenal, where the old Army buildings were better preserved, has been converted by Fox lawyers to condominiums, and two major charter schools are now operating in the heart of the campus. The northern half of the Arsenal, with its older, more decrepit buildings, needed a different approach, however. Its location—adjacent to exit and entrance ramps for Interstate 95—makes it

ideal for redevelopment as a major retail center, to be called The Shopping Center at the Arsenal. In July 2010, at a ceremony attended by Philadelphia Mayor Michael Nutter and many other dignitaries, the demolition of the buildings in the northern half of the Arsenal officially commenced.

As with CHOP at the Civic Center, the land being redeveloped for The Shopping Center at the Arsenal is being recycled from an obsolete to contemporary use, with no displacement of residents or loss of farmers' fields or open space. As pressure grows to limit suburban sprawl, developments like these are even more important.

Finally, the third venture is smaller in physical scope but encompasses even more of the history of Philadelphia, in this case essentially all of it: the top-to-bottom renovation of the Philadelphia History Museum's historic Atwater Kent building at 7th and Market Streets. Built in 1817 by John Haviland, one of Philadelphia's premier architects, the Museum's building was the original home of the Franklin Institute. It was acquired by industrialist Atwater Kent in 1934, when the Franklin Institute relocated to its home on the Parkway, and devoted to use as the City's history museum. The building has ever since housed the City's official history collection, encompassing thousands of artifacts. I have led the reconstruction effort as president of the board of trustees of the Museum for the past three years. While the renovation was conceived and designed, the necessary funds were raised, and at last the work went ahead, with completion scheduled for August 2010.

The Philadelphia History Museum will then have a museum quality, climate-controlled environment in which to display such iconic objects as the massive double desk where George Washington worked as President of the United States.

Three projects, all steeped in history, all completely contemporary, all pointing toward the brighter future of the City of Philadelphia.

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Timely Appeals Critical With Conditional Deadlines

By **Robert W. Gundlach, Jr.**



Dietrich v. Buffalo Tp. Planning Com'n, 995 A.2d 893, Pa.Cmwlt., May 18, 2010 (No. 683 C.D. 2009)

In this case, the applicant submitted an application to build a swine barn on their property. The proposed barn would consist of 69,500 square feet and house 8,800 swine. The applicant subsequently revised their plans in response to the comments of the township engineer. At its September 29, 2008, meeting, the Township Planning Commission voted to grant conditional approval of the plan.¹ By letter dated October 8, 2008, the Commission notified the applicant of its decision and gave them until October 29, 2008, to accept the five conditions outlined in the letter, stating “failure to do so will nullify this conditional approval on October 29, 2008.” On October 16, 2008, the applicant sent the Commission a written response stating they had no objection to the first four conditions but they believed the fifth condition was unreasonably vague and arbitrary. This condition stated “resolve safety issues concerning Baker Hollow Road and Snake Hill Road to the satisfaction of the Township Supervisors.”

The Township Planning Commission did not respond to the applicant’s request for further clarification of condition number five, but instead, at its next meeting on October 27, 2008, voted to deny approval of the plan for multiple reasons. On October 29, 2008, the deadline for

acceptance of the conditions, the applicant filed a land use appeal challenging the legality of condition number five as arbitrary, unreasonably, unsupported by substantial evidence and not calculated to effectuate a legitimate purpose of the ordinance. Thereafter, on October 30, 2008, the Commission issued a written decision denying approval of the plan citing multiple reasons. On October 26, 2008, the applicant filed a second appeal challenging the Commission’s written denial, specifically claiming the Commission had no authority to deny approval of the plan before the deadline for acceptance of the initial conditions and the specific deficiencies cited in the denial letter had not been raised as part of the conditional approval.

On appeal, the trial court deemed the first appeal as moot and affirmed the Township Planning Commission’s denial of the plan by concluding such denial was supported by substantial evidence.

On appeal to the Commonwealth Court, the applicant argued the trial court incorrectly deemed their first appeal moot and, thus, erred in failing to consider the first appeal on its merits.²

In response, the court concluded the applicant acted properly in filing an appeal from the conditional approval and the first appeal was not rendered moot by the Commission’s subsequent written denial of the plan. In fact, the Commonwealth Court found the Commission acted in bad

faith in issuing its denial under the circumstances, citing to *Highway Materials, Inc. v. Board of Supervisors of Whitmarsh Township*, 974 A.2d 539 (Pa.Cmwlt. 2009).

