In the Zone

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Fox Rothschild LLP
ATTORNEYS AT LAW

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When Does a Parking Lot Stop Being a 'Parking Lot'?

By Brian J. Levin and Reuben Asia

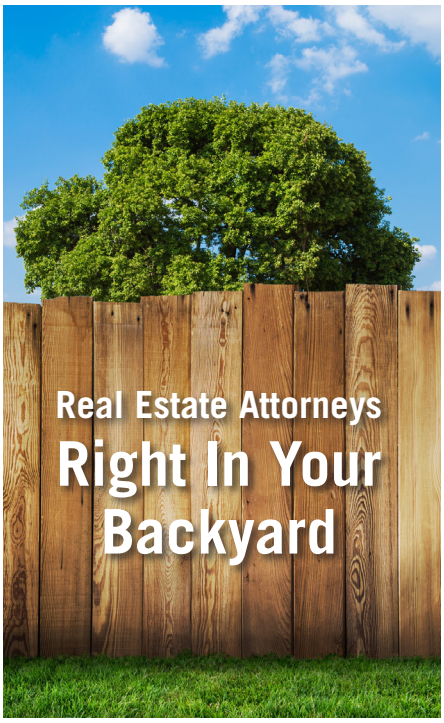
Individuals and companies involved in the use, purchase or sale of real estate with legal, nonconforming uses may confront thorny questions related to abandonment and/or change of the nonconforming use. For example, should a landlord be concerned when a tenant of a property with a legal, nonconforming use leaves and the landlord is unable to find a replacement for some time? Should a potential buyer of a property with a legal, nonconforming use purchase the property if the potential buyer's business is slightly different from the current user of the property?

While the answers to these and other questions are certainly fact-dependent, a recent opinion from the Commonwealth Court of Pennsylvania definitely provides insight and guidance.

In *Itama Development Associates, LP v. Zoning Hearing Board of the Township of Rostraver* (No. 985 C.D.2015, - A.3d -, 2016 WL 72822 (Pa. Cmmw. Ct. 2016)), the court addressed the zoning concepts of abandonment and expansion of a legal, nonconforming use of a property in Rostraver Township. Prior to the enactment of the township's zoning ordinance, the Belle Vernon Area School District had used a garage on the property for the storage, fueling, parking and maintenance of its buses and vehicles.

An ordinance enacted in 1970 placed the property in the township's Retail Business District, but the school district continued to use the property for the same purposes, and such use was expressly permitted as a legal, nonconforming use under the ordinance.

In 2009, the school district purchased a new parcel of land for the fueling and maintenance of its vehicles. It discontinued its long-term storage of vehicles at the property, but continued to use the property for refueling and maintenance between the hours of 6 a.m. and 5 p.m. during the academic year, with infrequent weekend and evening activity. Eventually, in April 2013, Itama Development Associates, LP purchased the property and continued to allow the school district to use the property for refueling and maintenance. In July 2013, the school district ended its use of the property.



> "The key takeaway from this case is that increasing the intensity of use of a legal, nonconforming property is not necessarily prohibited. However, at some point, the increased use can "cross the line" and become a prohibited expansion, where the increased use fundamentally alters the use of the property. As one can see from the differing conclusions of the zoning board/trial court and the Commonwealth Court, however, the line between natural expansion and a change in use is not always clear."

In April 2014, Itama found a potential new tenant that desired to use the property for its business of providing fresh water to gas well drillers and operators. Itama subsequently applied for an occupancy permit for a continuation of the legal, nonconforming use at the property. After the township's zoning officer initially refused to issue the permit, claiming the proposed use had been abandoned in 2009, the township's zoning board approved Itama's request for a permit to continue the use of the property as a vehicle garage. Similar to the school district's use of the property post-2009, Itama stated to the zoning board that the potential new tenant would use the property to refuel trucks and perform basic, vehicular maintenance. Though the deal between Itama and the potential new tenant fell through, Itama soon leased the property to another tenant that operated a commercial trucking business, serving the natural gas drilling industry.

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Soon after, following complaints from nearby residents about noise and the hours of operations, the zoning officer issued zoning use violations to Itama and the tenant. Itama appealed the violations to the zoning board, arguing they were improper since the tenant was using the property in accordance with the permit Itama had obtained. After a hearing, the board determined the tenant was using the property for: the parking of vehicles, long- and short-term storage of roll-off boxes and other container vessels (sometimes containing residual waste from drilling activity), and the construction and use of a containment area to prevent waste from the containers from reaching the ground. Moreover, the tenant was using the property during late night and early morning hours.

