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In the Zone

A Publication of the Real Estate Department and the Zoning and Land Use Practice Group

January 2011

Tax Credit Report

By Jeffrey M. Hall and Daniel V. Madrid

On Dec. 16, 2010, the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act (the Tax Relief Act) was passed into law. Of note to the real estate industry are two provisions:

- Section 733 of the Tax Relief Act extends the New Markets Tax Credit Program by providing $3.5 billion of tax credit authority for 2010 and 2011. The CDFI fund received applications for 2010 allocations on June 2, 2010, for an anticipated $5 billion dollars of tax credit authority. More than 250 applications were filed requesting a total of $23.5 billion in tax credits. It is anticipated that the CDFI fund will announce the 2010 allocatees later this month.
- Section 707 of the Tax Relief Act extends the grant in lieu of energy tax credit program through 2011. This program provides a significant incentive for alternative energy development by making qualifying projects (i.e., solar, hydropower and biomass) eligible for a payment in lieu of tax credit for up to 30 percent of the project cost.

On the state level, New Jersey is currently considering significant tax credit legislation to stimulate development. A-3143 proposes an expansion of the Urban Transit Hub Tax Credit (UTHTC). (By way of background, the UTHTC provides tax credits for every dollar of capital investment to cover the costs of investing in a facility within a designated urban transit hub. These tax credits can be applied to corporate business tax and/or insurance premium tax credits over a 10-year eligibility period. An urban transit hub includes property located within a 1/2 mile radius surrounding the mid-point of a New Jersey Transit, PATCO or PATH rail station platform area, including all light rail stations.) While the prior legislation allowed tax credits solely for the development of business facilities, A-3143 expands the availability of the tax credit to mixed-used residential projects provided the project meets certain requirements. As of the date of this writing, A-3143 has passed both houses and is awaiting Governor Christie's signature.

Under A-1851, titled the "Historic Property Reinvestment Act," New Jersey proposes a state counterpart to the federal Historic Tax Credit Program. The bill proposes a credit of up to 25 percent of the cost of rehabilitation of a "qualified property," which is defined as property: (1) individually listed or located in a district on the National Register of Historic Places and certified as contributing to the historic significance of the district; or (2) individually identified or registered or located in a district composed of properties identified or registered by a municipality as suitable for substantially achieving the purpose of preserving and rehabilitating buildings of historic significance and certified as contributing to the historic significance within the jurisdiction of the municipality. As of the date of this writing, A-1851 has been passed by the Senate and is being considered by the Assembly.

For more information about the New Markets Tax Credit Program, the Urban Transit Hub Tax Credit Program or the Historic Property Reinvestment Act, please contact Jeffrey M. Hall at 609.895.6755 or jhall@foxrothschild.com or Daniel V. Madrid at 609.844.7413 or dmadrid@foxrothschild.com. For more information about the Grant in Lieu of Energy Tax Credit Program, please contact Burton J. Jaffe at 609.895.6630 or bjaffe@foxrothschild.com or Alexander M. Wixted at 609.895.6730 or awixted@foxrothschild.com.

Recent Successes

The Bucks County Real Estate Team recently secured a number of victories on behalf of clients. Among them, Herbert K. Sudfeld, Jr. received a favorable decision from the Buckingham Township Zoning Hearing Board on a Zoning Ordinance Interpretation Question involving tree disturbance requirements for the installation of a client's sports court.

Herb was also successful in achieving a property rezoning from residential to C-commercial classification in New Britain Borough for a client seeking to relocate his business, and he also received transfer approvals from the Pennsylvania Liquor Control Board for two beer distributor licenses in Bucks and Montgomery counties. The Montgomery County license involved a purchase and transfer, and the Bucks County license was for a change of location.

Case Summary: *Borough of Moosic v. Zoning Hearing Board of the Borough of Moosic v. Giuseppe Basile*

By Robert W. Gundlach, Jr.

This case is good news for business owners looking to complete minor expansions to their commercial properties without having to participate in the costs and delays associated with the land development approval process.

In this case, the applicant appealed from the Order of the Court of Common Pleas of Lackawanna County (trial court), which affirmed the decision of the Zoning Hearing Board of the Borough of Moosic (ZHB) denying a building permit to erect a roof over a 20-by-40-foot outdoor concrete patio attached to the applicant's restaurant.

The question before the Commonwealth Court was whether constructing a roof over a previously approved patio constitutes "land development" under the Subdivision and Land Development Ordinance (SALDO) and Section 107(a) of the MPC. Section 107(a) of the MPC defines "Land Development" as any of the following activities:

(1) The *improvement* of one lot or two or more contiguous lots, tracts or parcels of land for any purpose involving:

(i) a group of two or more residential or nonresidental buildings, whether proposed initially or cumulatively, or a single nonresidential building on a lot or lots regardless of the number of occupants or tenure; or

(ii) the division or allocation of land or space, whether initially or cumulatively, between or among two or more existing or prospective occupants by means of, or for the purpose of streets, common areas, leaseholds, condominiums, building groups or other features.

(2) A subdivision of land.

(3) Development in accordance with Section 503(1.1).