Because the applicant filed a timely appeal from the conditional approval before the Township Planning Commission issued its written denial, the trial court had jurisdiction to consider the merits of that appeal and should have done so. Accordingly, the Commonwealth Court vacated the trial court’s order and remanded the case back to the trial court for consideration of the applicant’s first appeal on its merits.

Upon receipt of a conditional deadline, which contains a deadline for acceptance of the conditions, it is important for an applicant who does not agree with one or more of the conditions and cannot timely resolve them with the governing body to appeal that decision before the expiration set forth in the decision for the acceptance of the conditions. Query how the court would handle a case where the governing body grants a conditional approval with (1) a statement that if the applicant did not agree to the conditions the plan would be deemed denied, and (2) a detailed summary as to the reasons for denial.

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¹ The deadline to render a decision on the pending land development application was scheduled to expire on September 29, 2008.

² In their brief, the Dietrichs also raise the follow two issues: (1) If the trial court is correct that the Dietrichs’ October 16, 2008, letter nullified the BTPC’s conditional approval of the Plan, are the Dietrichs entitled to a deemed approval since the BTPC failed to issue a decision within 90 days after submission of the Plan? (2) Even if the trial court were procedurally correct in addressing only the Dietrichs’ Second Appeal, did the trial court err in upholding the BTPC’s denial of the Plan based on alleged deficiencies that were unsupported by substantial evidence? (See Dietrichs’ Brief at 4.) Because we conclude that the Dietrichs’ first claim has merit, we need not address these remaining issues.

Beware Razing Building When Seeking Relief From Nonconforming Use

By **Clair E. Wischusen**



Keebler v. Zoning Bd. of Adjustment of City of Pittsburgh, --- A.2d ----, 2010 WL 2572863, Pa.Cmwlth., June 29, 2010 (No. 1287 C.D. 2009) (no published citation yet)

In this case, the applicant filed an application with the ZHB seeking a special exception to change a previously recognized nonconforming commercial use into a proposed nonconforming use of residential dwellings and garage spaces. The last existing use of the subject property on record with the zoning administrator is that of a police station jail. Prior to filing its application for a special exception, the applicant razed the building but left the foundation.

In its decision, the ZHB noted that, prior to the building being razed, the property was a nonconforming use but upon razing of the building, the property abandoned its status as a nonconforming use. The board then found, although the special exception

requested by the applicant cannot be granted under a theory of a change in a nonconforming use, the applicant was entitled to a use variance. Objectors filed an appeal claiming the ZHB failed to provide them with an opportunity to be heard with respect to the variance. The trial court affirmed the decision of the ZHB and the objector's appeal to the Commonwealth Court.

In its decision, the Commonwealth Court first referenced a holding in a prior decision, *Appeal of Booz*, 533 A.2d 1096 (Pa.Cmwlth. Court 1987), wherein the court held "where, as here, the application of an alternate legal theory is first undertaken by the board at the time of deliberation, the board must likewise provide notice and an opportunity to be heard to any objectors who entered such an appearance at the first hearing." Based on this holding, the Commonwealth Court vacated and remanded the case back to the trial court with instructions that it remand the case back to the ZHB in order to

afford objectors an opportunity to present evidence in opposition to the requested use variance. The Commonwealth Court also concluded the applicant abandoned its nonconforming use upon razing the building and found that "while proof of intent to relinquish the use voluntarily is necessary in an abandonment case, such proof is not necessary where the structure is destroyed because the right to reconstruct the structure is extinguished by aberration of law," citing *Korngold v. Zoning Board of Adjustment of the City of Philadelphia*, 606 A.2d 1276 (Pa.Cmwlth. Court 1992).

Based on this case, it is clear that an applicant attempting to obtain relief by arguing it is changing the use of a property from one nonconforming use to another nonconforming use should never raze the building prior to obtaining this requested relief.

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Delaware Legislative Update: *McCray, et al. v. Fidelity National Title Insurance Company, et al.*

By **Michael J. Isaacs**



The U.S. District Court for the District of Delaware recently ruled that Delaware title insurance companies' collective rate setting practices are governed by the state laws of Delaware and are thus exempt from the provisions of the Sherman Act.

The plaintiffs in this case brought an action against 20 defendants, which included title insurance companies and the State of Delaware Insurance Rating Bureau, alleging the title insurance companies conspired with one another to fix the price of title insurance in Delaware.

