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In the Zone

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Pennsylvania's Fair Share Act Repeals "Deep Pockets" Rule

By Joshua L. Gayl

On June 28, 2011, Pennsylvania Governor Tom Corbett signed into law Senate Bill 1131, better known as the "Fair Share Act," which largely removes joint and several liability from Pennsylvania law. Under the Fair Share Act, individual defendants found to be less than 60 percent liable in civil cases, who were previously responsible for 100 percent of the judgment awarded against multiple defendants under the joint and several liability law, are now responsible for paying only their proportionate share of the judgment. The Fair Share Act is effective immediately and applies to causes of action that accrue on or after the effective date of the law.

The Fair Share Act was predominantly supported in the Pennsylvania Legislature by the Republican Party, which argued that joint and several liability unfairly punished "deep-pocketed" businesses or even small business owners that were dragged into litigation because of their ability to pay the judgment for all defendants. Solvent entities in Pennsylvania were frequently compelled by the threat of joint and several liability to settle frivolous lawsuits out of fear they would have to pay for a damages award disproportionate to their alleged share of culpability.

Critics of the Fair Share Act argue the new law will impact innocent victims who will not be able to obtain a full recovery from negligent acts of multiple tortfeasors. However, the Fair Share Act does require defendants found to be 60 percent or more at fault to be responsible for the full amount of the judgment. The Fair Share Act also excludes judgments in such circumstances as intentional misrepresentations, intentional acts, environmental crimes or liquor law violations. For example, joint and several liability continues to apply under the Pennsylvania Hazardous Sites Cleanup Act so that parties who contribute a very small portion of the waste at hazardous sites remain at risk for 100 percent responsibility.

A similar bill became law in 2002 but was overturned on constitutional grounds because the bill into which it was written violated the Pennsylvania Constitution's requirement that bills confine themselves to a single subject. This time around, business groups, including the Pennsylvania Chamber of Business and Industry, the Property Casualty Insurers Association of America, Insurance Agents & Brokers of Pennsylvania, the Insurance Federation of Pennsylvania and the Pennsylvania Association of Mutual Insurance Companies, praised the passage of the Fair Share Act as tort reform that will improve the state's business climate, job creation, and cost of goods and services.

Four Fox Rothschild attorneys from the Warrington (Bucks County) office attended the February 14, 2011, formal Government Affairs Committee meeting in Harrisburg, Pennsylvania, where the Fair Share Act (then in legislative committee) was addressed.

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Proposed Legislation in Delaware

By Michael J. Isaacs

Title 12, Chapter 39, Subchapter 1(v) of the Delaware Code sets forth rules with respect to the sale of a disabled person's real estate. Section 3951(b) currently provides that whenever application for the sale of a disabled person's real estate is made to the Chancery Court, the court will appoint a licensed appraiser to perform an appraisal of the property. The appraised value shall be used by the court to establish the lowest price at which the property may be offered for sale.

The proposed amendment provides that the appraised value shall be used by the court as a guideline when considering an application for the sale of real estate by a guardian of a disabled person, and the court shall determine, in its discretion, based on the appraisal and all other relevant circumstances, whether the requested sale is in the best interest of the disabled person.

Accordingly, the proposed amendment to Section 3951(b) provides more flexibility to the Court of Chancery to use its equitable powers in determining, in totality, whether the purchase price, and the sale itself, is in the best interest of the disabled person.

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Pennsylvania Case of the Month:
Ulsh v. Zoning Hearing Board of Lower Paxton Township, et al.

By Michael J. Kornacki

The case of *Ulsh v. Zoning Hearing Board of Lower Paxton Township, et al.*, ___ A.3d ___, 2011 WL 1566690 (Pa. Cmwlth.) (decided April 26, 2011), addresses matters of res judicata, collateral estoppel and whether "economic hardship" can justify the issuance of a variance, but it is also a perfect example of how complicated and convoluted Pennsylvania zoning cases can become.

The matter began with Triple Crown Corporation (TCC) seeking to develop 492 residential units (a combination of single-family homes, townhomes and condominiums) on undeveloped land in Lower Paxton Township. Only 374 residential units were permitted by right, so TCC sought a variance to construct the additional units. Township resident Harry C. Ulsh attended the hearing and opposed the variance. The Zoning Hearing Board (ZHB) denied the application but failed to mail a written decision within the required 45 days. In June 2006, after the area was rezoned to "residential cluster," TCC again applied for a variance, this time for 449 units. TCC also offered to fund $1,800,000 for off-site improvements. A second hearing was held and township resident Andrew Snyder opposed the application. At the hearing, TCC argued the variance for the additional units was necessary to offset the $1,800,000 it had committed to fund. The ZHB approved TCC's request for a variance subject to certain conditions, including the $1,800,000 contribution for offsite improvements. Snyder appealed the approval, and TCC intervened.