The SALDO's definition of "land development" is essentially the same as the definition of "land development" in the MPC.

The borough argues that the term "land development" includes "**any** improvement of a nonresidential building." The borough contends the roof over the patio is an enhancement that increases the value of the building and therefore constitutes an "improvement" to a nonresidential building and is "land development" under the SALDO and MPC.

In contrast, the applicant argues all that is at issue in this appeal is a request to erect a roof over a previously approved patio and the requested roof permit is not the type of "improvement" contemplated under Section 107(a) of the MPC or the SALDO as "land development."

The Pennsylvania Supreme Court provided clarification on the definition of "land development" in a 2007 case relating to the construction of a billboard, stating:

> The definition of land development, of course, does not exist in a vacuum. The significance of the definition is in the consequence of a finding that a proposed land use involves development; that consequence is the requirement of a land development plan. The statutory definition of a development plan in the **MPC plainly speaks of large-scale development and the issues that necessarily arise with such development**.

Moreover, the Commonwealth Court found the borough's very broad interpretation of the SALDO and MPC as requiring land development approval for **any** improvement to property, no matter how minor, is inconsistent with the Supreme Court's decision in *Upper Southampton* and the Commonwealth Court's case law. See *Tu-way Tower Co. v. Zoning Hearing Board of the Township of Salisbury*, 688 A.2d 744 (Pa.Cmwlth.1997) (holding the proposed extension or building of new towers did not constitute subdivision or land development under the MPC); *Marshall Township Board of Supervisors v. Marshall Township Zoning Hearing Board*, 717 A.2d 1 (Pa.Cmwlth.1988) (holding construction of a pole was not "land development" or "subdivision" within the MPC); and *Kirk v. Smay*, 367 A.2d 706 (Pa.Cmwlth.1976) (holding construction of a single medical office building on the grounds of a completed shopping center did not rise to the level of land development as defined in the MPC).

Based on the above, the Commonwealth Court held the construction of a roof over a previously approved patio does not constitute land development under the SALDO or the MPC and, therefore, the applicant is not required to obtain land development approval in order to receive the requested roof permit.

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

Federal Court Rules Applicable to Zoning Decisions

By Herbert K. Sudfeld, Jr.

In two separate and distinct actions, the U.S. District Court for the Middle District of Pennsylvania applied the standards required to dismiss a federal court complaint under Federal Rule of Civil Procedure 12(b)(6). In the first action, the court decided the plaintiff's complaint should be dismissed on the grounds of collateral estoppel, and in the second action, the court denied a motion to dismiss on the grounds that the joinder of the party seeking dismissal was necessary in order to allow the court to afford complete relief to the parties.

The first action, *Dizzy Dottie LLC vs. Township of Jackson,* 2010 WL 4853683 (M.D. PA), involved a case against the Township of Jackson brought by Dizzy Dottie, LLC, which ran an eating and drinking establishment named "Thrills" in the township. Thrills had built an extension to its stage to allow for costumed female dancers to get closer to the audience. A dispute had arisen as to whether a permit was required for the stage. The plaintiff, Thrills, alleged the refusal to allow the extension undermined its business plan. Thrills also alleged the Jackson Township Zoning Ordinance prohibited topless or nude dancing in violation of the First Amendment of the U.S. Constitution and the Pennsylvania Constitution and sought a declaration that the ordinance was unconstitutional under both federal and Pennsylvania law.

After resolving the stage extension issue and attempting resolution of other issues, Thrills began featuring topless dancers. The township brought a state action in the Court of Common Pleas of Monroe County seeking to enjoin the plaintiff's business and citing the same zoning ordinance that was the subject of the federal court action. After a telephone conference with the federal court, the township filed a motion to dismiss the plaintiff's complaint arguing that abstention and estoppel doctrines should prevent the federal court from hearing the case. Before the federal court could issue an opinion on the motion, Judge Vican in the Court of Common Pleas of Monroe County issued an order granting a preliminary injunction prohibiting topless or nude dancing and followed with a permanent injunction preventing the operation of an adult cabaret on the premises.

When a defendant files a motion to dismiss pursuant to Federal Rule 12(b)(6), all well-pleaded facts of the complaint must be viewed as true and in a light most favorable to the non-moving party. The defendants contended that the Rooker-Feldman doctrine prevented the court from hearing the matter. That doctrine would preclude a lower federal court from reviewing the decision of a state court brought by a state court loser. However the court herein decided that the Rooker-Feldman doctrine did not apply since the plaintiff had brought its federal court action prior to the state action being instituted. (It being noted that one of the requirements of the Rooker-Feldman doctrine is that the state judgment was rendered before the federal court case being brought, which was not the case herein.)

The federal court did, however, dismiss the complaint on the grounds of collateral estoppel, which applied if (1) the issue decided in the prior case was identical to the one presented in the later case; (2) there was final judgment on the merits; (3) the party against whom the plea was asserted was a party in the prior case; (4) such party had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment.

The court found that all the elements of collateral estoppel applied here since Judge Vican had also ruled on the constitutionality of the ordinance and had rendered a learned opinion on the subject. The federal court was therefore precluded from considering the plaintiff's constitutional claims.