The plaintiffs claim violations of the federal antitrust law (the Sherman Act).

In Delaware, the Department of Insurance regulates title insurance. Title insurers must file their rates with the Department of Insurance (DOI). This may be done through membership in a licensed rating bureau. The filed rates may be charged unless the Delaware Insurance Commissioner disapproves the rate. In this case, the only rate filing with the DOI was effective as of February 1, 2004.

The plaintiffs alleged the title insurers in Delaware set uniform rates that have not changed since 2004 and claimed the

Sherman Act is not preempted by the McCarran-Ferguson Act, which confers antitrust immunity over the "business of insurance" to the extent it is regulated by state law so long as the conduct is not an "agreement to boycott, coerce or intimidate." The defendants contended the plaintiffs' claim is barred by the McCarran-Ferguson Act as well as other doctrines.

The court found that the plaintiffs' Sherman Act claims challenge the rate making process for title insurance in Delaware. Delaware law permits title insurance companies to comply with the rate filing requirements through membership in a licensed rating bureau,

and in Delaware, the DOI regulates title insurance. Accordingly, the court found the defendants collective rate setting practices are the “business of insurance,”

and Delaware law governs these practices. Thus, the McCarran-Ferguson Act’s exemption provision bars the plaintiffs’ Sherman-Act claim.

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A Landlord’s Duty To Mitigate in a Commercial Context

By **Melvyn J. Tarnopol**



A recent unpublished case, *Cheesequake Realty, L.L.C. v. Finkelstein, et al.*, Superior Court of New Jersey, Appellate Division, Docket No. A-1877-08T3, 2010 N.J. Super. Unpub. LEXIS

1788 (July 28, 2010), touches on a landlord’s duty to mitigate in a commercial context.

In *Cheesequake*, the tenant vacated its leased premises approximately two years before its lease expired. There was a dispute between the landlord and the tenant as to whether the tenant had the right to vacate the leased premises. In any event, upon the tenant’s vacating of the leased premises, the landlord made no effort for the balance of the term of the lease to relet the premises. More specifically, a subtenant at a portion of the premises had received many phone calls from persons expressing interest in leasing the leased premises, which the subtenant relayed to the landlord. However, the landlord informed the subtenant that the landlord “could not do anything” until the tenant’s lease expired, and instructed the subtenant “not to bother telling him about future inquiries.” *Id.* at 8. The landlord also admitted at its deposition it had not tried to get new tenants for the property until the tenant’s lease was up. *Id.* The trial judge granted summary judgment in favor of the tenant (and the Appellate Division, in this case, affirmed) on the grounds the landlord had not presented any evidence that would permit a jury to find the landlord made any effort to mitigate its damages.

The court held “a landlord’s total failure of effort to mitigate damages by seeking

another tenant warrants entry of judgment in favor of the tenant on a landlord’s claim for rent due after surrender of the property.” *Id.* at 10.

The seminal case on the issue of a landlord’s duty to mitigate in a commercial context is *McGuire v. Jersey City*, 125 N.J. 310 (1991). In *McGuire*, the New Jersey Supreme Court noted that in *Sommer v. Kridel*, 74 N.J. 446 (1977), it was held that a residential landlord must mitigate damages arising from the breach of the lease by reasonable attempts to relet the premises. In *McGuire*, the court chose to extend a landlord’s obligation to mitigate damages in the residential context to a similar obligation to mitigate damages in a commercial context. Thus, the landlord bears the burden of demonstrating actions taken to mitigate damages. *Id.* at 316.

It is interesting to note that in *McGuire*, the court did not need to reach the question of whether the law requires mitigation of damages in a commercial context, since the lease in question contained an express provision that the landlord was to “take all reasonable steps to relet the leased premises in order to mitigate the damages or loss which may be charged to the lessee.” *Id.* at 316. Nonetheless, the court chose to hold that New Jersey law requires mitigation of damages in a commercial context.

Earlier, in *Fanarjian v. Moskowitz*, 237 N.J. Super. 395 (1989), the Appellate Division, without relying on any specific provision in the lease requiring the landlord to mitigate damages, had elected to extend the landlord’s obligation to mitigate damages from the residential context to the commercial context. In *Fanarjian*, the Appellate Division cited public policy

considerations consisting of denying the injured party the opportunity to sit idly by and exacerbate damages; discouraging economic and physical waste; and encouraging the vacant property be put to a practical use as soon as possible. *Id.* at 404. However, the Appellate Division in *Fanarjian* stated it “need not decide in this appeal whether under contract principles the parties to a commercial lease can contract away the mitigation of damage requirement” and stated it would “leave that determination for a case in which the issue is squarely presented.” *Id.* at 406.