In November 2006, while at the briefing stage of the *Snyder* appeal, TCC also filed a *mandamus* action against the ZHB and the township, demanding the ZHB give public notice of a "deemed approval" as a result of the ZHB's failure to issue a written decision on the first variance application within 45 days after the hearing. The ZHB settled the *mandamus* action by agreeing to give public notice of deemed approval of the first variance application in exchange for TCC's agreement to limit development to 449 units and agreeing to the other conditions imposed in connection with the second variance application approval.

After the ZHB gave public notice of the deemed approval of the first variance, Ulsh filed a timely appeal of that deemed approval, and TCC intervened. In the *Snyder* appeal, counsel representing Snyder (the same counsel that represented Ulsh) alerted the court to the *Ulsh* appeal and claimed that any decision in the *Snyder* appeal would be controlling in the *Ulsh* appeal. Although TCC denies that claim was ever made, the trial court in the *Ulsh* appeal never issued a briefing schedule.

In May 2008, the trial court in the *Snyder* appeal issued a decision upholding the ZHB's grant of the second variance, and Snyder appealed to the Commonwealth Court. In January 2009, the Commonwealth Court reversed the grant of the second variance on the grounds that economic hardship resulting from TCC's agreement to fund offsite improvements was not an "unnecessary hardship" that would support the grant of a variance.

TCC filed a petition for a judgment of *non pros* in the appeal of the first variance, since no action had been taken since its intervention in December 2007. Ulsh then filed an application for a status conference based on the fact that the Commonwealth Court had rendered a decision in the *Snyder* appeal. On June 25, 2010, the trial court denied TCC's petition for a judgment of *non pros* and reversed the deemed approval based upon the Commonwealth's ruling in the *Snyder* appeal. TCC appealed to Commonwealth Court.

The Commonwealth Court began its analysis by discussing whether the decision in the *Snyder* appeal of the second variance would be binding precedent upon the trial court hearing *Ulsh*'s appeal of the first variance. The court determined the issue decided in the *Snyder* appeal was identical to that being appealed in the *Ulsh* matter, notwithstanding the fact that the variances were separate matters with separate hearings. Since the terms and conditions agreed to connection with the approval of the second variance application (i.e., the number of units and the terms upon which the approval would be granted) were later adopted in settling the *mandamus* action relating to the first variance application, the issues in both matters became identical. In addition, because all of the parties were essentially the same (involving TCC, the ZHB and township residents represented by the same counsel), no party was disadvantaged by applying the conclusions reached in the Commonwealth Court's decision in the second variance application to the facts of the first variance application. As a result, the Commonwealth Court determined the doctrine of collateral estoppel applies and the trial court in the *Ulsh* appeal did not err in concluding that appeal is controlled by the Commonwealth Court decision in the *Snyder* appeal. TCC was thus collaterally estopped from re-litigating the issue "of whether TCC proved that the subject ordinance inflicted an unnecessary hardship with respect to the proposed development."

With regard to TCC's argument that it should have been granted a judgment of *non pros*, the court determined that TCC did not present any evidence of actual prejudice and Ulsh was justified in awaiting the decision in the *Snyder* appeal before proceeding with his appeal of the deemed approval of the first variance application. The trial court was thus justified in denying the request for a judgment of *non pros*.

The Commonwealth Court did, however, agree with TCC that the trial court in the *Ulsh* appeal "erred by failing to make substantive findings of fact to support its decision to reverse the deemed approval of the variance, and by interpreting *Snyder* as

compelling its conclusion that TCC is not entitled to *any* approval." Although the *Snyder* decision did collaterally estopp TCC from re-litigating certain issues, that was not sufficient for the trial court to determine that TCC was not entitled to any approval at all. The deemed approval of the first variance application is the equivalent of an approval. In *Snyder*, the Commonwealth Court did not specifically address the issue of the deemed approval in the first variance application. Since the trial court failed to make any specific findings of fact as to the merits of that particular application, the Commonwealth Court remanded the *Ulsh* appeal for proceedings consistent with its opinion.