The second case, *Global Tower LLC vs. Hamilton Township and Zoning Hearing Board of Hamilton Township*, WL 4860677 (M.D.PA), involved a plaintiff real estate company that leased ground and then built cell towers on the leased premises for further rental to wireless communication companies. The plaintiff had leased a 100-by-100-foot parcel for a tower location. The zoning ordinance of Hamilton Township allowed the use as a "special use" within the "C" zoning district, after a proceeding before the zoning hearing board to show compliance with the ordinance requirements. After 20 hearings spanning more than a year, the zoning hearing board denied the special use even though the plaintiff had met all the requirements. The board determined that the leased area was a new lot and required subdivision approval.

The plaintiff filed a federal court complaint alleging a violation of the Telecommunications Act. The township filed a motion to dismiss arguing that since the zoning board was a distinct and separate body that had jurisdiction over the application and the township had no authority to rule on the special use, it should be dismissed from the suit.

Here the federal court decided that the township's motion should be denied under Federal Rule of Civil Procedure, Rule 19, which states that a person subject to process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined if…in the person's absence, the court cannot afford complete relief among existing parties. The court reasoned that since the township had the exclusive jurisdiction over all subdivision matters pursuant to the Municipalities Planning Code, it must be joined if the court was to give complete relief. The court reasoned that if it were to decide that the zoning

board had erred and the leased lot was not a subdivision, then, if the township were dismissed, the township could turn around and claim that it was a subdivision and the plaintiff's relief would be for naught. The township must therefore remain a party in order for complete relief to be granted to the parties.

For more information, please contact Herbert K. Sudfeld, Jr. at 215.918.3570 or hsudfeld@foxrothschild.com.

Zoning Board of Adjustment Required To Make Findings Regarding Requirements To Support Variance Grant

By Carrie B. Nase

In the past, applicants requesting variances from the City of Philadelphia Zoning Board of Adjustment generally limited their testimony as to the details of their proposed project and the support of the applicable civic group. However, as a result of a recent Commonwealth Court case, applicants may now want to consider presenting "real" evidence to prove they satisfy the requirements to obtain a variance, as set forth in Section 14-1802(1)(a)-(1).

These requirements can be boiled down into three key conditions: (1) unique hardship to the property; (2) no adverse effect on the public health, safety or general welfare; and (3) the variance will represent the minimum variance that will afford relief at the least modification. See *Poole v. Zoning Board of Adjustment of the City of Philadelphia*, 2010 WL 4874483 (Pa. Cmwlth. 2010). In *Poole*, the Commonwealth Court remanded the matter to the Court of Common Pleas of Philadelphia with instruction to remand the matter to the city's Zoning Board of Adjustment (the ZBA) to make findings as to whether the applicant satisfied the requirements to obtain certain variances.

In *Poole*, the applicant is the developer of a Philadelphia property consisting of approximately 11,500 square feet located in the L-4 limited industrial zoning district. However, the surrounding properties were zoned R-10A residential. The property had been used for an automobile repossession yard. The applicant submitted an application to the Department of Licenses & Inspections (L&I) requesting a permit to demolish the existing building and construct eight structures to be used for 14 residential dwelling units. L&I refused the application for the following reasons: (1) the proposed use is not permitted in the L-4 zoning district; (2) multiple uses or structures are not permitted on a single lot; (3) two off-street loading spaces are required in the L-4 zoning district; and (4) the proposed rear yard did not comply with the required depth. The applicant appealed L&I's refusal to the ZBA. After a hearing, the ZBA granted the requested relief. An objector filed an appeal to the ZBA's decision to the Court of Common Pleas of Philadelphia County. The Court of Common Pleas affirmed the ZBA's decision. On appeal, the Commonwealth Court vacated the lower court's decision and remanded the matter for further findings.

The objector's issues on appeal were whether the applicant provided evidence: (1) of substantial hardship; (2) that the requested variances constituted the minimum variances necessary to alleviate any alleged hardship; and (3) that the property could not be reasonably used in accordance with the L-4 zoning district. The Commonwealth Court found the ZBA "failed to provide any finding of fact that addresses any of the criteria supporting the decision to grant" the variances. The court went on further to state the ZBA "did not provide any explanation for its reasoning" and "it did not make any factual findings or explain how those facts led it to determine that unnecessary hardship exists, that there is no public detriment, and that [the applicant] sought the minimum variance required in order to obtain the relief" with respect to the variances. Therefore, the court remanded the matter back with specific instructions that the ZBA make findings with respect to whether the applicant established the requirements for the requested variances.

An appeal from the ZBA will delay any project. However, a remand back to the ZBA for additional findings will further delay a project. In order to avoid this delay, an applicant should provide evidence at the ZBA hearing to prove it satisfies the requirements to obtain a variance.