Although this question has not subsequently been explicitly dealt with by New Jersey courts, it is likely that New Jersey courts would hold that a landlord and tenant have the right to negotiate a provision to the effect that the landlord has no duty to mitigate damages in a commercial context. Certainly, this is a common provision in landlords’ forms of commercial leases.

From a landlord’s standpoint, a landlord will want an explicit provision to the effect that it does not need to mitigate damages.

From a tenant’s standpoint, if confronted with such a provision, the tenant will counter that the landlord be obligated to exert reasonable efforts in mitigation of damages. This dynamic can result in a provision defining and describing exactly what efforts a landlord has to take to be considered to have been reasonable. Among other possible protections, landlords will seek a provision that:

- (1) Limits the landlord’s financial obligation to fit out the premises for a new tenant;

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- (2) Requires delivery of the premises before the obligation to mitigate commences;
 - (3) Permits landlord discretion as to the type of use for a new tenant and the caliber of the new tenant;
 - (4) Permits the landlord to lease vacant space in preference to releasing the premises; and
 - (5) Permits the landlord to honor any restrictions contained in leases for other space in a development.
- If representing a tenant and if there is no express provision in the lease permitting the landlord not to mitigate damages, it is best for the tenant to remain silent and not raise the issue, since in *McGuire*, the New Jersey Supreme Court held that the

landlord has a duty to mitigate absent an express provision to the contrary.

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Proposed Legislation in Pennsylvania

By David H. Comer



Senate Bill 1357 proposes to establish an unelected, statewide boundary review commission to review and make recommendations to the General Assembly for the merger, consolidation or annexation of municipalities. The boundary review commission would be in charge of recommending boundary changes to the General Assembly and affected local governments.

Interestingly, as I [wrote previously](#), House Bill 2431 proposes to make the county the basic level of government. There currently are more than 2,500 municipalities in Pennsylvania; there are 67 counties. Representative Thomas Caltagirone of Berks County introduced House Bill 2431, which would provide the county as the basic unit of local government with jurisdiction over: (1) personnel, (2) law enforcement, (3) land use, (4) sanitation and (5) health and safety. In essence, the

proposal would eliminate townships, cities and boroughs as they currently exist, and, in turn, counties would oversee operations on a much broader scale.

It will be interesting to see if either Senate Bill 1357 or House Bill 2431 gains any significant support.

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Recent NJ Appellate Court Decision Creates Conditional Use Ordinance Conundrum for Land Use Lawyers

By Henry L. Kent-Smith



A recent Appellate Division case has created a conundrum for land use lawyers in New Jersey faced with conditional use ordinances that may arguably be ambiguous or otherwise of questionable legality. In *Jackson Holdings, LLC v. Jackson Township Planning Board*, 2010 W.L. 2756763 (approved for publication) (N.J. App. Div., decided July 14, 2010), the Appellate Division held that where a trial court believes a conditional use ordinance may be of questionable legality because it fails to provide clear and ascertainable standards to guide the decision of the board, it is incumbent upon the parties and the trial court to join the township governing body as a party to ascertain the validity of the conditional use ordinance. This requirement creates a conundrum for land

use practitioners. To understand this conundrum, a little background is necessary.

In New Jersey, conditional use ordinances are specifically permitted by the Municipal Land Use Law, N.J.S.A. 40:55D-67. A conditional use is a use permitted anywhere in a zone subject to demonstration of compliance with specific conditions applicable solely to that use. Historically, conditional use ordinances have been utilized to regulate uses such as gasoline service stations, fast food restaurants or other similar type uses with characteristics that require unique land use regulation.

Courts have required conditional use ordinances to set forth “definite specifications in standards” in order to constitute a valid conditional regulation. See *PRB Enterprises Inc. v. South Brunswick Planning Bd.*, 105 N.J. 1, 7-10 (1987). The court’s holding arises directly from the

express language of the Municipal Land Use Law governing conditional use regulations that require “the zoning ordinance may provide for conditional uses to be granted by the Planning Board according to ‘definite specifications in standards which shall be clearly set forth with sufficient certainty and definitiveness to enable the developer to know their limit and extent.’” See N.J.S.A. 40:55D-67(a). Conditional use ordinances that do not provide sufficiently definite specification and standards or are not sufficiently certain are not valid conditional use regulations. *PRB Enterprises*, supra, 105 N.J. at 8.