First, the zoning board found that the school district had abandoned its use of the property for parking vehicles in 2009 when it discontinued its long-term storage of vehicles at the property, which was more than 12 months before the tenant began to park vehicles at the property. The zoning board noted that the ordinance stated a nonconforming use is considered abandoned when the use has been discontinued for a period of 12 months. Moreover, the zoning board also concluded the tenant's use of the property was an impermissible change in the legal, nonconforming use at the property, determining the tenant was engaged in activity at the property different from the school district.

On appeal, the Court of Common Pleas of Westmoreland County agreed with the zoning board that the school district abandoned its use of the property for parking vehicles in 2009. The trial court held that the only permissible use of the property was for the fueling and minor maintenance of vehicles, not for a parking lot or storage center, and therefore the tenant's dissimilar use of the property was impermissible. Itama appealed this decision to the Commonwealth Court of Pennsylvania.

Among the arguments Itama made, the two that resonated with the Commonwealth Court were the arguments against the abandonment and change of the legal, nonconforming use.

Contrary to the determinations of the zoning board and the trial court, the Commonwealth Court held there was clear evidence that the use of the property for the parking of vehicles had not stopped in 2009 but rather continued through July 2013. The Commonwealth Court noted the school district continued to use the property between 2009 and 2013 for the maintenance and fueling of its vehicles, a function which inherently included the parking of vehicles on the property. The Commonwealth Court seemed to take the view that the primary purpose of situating vehicles on the property did not need to be for parking, but rather that a use which included parking was sufficient. Because the tenant's use of the property for maintenance and fueling — which includes parking — began less than 12 months after the school district's use of the property for parking had stopped, the court held that the ordinance's definition of abandonment had not been met.

Rejecting the argument that the tenant's use of the property was fundamentally different from the school district's use, the Commonwealth Court invoked the doctrine of "natural expansion," which permits a property user to develop or expand upon an existing, legal, nonconforming use without the user's being considered to have impermissibly changed the use of the property. Whether a certain use of property is a natural expansion or a change is fact specific, but the Commonwealth Court noted that an increase in intensity of use does not necessarily constitute a new or different use. After parsing the facts of the case, the Commonwealth Court concluded that the tenant's use of the property, while definitely an increase in intensity, was not a different use. The school district had parked vehicles at the property; the tenant was parking vehicles at the property. The school district had vehicles coming to and from the property; the tenant had vehicles coming to and from the property. Though the tenant was "incidentally" storing boxes and containers at the property, this incidental storage was not sufficiently different from the school district's use of the property as a vehicle garage to be deemed a different or prohibited expansion of the use of the property.

The key takeaway from this case is that increasing the intensity of use of a legal, nonconforming property is not necessarily prohibited. However, at some point, the increased use can "cross the line" and become a prohibited expansion, where the increased use fundamentally alters the use of the property. As one can see from the differing conclusions of the zoning board/trial court and the Commonwealth Court, however, the line between natural expansion and a change in use is not always clear.

Authors

Brian J. Levin
215.299.2838
blevin@foxrothschild.com

Reuben Asia
215.299.2190
rasia@foxrothschild.com

PA Environmental Hearing Board's Recent Decisions Give Renewed Emphasis to PA Constitution's Article I, Section 27, Carrying Significant Implications for all PADEP Permit Programs

By Joel Bolstein

When the Pennsylvania Department of Environment Protection (PADEP) issues an environmental permit — such as a National Pollutant Discharge Elimination System (NPDES) stormwater construction permit for a new commercial or residential development — that final action may be appealed to the Pennsylvania Environmental Hearing Board (EHB) within 30 days of receiving notice by any person with standing to challenge the action, which generally includes any individual or organization claiming to be directly and substantially impacted. That allows municipalities, environmental groups and private individuals to submit appeals to the EHB, arguing that the PADEP's action was arbitrary and capricious, an abuse of discretion or contrary to law.

Until now, the EHB's primary focus would be on whether the PADEP's issuance of the permit complied with the applicable statutes and regulations. In arguing that the PADEP's action was contrary to law, appellants would routinely add an allegation that the PADEP's action violated Article I, Section 27 of the Pennsylvania Constitution, which states that the "people have a right to clean air, pure water and to the preservation of the natural, scenic, historic and esthetic values of the environment."