As an aside, it should be noted that although the objector did not challenge the applicant's request for a use variance, the Commonwealth Court did address this issue, stating it agreed with the ZBA's decision to grant the use variance and that the applicant established the key requirements in order to be granted a use variance. Specifically, the court found that although the property was zoned L-4, the surrounding properties are zoned R-10A, and the current form and use of the property is "inconsistent with the character of the neighborhood and is a general detrimental [sic] to the neighborhood's welfare." *Id.*

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

Pennsylvania Legislation Update

By David H. Comer

One of the highlights of Act 93, which was approved by Pennsylvania Governor Ed Rendell on Oct. 27, 2010, is a chapter known as the "Consolidated County Assessment Law." In essence, the Consolidated County Assessment Law, with an effective date of Jan. 1, 2011, does primarily what its name implies: it consolidates the Second Class A and Third Class County Assessment Law and the Fourth to Eighth Class County Assessment Law.

By way of background, the Second Class A and Third Class Counties are larger in size than the Fourth to Eighth Class Counties, and differences, albeit mostly slight ones, existed in the different assessment laws. The Consolidated County Assessment Law attempts to remove those differences.

The General County Assessment Law remains, as do the First Class County Assessment Law (applicable to Philadelphia), the Second Class County Assessment Law (applicable to Allegheny County) and the Third Class City Assessment Law. However, as of Jan. 1, 2011, the Second Class A and Third Class County Assessment Law and the Fourth to Eighth Class County Assessment Law became the Consolidated County Assessment Law.

For decades, the Second Class A and Third Class County Assessment Law and the Fourth to Eighth Class County Assessment Law contained slight differences, but, as previously stated, the Consolidated County Assessment Law attempts to eliminate those inconsistencies. In addition to updating and simplifying the language from the prior laws, the Consolidated County Assessment Law does include substantive changes as well. For example, language has been added that addresses the appointment and role of a chief assessor for a county, and previously distinct provisions regarding real estate tax exemption have been reconciled.

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

PA Commonwealth Court Defers to Township Zoning Board To Define and Interpret Zoning Ordinance Terms

By Harris A. Dainoff

Where certain terms or phrases are not specifically defined in a township's zoning ordinance, the ordinance should be construed in a sensible manner with deference to the zoning board's understanding and interpretation of the legislation it is charged to enforce. In *Rosebosky v. Unity Township Zoning Hearing Board*, the Unity Township zoning officer issued a violation notice to the appellants alleging the appellants' use of more than 80 acres of their private property located in the R-1 district as a track for off-road vehicles was not permitted under the township's zoning ordinance. At the zoning board hearing, the appellants argued their development of the property as a dirt bike track for use by their children and some friends did not violate the township's zoning ordinance because it constituted "parks and recreation" as permitted in the R-1 district. The appellants noted the term "parks and recreation" was not specifically defined in the zoning ordinance and as such, the zoning hearing board was bound to consider common word usage and general definitions in their interpretation. The appellants further argued that any doubt in the meaning of a term should be resolved in favor of the landowner and the least restrictive use.

Based predominantly on testimony provided by neighbors who maintained the appellants' track operated five days a week, created considerable amounts of noise and coated neighboring homes and properties with dust, the zoning hearing board determined the dirt bike track did not fall within the category of "parks and recreation." The board noted the intensity of the usage and the size, scope and magnitude of the track and determined the track could not be included within any reasonable definition of recreational activity in a residential zone. Further, the board stated "[T]he dirt bike track operation is a private use being made by the Appellants and their friends, neighbors, guests and invitees to the site, and is not of a public nature as one would also readily conclude the term 'parks and recreation' was designed to encompass." Accordingly, the board denied the appellants' appeal from the zoning officer's violation notice. The appellants appealed the board's decision to the trial court, which denied the appeal. The appellants then appealed the trial court's decision to the Commonwealth Court of Pennsylvania.

In the Commonwealth Court's recent unreported decision on this matter (filed Dec. 10, 2010), the court rejected the appellant's argument that the least restrictive interpretation of the term "parks and recreation" would allow the phrase to be read as separate uses (i.e., "parks" and "recreation" separately) and that a track used for off-road vehicles is a type of recreation that should be admissible under the zoning ordinance. The Commonwealth Court affirmed the decision of the trial court and held that the private use of the dirt bike track by the Appellants, their friends, neighbors and other invitees is not of a public nature,

which is the common meaning of the term "parks and recreation." Merely because riding a dirt bike is a form of recreation, it does not follow that having a track for such use constitutes "parks and recreation." The court further noted the R-1 designation is one of the most regulated and restrictive zones in the township, and the zoning board should be granted deference in understanding and interpreting the legislation and ordinances it is charged to enforce. Accordingly, the Commonwealth Court agreed with the zoning hearing board and the trial court in concluding the appellant's use of their land did not constitute "parks and recreation" as permitted in the R-1 zoning district.

For more information, please contact Harris A. Dainoff at 215.299.2837 or hdainoff@foxrothschild.com.

EPA Finalizes Landmark "Pollution Diet" for the Chesapeake Bay

By M. Joel Bolstein

On December 29, 2010, the U.S. Environmental Protection Agency (EPA) established a landmark "pollution diet" to restore clean water in Chesapeake Bay and the region's streams, creeks and rivers. This pollution diet is driven primarily by jurisdictions' plans to put all needed pollution controls in place by 2025, and the EPA will hold jurisdictions accountable for results along the way.