The *Jackson* case involved a residential development in the RG-2 Regional Growth Zone. The *Jackson* ordinance permitted the Planning Board to grant higher density residential development in any part of the zoning district served by a

public sanitary sewer system. The ordinance designates the higher density development areas as a conditional use in its ordinance. The conditional use standards require that the board find the proposal (1) is not inconsistent with and will not create traffic hazards or adversely affect traffic patterns established by the surrounding developments; and (2) the proposal is consistent with the intent and purpose of the Master Plan and Pinelands Comprehensive Management Plan. If the Planning Board makes these findings and the developer uses Pinelands development credits to authorize the increased density, a developer may construct up to three units per acre on lots as small as 9,000 square feet.

Jackson Holdings proceeded under this conditional use standard seeking an approval for a 493 single family residential lot development on a 303-acre property. The development proposed 393 9,000-square foot building lots and 100 10,200-square foot lots.

After three hearings, the Planning Board denied the application. The Board based its finding on its determination that Jackson Holdings had failed to demonstrate its proposal was consistent with the Pinelands Comprehensive Management Plan as it has not obtained a “consistent” Certificate of Filing from the Pinelands Commission. The Board also found the developer had failed to address the issue of the presence of a northern pine snake on the development site. Finally, the Board found that Jackson Holdings’ proposed development would create additional traffic hazards and adversely affect traffic patterns in the area. On these grounds, the Board concluded that Jackson Holdings found and failed to meet the conditions necessary for the grant of conditional use approval and denied the application.

Jackson Holdings filed a lawsuit challenging the Planning Board’s determination. The trial court concluded there was a substantial question as to the validity of Section A of the Conditional Use Ordinance regarding the proposed

development not creating adverse traffic hazards or conditions. In particular, the court found the traffic hazard language under Ordinance 109-81D(2)(a) provided the Planning Board with no definite specifications or standards to guide the Board in the evaluation of whether traffic hazards exist or whether the proposed development would adversely affect traffic patterns. Notwithstanding the trial court’s questioning of the validity of that ordinance’s standards, the trial court concluded Jackson Holdings had presented compelling, uncontroverted evidence to support the conditional use variance and the Planning Board’s denial was arbitrary, capricious and unreasonable.

On the Planning Board’s appeal of the trial court’s decision, the Appellate Division specifically addressed the following question: “If a court hearing an action in lieu of prerogative writs challenging the grant or denial of a development approval concludes that there is a substantial question concerning the validity of the zoning ordinance under which that approval is sought, does the court have an obligation to raise the question of the validity of the ordinance and require joinder of the municipal governing body in the action?” The Appellate Division held that where a trial court finds a conditional use ordinance creates a substantial question as to whether an ordinance condition is valid under the Municipal Land Use Law, the trial court is required to conduct a plenary hearing to determine whether the ordinance provision is in fact compliant with the Municipal Land Use Law. This issue of the validity of the conditional use ordinance must be determined prior to the underlying review of the planning board action.

In many prerogative writ actions, the action is brought between the applicant/objector plaintiff/defendant and the municipal planning board. In those incidents where there is a challenge to the validity of an ordinance section as a result of this case, it will be necessary to join the township governing body as a party, as the township

governing body must defend the validity of its ordinance.

The implications of the *Jackson Holdings* decision are substantial. First, land use practitioners should advise their client as to whether the conditional use ordinance under which an application is being proposed contains provisions that may be of suspect legality. Second, in the event of a board action and subsequent appeal, the question of the ordinance validity may require that the governing body be brought in as party and a trial *de novo* occur regarding whether that conditional use provision in question is compliant with the Municipal Land Use Law. In the event the ordinance condition is found to be arbitrary, the normal procedure would be for the trial court to remand the ordinance back to the governing body for further consideration as to whether any modifications to the ordinance are necessary in order to permit the legislative body to take its action. Obviously, this has an enormous potential to create significant delay. It also provides an issue for an objecting party to raise to both delay and potentially challenge a conditional use ordinance through subsequent legislative review. The Appellate Division ended its opinion with a cautionary note that the issue of the validity of the ordinance section can not be a “spurious challenge to the validity of the zoning ordinance,” and noted it is the trial court that must make the preliminary determination as to whether there exists a substantial question as to the validity of the ordinance and not a party to the action. However, given the enormous inertia present in New Jersey Zoning and Land Use Regulation, it is probable that numerous conditional use ordinances contain conditions of suspect legality. Therefore, a party may raise these issues in an appeal process in order to delay or potentially thwart what would be otherwise a permissible conditional use application.