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Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 1473 proposes to add what would be known as the "Highway Corridor Enhancement Act," which, according to the proposed legislation, would serve the following purposes: (1) "To provide municipalities with alternative means to retain or protect, for the public and economic benefit, the natural, historical, architectural, archeological, cultural, scenic or open space values of real property along public highway corridors," and (2) "To better enable municipalities to control the erection and maintenance of outdoor advertising devices in areas along the highways within this Commonwealth.[...]"

The proposal defines several terms, including "highway corridor conservation easement," which is: "A nonpossessory interest in real property, whether appurtenant or in gross, imposing limitations or affirmative obligations, the purposes of which may include, but are not limited to: (1) retaining or protecting for the public and economic benefit the natural, scenic or open space values of real property adjacent to or within view of highways; (2) assuring its availability for agricultural, forest, recreational or open space use; (3) protecting, conserving or managing the use of natural resources; (4) protecting wildlife; (5) maintaining or enhancing land, air or water quality or preserving the historical, architectural, archaeological or cultural aspects of real property adjacent to, or within view of, highways. Such interest may impose limitations on the use of the property for outdoor advertising devices for such purposes."

The proposed "Highway Corridor Enhancement Act" would allow, generally, a land trust or municipality to acquire by purchase, contract, gift or device a highway corridor conservation easement. Interestingly, the proposal provides the assessment of a private interest in land subject to a highway conservation easement would reflect any change in market value of the property as a result from the acquisition of the conservation easement interest.

The proposed legislation would allow a municipality to establish a highway corridor overlay district within 660 feet of the nearest edge of the right-of-way of any highway or portion of a highway within the municipality in order to further promote the purposes of the "Highway Corridor Enhancement Act." By way of example, the highway corridor overlay district could include "[r]estrictions of commercial or industrial use or development of property within the district, including limitations on the use of property for outdoor advertising devices."

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Florida Update: The Community Planning Act

By Peter L. Blacklock

On June 2, Florida Governor Rick Scott signed 48 bills into law, including HB 7202, the "Community Planning Act," a growth management measure that abates state oversight over local land use projects. In addition to placing the regulatory burden on local governments, the law also expedites the review process for state agencies such as the Department of Environmental Protection and diminishes their authority to comment on and object to development proposals. The legislation also eradicates concurrency requirements — provisions that mandate developers to ensure that adequate educational, transportation and recreation facilities are in place prior to project completion.

Conservationists and environmental groups opposing the bill voiced concern that its passage would enable developers to fast-track proposals through understaffed municipal agencies without the checks and balances afforded by state supervision. These concerns were magnified as a result of Scott's simultaneous eradication of the state's Department of Community Affairs, an agency formed in 1969 to prevent overdevelopment. Supporters of the bill, which included the Associated Industries of Florida and the Florida Chamber of Commerce, countered that local governments are better equipped to evaluate the impact of development upon their communities and the elimination of bureaucracy at the state level will lead to the timely completion of more projects, and ultimately, the creation of more jobs.

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Pennsylvania Bans Private Transfer Fees

By Robert W. Gundlach, Jr.

On June 24, 2011, Pennsylvania Governor Tom Corbett signed legislation prohibiting the imposition of private transfer fees (PTFs) on real estate transactions in the Commonwealth. Pennsylvania joins 27 other states in banning PTFs.

PTFs are part of a covenant attached to the property deed that forces the seller to pay a percent of the purchase price (usually one percent) to a private third party every time the property sells over the 99 years. The fee generally serves only to provide additional income to a third party and sometimes can discourage a buyer from purchasing a home due to the extra cost.

A national coalition has formed to battle the legality of the fees in state legislatures across the nation. The group includes consumer organizations, the REALTORS©, Land Title Associations and others. The Pennsylvania REALTORS© have produced a video explaining PTFs and impacts of the fee.

Pennsylvania state legislators Sen. Wayne Fontana (D-Allegheny) and State Rep. Sue Helm (R-Dauphin) advocated passage of House Bill 442, which gives home buyers added protection during the purchase process. The new law prohibits the charging of private transfer fees in real estate transactions. And, for those PTFs already attached to a property, the law specifies disclosure requirements for existing private transfer fees in order for them to remain valid.

HB 442 takes effect immediately.

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Pennsylvania Senate Considers Mandating Carbon Monoxide Alarms

By Lauren W. Taylor

On June 22, 2011, the Pennsylvania Senate Urban Affairs and Housing Committee held public hearings on mandating carbon monoxide (CO) alarms in residential homes.

The committee received testimony on the Carbon Monoxide Alarm Standards Act, introduced by State Sen. Pat Browne (R-Lehigh). Senate Bill 920 would require homeowners, upon the sale of their home, to demonstrate the home is equipped with a CO alarm.