The pollution diet, formally known as the Chesapeake Bay Total Maximum Daily Load (TMDL), identifies the necessary reductions of nitrogen, phosphorus and sediment from Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia and the District of Columbia. The TMDL is shaped by an extensive public and stakeholder involvement effort during the past two years, coupled with detailed plans by jurisdictions for how they will achieve pollution reductions.

To address deficiencies in draft plans submitted by jurisdictions in September 2010, the EPA worked closely with the jurisdictions during the past several months. As a result of this cooperative work and through strong state leadership, the final plans were significantly improved. The EPA was able to reduce and remove most federal backstop measures in the draft TMDL while still maintaining rigorous accountability through enhanced oversight and the availability of contingency actions. The result is a TMDL primarily shaped by the jurisdictions' plans to reduce pollution, which has been the EPA's goal from the outset.

The EPA posted separate comments on each state's Watershed Implementation Plan (WIP), including Pennsylvania's. The EPA's comments on the DEP's plan note that Pennsylvania meets its nutrient and sediment allocations for each basin in the final TMDL. After adjusting for EPA-approved nitrogen and phosphorus exchanges, Pennsylvania's WIP input deck resulted in statewide loads that are two percent over for nitrogen and phosphorus and five percent under for sediment allocations. The EPA and the Commonwealth have reached agreement on further nonpoint source reductions in order to achieve allocations both statewide and in each basin, as documented in the final TMDL. The further reductions are supported by contingencies included in the WIP and EPA's commitment to track progress and take any necessary federal actions to ensure these reductions are achieved and maintained.

Among the significant improvements in jurisdiction plans are:

- Committing to more stringent nitrogen and phosphorus limits at wastewater treatment plants, including on the James River in Virginia. (Virginia, New York, Delaware).
- Pursuing state legislation to fund wastewater treatment plant upgrades, urban stormwater management and agricultural programs. (Maryland, Virginia, West Virginia).
- Implementing a progressive stormwater permit to reduce pollution. (District of Columbia).
- Dramatically increasing enforcement and compliance of state requirements for agriculture. (Pennsylvania).
- Committing state funding to develop and implement state-of-the-art-technologies for converting animal manure to energy for farms. (Pennsylvania).
- Considering implementation of mandatory programs for agriculture by 2013 if pollution reductions fall behind schedule. (Delaware, Maryland, Virginia, New York).

The TMDL still includes targeted backstops for those jurisdictions that did not meet all of their target allocations or did not meet the EPA's expectations for providing reasonable assurance that they will achieve the necessary pollution reductions. These included backstop allocations and adjustments for the wastewater sector in New York, the urban stormwater sector in Pennsylvania and the agriculture sector in West Virginia.

In addition, the EPA will provide enhanced oversight of Pennsylvania agriculture, Virginia and West Virginia urban stormwater, and Pennsylvania and West Virginia wastewater. If the jurisdictions do not make sufficient progress, the EPA may utilize contingencies that include additional controls on permitted sources of pollution, such as wastewater treatment plants, large animal feeding operations and municipal stormwater systems.

The EPA will also regularly oversee each jurisdiction's programs to make sure they implement the pollution control plans, remain on schedule for meeting water quality goals and achieve their two-year

milestones. This oversight will include program review, objecting to permits and targeting compliance and enforcement actions as necessary to meet water quality goals.

The pollution diet calls for a 25 percent reduction in nitrogen, 24 percent reduction in phosphorus and 20 percent reduction in sediment. The TMDL, which sets Bay watershed limits of 185.9 million pounds of nitrogen, 12.5 million pounds of phosphorus and 6.45 billion pounds of sediment per year, is designed to ensure all pollution control measures to fully restore the Bay and its tidal rivers are in place by 2025, with at least 60 percent of the actions completed by 2017.

Despite all the extensive restoration efforts during the last 25 years, the TMDL was prompted by insufficient progress in restoring the Bay. The TMDL is required under federal law and responds to consent decrees in Virginia and the District of Columbia dating back to the late 1990s.

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

Pennsylvania's DEP Files 2010 Report on Water Quality

By Kimberly A. Freimuth

The Pennsylvania Department of Environmental Protection (DEP) has submitted its "2010 Pennsylvania Integrated Water Quality Monitoring and Assessment Report" to the Environmental Protection Agency to satisfy requirements of both sections 305(b) and 303(d) of the Clean Water Act. There are several goals of the 2010 Integrated Water Quality Monitoring and Assessment Report. Foremost is to report on the condition of the waters in the Commonwealth. Other goals include describing the water pollution control and assessment/monitoring programs.

Section 303(d) of the Clean Water Act requires states to list all impaired waters not supporting uses even after appropriate and required water pollution control technologies have been applied. The DEP has an ongoing program to assess the quality of waters in Pennsylvania and identify streams and other bodies of water that are not attaining designated and existing uses as "impaired."