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PaDEP and DCED Publish Notice of Approvals Impacted by Permit Suspension Legislation and PaDEP Issues Guidance

By Kimberly A. Freimuth



On July 6, 2010, Pennsylvania Governor Edward Rendell signed the Fiscal Code Bill ([Senate Bill 1042](#)), providing, in part, for the automatic suspension, during the “extension period” (which begins after December 31, 2008, and ends before July 2, 2013), of approvals granted by a government agency for or in effect during the extension period, whether obtained before or after the beginning of the extension period. This new legislation is a welcome relief, and significant benefit, to Pennsylvania developers and landowners hurt by the recession. Significantly, certain permits and approvals that may have expired since

December 31, 2008, may no longer be considered to have expired, but have been suspended since January 1, 2009, thereby buying a developer or landowner significant additional time.

In accordance with the requirements of the legislation, municipalities and other government agencies had until August 5, 2010, to publish notice in the Pennsylvania Bulletin of the applicability of the extension period to approvals they have granted.

In response, both the Pennsylvania Department of Environmental Protection (PaDEP) and the Department of Community and Economic Development (DCED) have published their lists in the Pennsylvania Bulletin. PaDEP’s list may be

[viewed here](#), and the DCED list may be [found here](#).

In addition, PaDEP published specific “[Guidance for Implementation of Act 46](#),” which provides specific information on PaDEP’s verification process. Specifically, PaDEP advised that holders of approvals should not assume that an expiration date has been extended unless it is listed in the guidance document *and* the holder has received verification pursuant to PaDEP’s outlined procedure.

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Negotiating Prepayment Penalties

By Lauren W. Taylor



Many borrowers seeking to sell or refinance their existing commercial mortgages are now finding themselves face to face with giant prepayment penalties. While you can attempt to negotiate with your lender for a waiver or reduction of the prepayment penalty when you are refinancing or selling the property, the best time to negotiate prepayment penalties is **before** you sign the loan documents.

There are a number of ways to make your prepayment penalty less costly:

- **Types of Prepayment Penalties**

Before you agree to a prepayment penalty, you should be certain that you understand how it will be calculated. Lenders use several types of methods to calculate prepayment penalties. For instance, lenders may charge a flat fee or a fixed percentage of the outstanding loan balance at the time of prepayment. Lenders may also use a yield

maintenance formula, which basically results in the lender receiving all the interest it would have received had the loan not been prepaid. Yield maintenance formulas are complex and can be difficult to calculate, so it is important borrowers understand how they work before agreeing to a prepayment penalty based on such a formula. It may make sense to crunch some numbers upfront so you can quantify the prepayment penalty before agreeing to it.

- **Term of Prepayment Penalties**

Shortening the term for which prepayment penalties apply can also decrease the cost of prepayment penalties. Ideally, your prepayment penalty will decline or disappear with the passage of time. For instance, you may be able to negotiate a prepayment penalty that starts at five percent but declines by one percent annually and then remains at one percent through the final year of the loan term – or disappears altogether.

- **Excluded Transactions**

There are several circumstances where a lender may agree upfront that the prepayment penalty should not apply: for example, if you are prepaying your loan in connection with a refinancing with the same lender or you are selling the property to a third party. In addition, you should attempt to exclude the situation when the mortgage debt is accelerated as the result of the borrower’s default in making the mortgage payments.

Unfortunately, it is not uncommon for borrowers to give prepayment penalties little thought until it comes time to sell the property or refinance the loan. But by negotiating the terms of prepayment penalties upfront, you can save money down the road.

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EPA Holds Sessions on Potential Revisions to Water Quality Standards Regulation

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



The U.S. Environmental Protection Agency (EPA) recently held two [public listening sessions](#) on potential changes to the water quality standards regulation before proposing a national rule. The [current regulation](#), in place since 1983, governs how states and authorized tribes adopt standards needed under the Clean Water Act to protect the quality of their rivers, streams, lakes and estuaries. Potential revisions include strengthening protection for water bodies with water quality that already exceeds or meets the interim goals of the Clean Water Act; ensuring standards reflect a continued commitment to these goals wherever

attainable; improving transparency of regulatory decisions; and strengthening federal oversight.