Historically, it has been extremely difficult for appellants to win an appeal based on an alleged violation of Article I, Section 27, because long-standing EHB case law held that as long as the PADEP complied with the applicable regulations issuing the permit, and those regulations were adopted pursuant to Article I, Section 27 (which they all have been since 1971), then the Article I, Section 27 challenge would be unsuccessful.

In two recent cases, however, the EHB denied motions for summary judgment filed by permit holders seeking to dismiss Article I, Section 27 challenges. The EHB held in these cases that a demonstration of compliance with the applicable regulations will no longer be deemed adequate to satisfy Article I, Section 27. Although neither case resulted in a ruling on the merits, they potentially leave the PADEP permits vulnerable to challenges on the basis that the PADEP should have used its discretion and imposed additional conditions to reflect its responsibility to implement Article I, Section 27.

The most recent case where this issue came up was *Justin Snyder et al. v. PADEP and Columbia Gas Transmission, LLC*, which was decided by the EHB on December 21, 2015. In that case, the PADEP had approved an air quality plan for a natural gas compressor station in Pike County. A group of neighbors challenged the permit in an appeal to the EHB. Among the arguments raised in the appeal, the neighbors contended that the PADEP's action violated Article I, Section 27 of the Pennsylvania Constitution, asserting they had a right to clean air which was not taken into consideration.

The permittee asserted that its compliance with all of the applicable statutory and regulatory requirements automatically constituted compliance with Article I, Section 27 and sought to dismiss that claim in a motion for partial summary judgment. In rejecting the permittee's argument and allowing the Article I, Section 27 claim to proceed to a hearing, EHB Judge Bernard A. Labuskes referred to his prior ruling in *Sludge Free UMBT v. DEP*, decided on July 1, 2015, in which he had written extensively regarding the test to be used from here forward by the EHB for determining compliance with the constitutional provision.

As noted by Judge Labuskes, the Commonwealth Court in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), affirmed 361 A.2d 263 (Pa. 1976) first articulated a three-part test for analyzing whether the PADEP's final action comports with Article I, Section 27. The *Payne* test consists of the following questions:

- Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
- Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- Does the environmental harm that will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

In *Sludge Free UMBT*, Judge Labuskes emphasized the second and third prongs of the Payne test, which had previously been largely ignored by the EHB. In his decision, he stated that perfect compliance with the minimum regulatory requirements "may not always be enough" if the PADEP can be shown to have unreasonably exercised its discretion. The judge indicated that, going forward, the EHB would address all three questions set forth in the *Payne* test in cases in which the appellants claim that the PADEP's action violates Article I, Section 27, which would open the door for greater scrutiny to be placed on PADEP's permitting decisions.

So what do these recent EHB decisions regarding Article I, Section 27 mean for developers applying for and receiving environmental permits from PADEP? They mean that the permitting process must be considerably more thoughtful on the part of both the PADEP and the permit applicant.

Let me provide an example of what I mean by thoughtful. Suppose a residential developer is going to construct 200 homes on 100 acres and is applying to the PADEP for an NPDES stormwater construction permit. Ordinarily, the developer's engineer would prepare an application, paying close attention to the requirements under the applicable statutes, regulations and PADEP guidance. It would submit that application to the PADEP, and the PADEP's review would focus primarily on whether the application complies with the applicable statutes, regulations and guidance.

Given the EHB's recent rulings on Article I, Section 27, however, both the permit applicant and the PADEP would be well advised to consider whether additional efforts, such as voluntarily agreeing to include additional BMPs as conditions in the permit, should be taken to establish in the administrative record that "reasonable efforts" were undertaken to further "reduce to a minimum the environmental incursion of the project under review." Moreover, both the permit applicant and the PADEP might want to highlight areas in the permit application that specifically identify the "benefits" of the project and the efforts being undertaken to minimize any potential environmental harm.

While those things might have been taken into consideration previously by both the PADEP and the permit applicant and its consultants, the most recent EHB decisions focusing on Article I, Section 27 would now compel the PADEP and the permit applicant to affirmatively undertake those efforts, do more to highlight such information in the permit application so the EHB can clearly see it later if the permit is appealed, and consider whether to voluntarily include conditions in the permit that would not necessarily be "required" by the regulations, but would demonstrate to the EHB that the PADEP exercised its discretion and took additional efforts to reduce any environmental incursion to a minimum.