Each water body must be assessed for four different uses (aquatic life, water supply, fish consumption and recreation) as defined in the DEP's rules and regulations at 25 Pennsylvania Code Chapter 93 (Water Quality Standards) in Section 93.3, Protected Water Uses. Generally, aquatic life pertains to maintaining flora and fauna indigenous to aquatic habitats; water supply relates to the protection of ambient water quality for possible use as a potable water supply; fish consumption protects the public from consuming tainted fish; and recreation relates to water contact and boating. Each use may have different water quality criteria for individual chemical constituents, and each use requires a different type of stream or lake assessment.

According to the report, 68,320 miles of the state's 84,867 miles of streams and rivers—or 80 percent—assessed for aquatic life use are attaining that water use. Of the impaired miles, 9,413 require development of a total maximum daily load, or TMDL, to reduce pollutant inputs, and 6,105 have an approved TMDL. An additional 65 miles are under compliance agreements and are expected to improve within a reasonable amount of time. (See listing of various categories and relevant water bodies at the DEP web site.) A TMDL identifies allowable pollutant loads to a water body from both point and non-point sources that will prevent a violation of water quality standards.

The report found that Pennsylvania's water bodies are facing threats from a variety of industries and are subject to many different types of pollutants. Sources of pollution include agriculture, stormwater runoff, land development, sewage treatment plants and atmospheric conditions. Some of the pollutants of concern include nutrients, suspended solids, silt, metals and total dissolved solids (TDS).

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

EPA To Set Greenhouse Gas Standards

By Clair E. Wischusen

On Dec. 23, 2010, the Environmental Protection Agency (EPA) issued its plan for establishing greenhouse gas (GHG) pollution standards under the Clean Air Act in 2011. The agency looked at a number of sectors and is moving forward on GHG standards for fossil fuel power plants and petroleum refineries—two of the largest industrial sources, representing nearly 40 percent of the GHG pollution in the United States. The schedule issued in the agreements provides a path forward for these sectors and is part of the EPA's approach to addressing GHGs from the largest industrial pollution sources.

Several states, local governments and environmental organizations sued the EPA over its failure to update the pollution standards for fossil fuel power plants and petroleum refineries, two of the largest source categories of GHG pollution in the United States. Under the new agreement, the EPA will propose standards for power plants in July 2011 and for refineries in

December 2011 and will issue final standards in May 2012 and November 2012, respectively.

This schedule will allow the agency to host listening sessions with the business community, states and other stakeholders in early 2011 before the rulemaking process begins as well as to solicit additional feedback during the routine notice and comment period.

The Clean Air Act requires the EPA to set industry-specific standards for new sources that emit significant quantities of harmful pollutants. These standards, called New Source Performance Standards (NSPS), set the level of pollution new facilities may emit and address air pollution from existing facilities.

The EPA will accept public comment on these two agreements for 30 days following publication of notice in the *Federal Register*.

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

Time Period for Third-Party Appeals to NPDES Permits and Chapter 105 Permits

By Kimberly A. Freimuth

Anyone proposing to discharge stormwater from construction activities disturbing five acres or more of land must apply for and receive a National Pollutant Discharge Elimination System (NPDES) Permit, which regulates the discharge of pollutants from a point source into surface waters.

Chapter 92a of Title 25 of the Pennsylvania Code regulates NPDES permits. Public notice of every complete application for an NPDES permit will be published in the *Pennsylvania Bulletin*. 25 Pa. Code § 92a.82(a). Following public notice, there is a 30-day period during which written comments may be submitted by interested persons before the Pennsylvania Department of Environmental Protection makes its final determinations. *Id.* at 92a.82(d). The Department reserves the right to extend this public comment period for an additional 15 days. *Id.* In addition, the Department provides an opportunity for the applicant, any affected state, any affected interstate agency or any interested agency, person or group of persons to request or petition for a public hearing and file a request for such hearing within the 30-day public comment period. *Id.* A hearing will be held if there is significant public interest. *Id.* Following the public comment period and any public hearing, the Department will take action on the permit and publish any final action in the *Pennsylvania Bulletin*. *Id.* at 92a.86. Appeals to the Department's issuance of an NPDES permit may be taken to the Environmental Hearing Board (EHB) and notice of the appeal will also be published in the *Pennsylvania Bulletin*. See *id.* at 92a.88.

Chapter 105 of Title 25 of the Pennsylvania Code provides that a person may not construct, operate, maintain, modify, enlarge or abandon a dam, water obstruction or encroachment without first obtaining a written permit from the Department. 25 Pa. Code § 105.11(a). Except for dams, water obstructions and encroachments authorized under Sections 105.12 (regarding waiver of permit requirements), 105.64 (regarding emergency permits) and Subchapter L (regarding general permits on a regional or statewide basis for a category of dam, water obstruction or encroachment), or as small projects (those having an insignificant impact on safety and protection of life, health, property and the environment), the Department will publish a notice in the *Pennsylvania Bulletin* upon receipt of an application and again upon the issuance or denial of a permit by the Department. *Id.* at 105.21a. Appeals to the Department's issuance of a Chapter 105 permit may be taken to the EHB upon the filing of a notice of appeal. *Id.* at 1021.51.