For the past several years, Pennsylvania has had the highest number of accidental CO poisoning deaths in the country. Because the gas is odorless, colorless and tasteless, CO alarms are the only safe way to know if carbon monoxide is present in a home and will alert residents to its presence before it becomes harmful or fatal. CO poisoning kills about 500 people and sends more than 15,000 people to emergency rooms annually, according to the Centers for Disease Control and Prevention.

The requirements of the law would apply only to homes and multifamily dwellings (such as apartments) that have fossil fuel-burning heaters or appliances and/or an attached garage. Apartments would be required to install an alarm following the law's effective date.

Alarms could be installed via hard-wiring, plugged directly into an electrical outlet or be a battery-powered device. Enforcement would occur at the point-of-sale of the residential structure.

According to the U.S. Census Bureau, about 83 percent of Pennsylvania housing uses some form of fossil fuel-burning heating, which can generate CO. CO incidents occur more frequently in colder weather, mainly due to the increased use of fuel-burning heating systems, fireplaces and gas generators.

SB 920 is currently awaiting action by the Senate Urban Affairs & Housing Committee.

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U.S. Senate Bill Promotes Energy Efficiency Building Code

By Kimberly A. Freimuth

The National Association of Home Builders (NAHB) reports that on May 21, 2011, Sens. Jeanne Shaheen (D-N.H.) and Rob Portman (R-Ohio) introduced legislation to promote energy efficiency in a variety of areas, including energy codes for new homes and commercial buildings.

The Energy Savings and Industrial Competitiveness (ESIC) Act of 2011 contains a number of provisions, but most importantly, it would create a model federal building code administered with support by the U.S. Department of Energy (DOE).

Proposals from Congress regarding energy codes have appeared in federal legislation for a number of years, but the ESIC Act takes a significantly different approach from one of the most recent, the controversial and onerous "Waxman-Markey" House bill introduced in 2009.

The NAHB and other national real estate organizations have had the opportunity to provide comments as the ESIC language was developed and were able to improve the legislation.

As a result of those recommendations, the legislation:

- Requires the DOE to establish all energy targets through public notice and comment rulemaking procedures, as opposed to specifying efficiency targets in the law itself. For example, the ESIC Act does not set a mandate for model energy codes to achieve a 50 percent increase in efficiency over a baseline by a target year.
- Incorporates economic and cost considerations as model energy codes are developed, including a return on investment analysis for commercial/multifamily.
- Subjects DOE model codes to a small business impact review analysis.
- Recognizes that "plug load" appliances and other items must be among considerations that count towards the energy efficiency target settings.
- Strikes language that would measure federal code compliance against ill-defined "renovations" and maintains the status quo on building retrofits as covered by current IECC codes.

While the language has been improved, concerns remain.

The ESIC Act gives the DOE new authority to "support the development of" federal model building energy codes, and in certain cases, even "establish" them.

Even without congressional action, the DOE and stakeholders on all sides acknowledge the IECC and ASHRAE model codes are becoming more stringent in their energy requirements.

With traditional energy codes already moving down the path of vastly improved building efficiency — driven in large part by the DOE's ongoing support and advocacy — there are fundamental questions about why federal law is needed to create a new codes bureaucracy in Washington, DC.

The bill also seeks a $400 million appropriation to cover costs through 2015, which seems out-of-step with bipartisan sentiments to alleviate regulatory burdens on small businesses, minimize the reach of federal programs and reduce the nation's annual deficit and overall debt.

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The State of the Nation Housing: 2011 Report

By Herbert K. Sudfeld, Jr.

Harvard University's Joint Center for Housing Studies has recently released "The State of the Nation Housing: 2011 Report."

Stating that "renewed job growth and stronger consumer confidence are needed to spark the housing recovery," the report indicates not much has changed through 2010.

Homeowner demand is currently being held back by the continued decline in home prices, ongoing foreclosures and the large share of homeowners who still find themselves underwater with depressed home values.

The report states the home ownership rate dropped nationally in 2010 to 67 percent from 69 percent in 2004. Meanwhile, rental housing is on the uprise. In order for the excess supply to be absorbed, we need a more normal rate of household growth, and while that is seen as coming, economic factors are still weighing heavily on would-be new homeowners.

The report further highlights the fact that baby boomer households are projected to increase by 35 percent over the next decade and may cause a market for smaller homes to expand.