Again, while neither of the recent cases involved decisions on the merits of the underlying Article I, Section 27 claims, the PADEP and permit applicants would do well to anticipate such claims and marshal all of the ammunition possible for the EHB to later find, if it comes to that, no violation of Article I, Section 27 based on the thoughtfulness of both the PADEP and the permit applicant in doing more than is minimally necessary under the applicable statute and regulations and reflecting that in the permit itself and the underlying administrative record.

It is clear that permits issued by the PADEP are slightly more vulnerable to challenges based on Article I, Section 27 than they were before. Both the PADEP and permit applicants need to be aware of those recent decisions and act accordingly.

Author

M. Joel Bolstein
215.918.3555
jbolstein@foxrothschild.com

'Time of Application Rule' Allows Developers To Take Advantage of Changes in Zoning Laws During Pendency of Application, NJ Appellate Division Rules

By Michael T. Lavigne

New Jersey developers received some useful guidance in a case recently decided by the Appellate Division relating to (1) whether a developer can take advantage of a favorable change in a local zoning ordinance that occurs subsequent to the date that the developer submitted its pending application in light of New Jersey's "Time of Application Rule;" and (2) their ability to rely on the Nonstructural Strategies Point System matrix, which was informally promulgated by the New Jersey Department of Environmental Protection, in demonstrating compliance with municipal stormwater regulations.

In *RUPE v. Planning Bd. of the Township of Hamilton*, No. A-4794-13T1 (App. Div. 2015), the developer, Hamilton Crosswicks 130, LLC, initially filed an application with the Hamilton Township Zoning Board of Adjustment seeking a conditional use variance as well as preliminary and final site plan approval in order to construct a Wawa convenience store and gasoline service station on its property commonly known as Deer Path Plaza. The subject property contained existing retail development consisting of a strip shopping mall and a separate free-standing building occupied by an Army and Navy store. These existing retail buildings were served by on-site parking fields and two stormwater detention basins. The developer proposed to demolish the existing 12,605-square-foot Army and Navy store building to enable Wawa to construct in its place a 4,691-square-foot convenience store and a gasoline station with 12 fueling positions under a 4,710-square-foot canopy.

At the time the developer submitted its application, convenience stores were a permitted use in the relevant zoning district, and gasoline stations were designated as a conditional use. One of the applicable conditional use standards required that no gasoline service station be located within 1,500 feet of another gasoline station. Because there was an existing gasoline station less than 1,500 feet from the subject property, the developer submitted its application to the Zoning Board of Adjustment for a conditional use variance along with preliminary and final site plan approval. Subsequent to the developer's submission of its application to the zoning board, but prior to the first public hearing on the matter, the Hamilton Township governing body amended the zoning ordinance to delete the 1,500-foot separation requirement from the conditional use standards applicable to gasoline stations. The effective date of the amendment was May 9, 2013. Following passage of the amendment, counsel for the developer submitted a letter to the township's land use coordinator requesting that he "deem the application [to the Zoning Board of Adjustment] be withdrawn effective May 10, 2013, and refiled as of that date before the Township Planning Board." The land use coordinator complied with this request, and the developer's application proceeded before the Township Planning Board.

One of the principal issues before the planning board was the extent to which the proposed development complied with Hamilton Township's stormwater control ordinance applicable to "major development." The developer contended that it was not required to demonstrate compliance with the stormwater

standards pertaining to the quality of runoff generated from the proposed development because its proposal called for the creation of less than a quarter acre of additional impervious coverage. Nevertheless, at the request of the planning board's engineering consultant, the developer submitted a report addressing the quality of the stormwater runoff to be generated by its development proposal and incorporated therein an analysis using the Nonstructural Strategies Point System (NSPS) matrix that had been promulgated informally by the New Jersey Department of Environmental Protection (NJDEP).

At the conclusion of the second public hearing, the planning board voted to grant the developer conditional use approval, amended preliminary and final site plan approval and certain waivers. In its memorializing resolution, the planning board expressly stated that it found the developer's testimony with respect to compliance with the township's stormwater ordinance to be credible, and concluded that the proposed development complied with the township's ordinance as it pertains to stormwater quality, regardless of whether, strictly speaking, the proposed development was exempt from these requirements or not.