Chapter 1021 of Title 25 of the Pennsylvania Code regulates the practices and procedures before the EHB. An appeal from a Department action shall commence with the filing of a written notice of appeal with the EHB. 25 Pa. Code § 1021.51. The person to whom the Department action is directed or issued shall file its appeal within 30 days after it receives written notice of the action. *Id.* at 1021.52(a)(1). Any other person aggrieved by an action of the Department shall file its appeal within one of the following: (1) 30 days after the notice of the action has been published in the *Pennsylvania Bulletin*; or (2) 30 days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin*. *Id.* at 1021.52(a)(2). Publication of a notice of action or proposed action by the Department or Board in the *Pennsylvania Bulletin* constitutes notice to or service upon all persons, except a party, effective as of the date of publication. *Id.* at 1021.38.

Therefore, the time period to file an appeal with the EHB to the issuance of an NPDES permit by the Department is within 30 days after notice of the issuance of the permit is published in the *Pennsylvania Bulletin*. With regard to a Chapter 105 permit, assuming the type of Chapter 105 permit is one that would published in the *Pennsylvania Bulletin*, a third party would have 30 days from the date on which issuance of the Chapter 105 permit is published in the *Pennsylvania Bulletin* to file its appeal with the EHB. If the Chapter 105 permit is not one that would have been issued in the *Pennsylvania Bulletin* (for instance, if it were designated a "small project" having an insignificant impact on safety and protection of life, health, property and the environment), then a third party would have 30 days after actual notice of the issuance of the Chapter 105 permit to file its appeal.

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

Beer in the Grocery Store?

By Herbert K. Sudfeld, Jr.

In the case of *Malt Beverage Distributors Association and K.E. Pletcher, Inc. v. Pennsylvania Liquor Control Board and Wegmans Food Markets, Inc.*, J-28E-2010, the Supreme Court of Pennsylvania heard an appeal from the Order of the Commonwealth Court entered March 2, 2009, at No. 516 C. D. 2008, affirming the decision of the Pennsylvania Liquor Control Board (PLCB) dated March 19, 2008, at Nos. 07-9144. (The Commonwealth Court decision being cited at 966 A.2d 1180 (Pa. Cmwlth. 2009).) In this case, the court was called upon to determine whether the PLCB erred by authorizing five restaurants located in various Wegmans Food Stores to sell beer for consumption on the premises and in limited quantities for take-out purposes.

All parties agreed the restaurants qualified as a restaurant under the definition in the Section 102 of the Liquor Code, 47 P.S. § 1-102. The court therefore focused on whether the PLCB acted within its discretion in approving the interconnection between the restaurant and the unlicensed supermarket, and assuming such approval was proper, whether a restaurant located entirely within a supermarket should be eligible to hold a liquor license.

The Malt Beverage Distributors Association (MBDA) and the other appellants argued that PLCB Regulation 3.52, "Connection With Other Business," should prohibit the restaurant in the supermarkets. That section prohibits licensees from conducting another business on the licensed premises and requires that the licensed premises may not have an inside passage or communication to or with any business conducted by the licensee except as approved by the Board. *Id.* at § 3.52(b). Regulation 3.54 requires any such interior connection to be clearly indicated by a permanent partition at least four feet in height. Other requirements concerning storage and sales of liquor and malt beverages strictly within the premises or area covered by the license are also contained within the Regulations. See *Id.* at § 3.53.

The court determined the PLCB had conducted hearings and determined that every requirement of the regulations had been met by Wegmans, and that once the PLCB had made the discretionary decision to allow the interior connection, it then had properly determined that Wegmans had satisfied all the other requirements of the regulations regarding restriction on beer sales and the permanent four-foot high wall. In responding to the MBDA's argument that the case involved the sale of malt liquor by a grocery store, which is impermissible in Pennsylvania, the court noted the MBDA pointed to no statute or regulation that prohibits a restaurant liquor license from having an interior connection with a supermarket and the Liquor Code does not even reference a supermarket or grocery store. The court found Wegmans had met every requirement for a license as a restaurant and the PLCB had not erred as a matter of law in issuing a license to Wegmans. The court refused to step into the shoes of the Legislature on the issue of whether Pennsylvania should allow licensed restaurants to be established in supermarkets or to curtail such practice.

While I personally recognize the fear of Pennsylvania beer distributors that big grocery store chains are intruding upon their niche business, this decision was correctly made based upon the law in Pennsylvania at the current time. Our Legislature needs to carefully review the issue to determine whether it creates such a change to the beer distribution system in the Commonwealth that legislation is required to curtail any further intrusion into the business of beer sales.

For more information, please contact Herbert K. Sudfeld, Jr. at 215.918.3570 or hsudfeld@foxrothschild.com. He regularly represents both restaurants and beer distributors in liquor license acquisitions, renewals and enforcement actions before the PLCB.

New Jersey Legislative Report: Update on S-1451 - The Rice Bill

By Jeffrey M. Hall

On Jan. 10, 2011, the New Jersey State Senate voted down S-1451, popularly known as the Rice bill, named after Ronald Rice, a State Senator from Essex County. (See November 2010 *In the Zone* for a complete summary of the bill).