Water quality standards are the foundation of the water quality-based approach to pollution control, including Total Maximum Daily Loads and National Pollutant Discharge Elimination System permits. Standards are also a fundamental component of watershed management.

The public listening sessions were held via audio teleconferences on August 24 and 26, 2010, from 1 p.m. to 2:30 p.m. EDT. At the sessions, the EPA provided a review of the current regulation and a summary of the revisions the agency is considering. Clarifying questions and brief oral

comments (three minutes or less) from the public were accepted at the sessions, as time permitted. The EPA will consider the comments received as it develops the proposed rulemaking.

The EPA expects to publish the proposed revisions to the water quality standards regulation in summer 2011.

For additional information on water quality standards regulatory changes, visit <http://www.epa.gov/waterscience/standards/rules/wqs/>

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EPA Storm Water Rules Sent Back to Drawing Board

By **M. Joel Bolstein**



In a major victory for affordable housing, sound science and more sensible regulations, the U.S. Environmental Protection Agency has been forced to withdraw a key portion of new storm water management regulations for builders and developers and devise new ones based on better research.

The move is the result of a lawsuit filed by the National Association of Home Builders (NAHB) and petitions filed by both NAHB and the federal Small Business Administration (SBA) Office of Advocacy asking the agency to revise its new Effluent Limitation Guidelines (ELGs) for the construction and development industry.

In these new regulations, the EPA set a numeric limit on the amount of sediment that can cloud the water that both NAHB and SBA claimed was arbitrary and based on flawed analyses.

The Justice Department asked the EPA to defend the numeric limit. The EPA was forced to admit several flaws in the final rule and that it had improperly interpreted the data. As a result, the Justice Department filed a motion with the Seventh Circuit Court of Appeals asking it to vacate the numeric limit and place a hold on the litigation until February 2012, while the EPA goes back and develops a numeric limit builders can actually comply with.

Published in December 2009, the ELGs imposed a nationally applicable—and potentially impossible-to-meet—limit of 280 “turbidity units” on storm water discharges from construction sites disturbing 10 or more acres of land at one time.

While the ruling removes the numeric limit, the other requirements of the ELGs remain in place. The EPA is expected to issue interim storm water management guidance for construction site operators as the agency works to refine the rule.

For more information, please contact [M. Joel Bolstein](#) at 215.918.3555 or jbolstein@foxrothschild.com.

Challenge to PA Building Code Falls Short

By **Robert W. Gundlach, Jr.**

In its effort to reform the manner by which Pennsylvania adopts its statewide building code, the [Pennsylvania Builders Association](#) filed suit against the

Department of Labor and Industry earlier this year. On August 25, 2010, the Commonwealth Court [ruled](#) on that challenge in favor of the state.

The crux of PBA’s argument was that the [Pennsylvania Construction Code Act](#) (PCCA), enacted in 1999, improperly vests legislative authority with a third party, the

[International Code Council](#) (ICC), instead of with the General Assembly in violation of Article II, Section 1 of the Pennsylvania constitution.

Pursuant to Section 304(a) of the PCCA, the Department of Labor and Industry is mandated to promulgate regulations by December 31 of each year that the ICC model codes are modified, in order to likewise update the state's [Uniform Construction Code](#) (UCC). Consequently, the Department of Labor and Industry amends its regulations to adopt the newest editions of the codes without going through the typical notice-and-comment rulemaking.

In 2008, the state legislature created and the governor appointed representatives to a [Review and Advisory Council](#) (RAC) to examine and potentially exclude code provisions from Pennsylvania's UCC.

In deciding this case, the court found the ICC wielded extraordinary power over the codes adopted pre-RAC (e.g., 2006 IRC, etc.). Such code adoption could have possibly been unconstitutional. However, in light of the legislature's creation of the RAC, a mechanism existed to examine the reasonableness and feasibility of any new building codes. Since the state was not obligated to adopt the latest ICC codes "sight unseen," no violation presently

exists for the adoption of the current 2009 I-codes.

As a result of this ruling, the 2009 building codes will remain in effect, including the 2011 phase-in of sprinklers for single family homes. The next code adoption cycle is scheduled to occur on December 31, 2012, with the 2012 I-codes.

For more information, please contact [Robert W. Gundlach, Jr.](#) at 215.918.3636 or rgundlach@foxrothschild.com.