Nothing would spur housing growth more than economic growth, however. The number of younger households is due to rise sharply. First-time homebuyers will be looking for new product, which is currently at all-time inventory lows. A turnaround in demand could spur a tighter market and therefore increase prices. Increased job growth, recovering economy, more young adults trending up in income, baby boomers seeking to move to smaller homes — all could help the housing market, which seems to be making a slow turn toward recovery.

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Congress Seeks To Re-Balance Power Between EPA and States Regarding Water Quality

By M. Joel Bolstein

On June 22, 2011, the U.S. House Transportation and Infrastructure Committee voted to advance legislation seeking to rebalance the relationship between the U.S. Environmental Protection Agency (EPA) and the states in setting water quality standards under the Clean Water Act (CWA). H.R. 2018, the Clean Water Cooperative Federalism Act of 2011, would reduce the EPA's authority and transfer greater control to the states.

The bipartisan bill is an effort to amend the CWA and return responsibility for water pollution control to the states. The legislation would restrict the EPA's ability to override or delay a state's permitting and water quality certification decisions under the CWA once the EPA has already approved a state's program, unless the state concurs that a new standard is necessary.

The bill would prohibit the EPA from withdrawing approval of a state water quality permitting program under CWA or from limiting federal financial assistance for the state water quality permitting program on the basis that the EPA disagrees with the state.

Not surprisingly, the EPA and number of environmental groups have taken an unfavorable stance toward the legislation. The EPA has voiced concerns with various provisions of the bill. In its legal analysis of H.R. 2018, the EPA stated the bill would undermine its mission and ability to ensure effective and appropriate standards to protect water quality requirements of the Clean Water Act.

The legislation is expected to be scheduled for a floor vote in the House this summer.

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Pennsylvania Property Tax System Ranked Second Worst in Nation

By Herbert K. Sudfeld, Jr.

The Council of State Taxation recently released its "2011 Scoreboard on State Property Tax Administration Practices."

Noting that a fair property tax administration should have the following standards, the Council ranked the states utilizing both a point and letter grade combination. The standards utilized by the Council for such a property tax administration are:

1. Standardized procedures for filing, remittance and appeal along with a reasonable property tax evaluation system;
2. The appeal process must be before an independent tribunal in a de novo hearing without "pay to play" requirements; and
3. The tax burden must be balanced and uniform while not being shifted to business taxpayers.

Points were assigned to each category and grades A through F were given based upon the number of points in each category on a state-by-state basis.

On standardized procedures, Pennsylvania received a grade of F; on fair tax appeal procedures, a grade of C; on balance between residential versus business property taxes, a grade of C-; and finally, an overall grade of D-, which tied Pennsylvania for second worst behind only New York State. Maryland was number one with an overall grade of A.

New Jersey, on the other hand, received an overall grade of C- with a D in standardized procedures, a C in fair tax appeal procedures and a B- in residential versus business property taxation.

Delaware was tied with Pennsylvania with a D-, having received an F in standardized procedures, a C- in fair tax appeal procedures and a B- in residential versus business property taxation.

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OSHA Announces Three-Month Phase-In for Residential Construction Fall Protection

By Robert W. Gundlach, Jr.

On June 9, 2011, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) announced a three-month phase-in period to allow residential construction employers to come into compliance with the Agency's new directive to provide residential construction workers with fall protection.

The three month phase-in period runs from June 16 to September 15, 2011. During this time, if the employer is in full compliance with the old directive (STD 03-00-001), OSHA will not issue citations but will issue a hazard alert letter informing the employer of the feasible methods it can use to comply with OSHA's fall protection standard or implement a written fall protection plan. If the employer's practices do not meet the requirements set in the old directive, OSHA will issue appropriate citations.

If an employer fails to implement the fall protection measures outlined in a hazard alert letter, and during a subsequent inspection of one of the employer's workplaces OSHA finds violations involving the same hazards, the Area Office shall issue appropriate citations.

The new directive, "Compliance Guidance for Residential Construction" (STD 03-11-002), a detailed description of the phase-in policy, a presentation and other guidance materials about requirements for protecting workers from falls, are available at www.osha.gov/doc/residential_fall_protection.html.

OSHA has a wide variety of resources and guidance materials to assist employers in complying with the new directive, including many guidance products and a fall protection slide show. OSHA has encouraged employers to contact its local Area Offices and take advantage of its free On-site Consultation Program.

Under the Occupational Safety and Health Act of 1970, employers are responsible for providing safe and healthful workplaces for their employees. OSHA's role is to assure these conditions for America's working men and women by setting and enforcing standards and providing training, education and assistance. For more information, visit www.osha.gov.

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