The Rice bill proposed a number of changes to the Local Redevelopment and Housing Law, the Eminent Domain Act and the Relocation Assistance Act. If enacted, S-1451 would have granted property owners greater rights in condemnation matters for redevelopment by redefining "blight," by enhancing notice requirements and by giving owners greater advantages in the valuation process. The bill sought to codify appellate court holdings in *Gallenthin Realty Development Inc. v. Paulsboro*, 191 N.J. 344 (2007) and *Harrison Redev. Agency v. DeRose*, 398 N.J. Super. 361 (App Div. 2008). The measure was roundly rejected as, reportedly, there had been strong opposition from both municipalities and developers.

For more information, please contact Jeffrey M. Hall at 609.895.6755 or jhall@foxrothschild.com.

Congress Enacts New Federal Law Requiring U.S. To Pay for Stormwater Pollution

By Robert W. Gundlach, Jr.

In the waning legislative days of 2010, Congress approved legislation that would require the federal government to pay "reasonable service charges" to local governments managing stormwater runoff pollution from federal facilities, putting it on the same level for mitigation fees paid by private citizens and businesses.

Senator Benjamin L. Cardin (D-MD), chair of the Senate Environment and Public Works (EPW) Water and Wildlife Subcommittee, and Senator James Inhofe (R-OK), ranking member of the EPW Committee, lauded Congressional passage of S. 3481, which requires the federal government to comply with local stormwater fees that are used to treat and manage polluted stormwater runoff. The bill amends the Clean Water Act, in response to recent written decisions that rebuffed or left ambiguous the need for federal agencies to pay such fees.

"At stake has been a fundamental issue of equity: polluters should be financially responsible for the pollution that they cause, including the federal government," said Senator Cardin. "From Washington, DC, to Washington State, the failure of the federal government to pay localities for reasonable costs associated with the control and abatement of pollution that originated on its properties has taken its toll. Annually hundreds of thousands of pounds of pollutants wash off the hardened surfaces in urban areas and into local rivers and streams, threatening the health of our citizens and causing significant environmental degradation."

The legislation has been presented to President Obama and awaits his signature.

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

Judge Michael Krancer Named as Next PADEP Secretary

By M. Joel Bolstein

Pennsylvania Governor-Elect Tom Corbett recently announced his intention to nominate Environmental Hearing Board Judge Michael Krancer as Secretary of the Department of Environmental Protection. Judge Krancer has served as a judge on the EHB for almost 10 years. He was nominated by Governor Tom Ridge in 1999, and in 2003 was named by Governor Rendell as Chief Judge and Chairman of the EHB. Judge Krancer briefly stepped down from the EHB to be the Republican nominee for the Supreme Court of Pennsylvania and then served as assistant general counsel for Exelon Corporation prior to returning to the EHB.

Judge Krancer no doubt has a tough job ahead of him running the PADEP, which has been battered in recent years by budget cuts and low morale. The Department has also lost many senior staff to retirement, and the expectation is that more retirements will be coming. Additionally, the most significant economic opportunity to hit Pennsylvania in decades – the development of the Marcellus Shale – raises a whole host of environmental issues that will quickly confront the new Secretary. Those issues include balancing the need to grow Pennsylvania's economy and create jobs with the need to strictly regulate the industry and protect the state's water supply, as well as defending Pennsylvania's sovereignty and its ability to control its own economic destiny while others, such as the Environmental Protection Agency and Delaware River Basin Commission, try to push their way into the regulatory framework.

The PADEP is a big department with many moving parts, and Judge Krancer is likely to have his hands full beyond the Marcellus Shale. There is the matter of reorganizing the Department, which was last restructured in 1995 when, along with the Department of Conservation and Natural Resources, it split from the Department of Environmental Resources. Governor-Elect Corbett has talked about pulling all the energy functions out of the Department, which it if happens will occur relatively quickly, along with other restructuring necessary to implement his "back-to-basics" philosophy for the Department.

For more information about the likely direction the PADEP will take under Secretary Krancer or if you have a question you'd like to direct to the new Secretary, please contact M. Joel Bolstein at 215.918.3555 or jbolstein@foxrothschild.com.

PA Act 319 Preferential Tax Treatment Amended To Include Land Devoted to Alternative Energy Systems

By Kimberly A. Freimuth

On Nov. 23, 2010, Governor Rendell signed into legislation Act 109 amending Act 319, which provides preferential tax assessments for land devoted to agricultural use, to include land devoted to alternative energy systems.

Specifically, Act 109 amends the definitions of "agricultural reserve," "agricultural use" and "forest reserve" to include "any 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." An "alternative energy system" is defined as a "facility or energy system that utilizes a Tier 1 energy source [as defined by the Alternative Energy Portfolio Standards Act] to generate alternative energy," including "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 amendment to the Act further allows landowners enrolled under Act 319 to use their land for commercial wind production where more than half of the produced energy is sold and used off of the tract of land, but subjects the land devoted to such use to rollback taxes. The remaining land stays in preferential treatment.

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

Fox Rothschild LLP
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