Neshaminy Creek Watershed Plan Approved by Bucks Commissioners

By **Carrie B. Nase**



On August 18, 2010, the Bucks County Board of Commissioners approved the [Stormwater Management Plan](#) for the Neshaminy Creek Watershed. The watershed encompasses 41 municipalities across Bucks and Montgomery counties.

The storm water plan was developed in accordance with the requirements of the Pennsylvania Stormwater Management Act, Act 167 of 1978. According to Act 167,

each county must prepare a storm water management plan for each of its designated watersheds in consultation with the municipalities within the boundaries of the watershed.

The Neshaminy Creek Watershed plan was last updated in the mid-1990s.

The current plan analyzed the hydrologic flows within the watershed and developed model ordinance provisions aimed at managing storm water as well as establish minimum standards for affected

municipalities. Such standards include volume control criteria for water quality protection and groundwater recharge; peak rate controls for accelerated runoff; and computational methodologies for storm water management measures.

The respective municipalities have six months to adopt the base elements of the Act 167 plan.

For more information, please contact [Carrie B. Nase](#) at 215.299.2030 or cnase@foxrothschild.com.

PA Labor & Industry Rules on Excessive Building Code Ordinance

By **Kimberly A. Freimuth**

On August 18, 2010, the Pennsylvania Department of Labor and Industry [ruled on the validity](#) of a Roaring Brook Township, Lackawanna County building code ordinance. The township ordinance, enacted on October 1, 2009, required that plans be sealed by a licensed design professional.

The ordinance stipulated every application for a construction permit for a new residential dwelling or townhouse in the township, including any additions more than

1,000 square feet, include plans signed and sealed by a design professional licensed in the Commonwealth of Pennsylvania.

The ordinance was challenged by the Pennsylvania Builders Association and a hearing was held in July 2010 before the Department.

As a result of the successful challenge, the Department of Labor and Industry ruled that the township's ordinance was null and

void because it exceeded the minimum standards set by the Pennsylvania Uniform Construction Code (UCC).

Municipal ordinances can only exceed the UCC if they have been grandfathered or can demonstrate a compelling local interest in exceeding the building code.

For more information, please contact [Kimberly A. Freimuth](#) at 215.918.3627 or kfreimuth@foxrothschild.com.

Final Pennsylvania Chapter 102 Regulations Published

By **Robert W. Gundlach, Jr.**

On August 21, 2010, the Pennsylvania Department of Environmental Protection published in the Pennsylvania Bulletin the [final Chapter 102 regulations](#) that govern erosion and sediment control as well as storm water. With its publications, the new regulations will take effect across the state on November 19, 2010.

Much has been written about the new Chapter 102 regulations and their negative impact on the development community. However, there are a few positive aspects

to the new rules, and applicants have to watch the clock to take advantage of two of them.

Section 102.14(d)(1)(iv) offers a permanent exception from the riparian buffer requirements for those applications submitted prior to the effective date of the regulations. Such an exception would grandfather the project from buffering special protection waters even when going for NPDES renewals in the future.

Conversely, Section 102.8(a) holds an applicant seeking to renew his or her NPDES permit shall have the Post Construction Stormwater Management plan grandfathered to the original plan so long as the permit renewal occurs after the effective date of the regulations but before January 1, 2013.

For more information, please contact [Robert W. Gundlach, Jr.](#) at 215.918.3636 or rgundlach@foxrothschild.com.

PA EQB Approves Administration of UECA Regulations

By **Clair E. Wischusen**

On August 30, 2010, the Pennsylvania Environmental Quality Board [approved as final form regulations](#) the Administration of the Uniform Environmental Covenants Act (Chapter 253).

The final regulations establish requirements for the submission of an environmental covenant to the Department of Environmental Protection as demonstration of attainment or maintenance of an environmental remediation standard under Act 2 or as part of a corrective action requirement under the Tank Act.

The final form regulations include provisions clarifying when an environmental covenant is required, how it should be created, what it must contain and when it must be submitted to the Department.

Pursuant to authority contained in UECA, the final rulemaking also establishes a fee to support Departmental review of environmental covenants submitted to the Department as part of a demonstration of attainment or maintenance of a remediation or corrective action standard.

The Department's [PowerPoint presentation](#) as well as the [comment-and-response document](#) containing input received during the public participation process is available online.

The regulations will now be submitted to the Pennsylvania Independent Regulatory Review Commission for its consideration, as well as the respective state House and Senate Environmental Resources Committees.

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