The plaintiff, RUPE, LLC (the owner of a competing gasoline station located within 1,500 feet of the subject property), appealed the planning board's approval. The plaintiff argued, among other things, that the planning board lacked jurisdiction to hear the developer's application because, at the time the application was filed, it required a d(3) conditional use variance that can be granted only by the zoning board. The plaintiff also argued that, since the NJDEP had promulgated the NSPS informally, without complying with the requirements for formal administrative rulemaking outlined in the New Jersey Administrative Procedure Act, the planning board's reliance on the developer's stormwater management report containing an NSPS matrix to show compliance with the township's stormwater ordinance was arbitrary, capricious and unreasonable, citing the Appellate Division's holding in *In re Authorization for Freshwater Wetlands Statewide General Permit 6*, 433 N.J.Super. 385 (App. Div. 2013). The trial court rejected all of the plaintiff's arguments and upheld the planning board's approval. On appeal, the Appellate Division affirmed the holding of the trial court.

To determine the threshold issue of the planning board's jurisdiction to hear the developer's application, the Appellate Division examined New Jersey's "Time of Application Rule," and the legislative history leading to its adoption. The "Time of Application Rule" is codified at *N.J.S.A.* 40:55D-10.5 and reads as follows: "Notwithstanding any provision of law to the contrary, those development regulations which are in effect on the date of submission of an application for development shall govern the review of that application for development and any decision made with regard to that application for development. Any provisions of an ordinance, except those relating to health and public safety, that are adopted subsequent to the date of submission of an application for development, shall not be applicable to that application for development."

In applying the "Time of Application Rule" to the facts of *RUPE*, the Appellate Division looked beyond the statutory language to the legislative intent behind its enactment. As the court noted, the "Time of Application Rule" was intended to benefit developers by shielding them from the often harsh and inequitable consequences of the previously applicable "Time of Decision Rule," which generally subjected developers to changes in law, sometimes adopted in direct response and opposition to the developer's proposed project, after considerable amounts of time and money had already been spent preparing and prosecuting the development application in reliance on the state of the law at the time of its initial submission. In *RUPE*, the change in law at issue (i.e., the township's repeal of the 1,500 foot separation distance requirement applicable to gasoline stations) favored the developer. The court held that, given its ameliorative intent, there is nothing in the "Time of Application Rule" to prevent a developer in such circumstances from withdrawing and refiling a development application to avail itself of the favorable change in the law. Accordingly, the Appellate Division validated the withdrawal and refiling procedure requested by the developer's counsel and agreed to by the township's land use coordinator, allowing the developer to avail itself of the favorable change in the ordinance and vesting the planning board with jurisdiction over the application.

RUPE also argued on appeal that the planning board's decision was invalid because it determined the developer's compliance with the township's stormwater ordinance by relying on the NSPS, which RUPE argued was contrary to the Appellate Division's holding in *In re Authorization for Freshwater Wetlands Statewide General Permit 6*, 433 N.J.Super. 385 (App. Div. 2013). In that case, the Appellate Division ruled that the NJDEP's failure to follow the formal administrative rulemaking procedures set forth in New Jersey's Administrative Procedure Act in adopting its NSPS stormwater evaluation system was improper. As the Appellate Division explained in its *RUPE* holding, *In re Authorization* should not be interpreted to mean that the NJDEP's NSPS matrix has no evidential value. On the contrary, the *RUPE* court expressly held that it was not arbitrary, capricious or unreasonable for the planning board to utilize the NSPS tool that NJDEP had informally promulgated in the planning board's efforts to apply the township's stormwater ordinance and evaluate the effects that the developer's project would have on the quality of stormwater runoff.

The *RUPE* case makes clear that New Jersey's "Time of Application Rule" does not prevent a developer from taking advantage of a favorable change in the applicable zoning ordinance that becomes effective subsequent to the initial filing of the developer's application and provides procedural guidance as to how this can be accomplished. In addition, it supports the use of the NJDEP's NSPS scoring matrix, promulgated without the required formalities of administrative rulemaking, in demonstrating compliance with a municipality's stormwater management ordinance.

Author

Michael T. Lavigne
973.326.7113
mlavigne@foxrothschild.com

Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 1555 proposes to amend the Pennsylvania Municipalities Planning Code (MPC) by mandating that additional requirements are met before a plan can receive final approval.

Representative Dan Truitt, who represents residents of a portion of Chester County from the 156th District of Pennsylvania and is one of the sponsors of House Bill No. 1555, wrote that the proposed legislation would "require that before a municipality can issue final approval for a development plan, it must receive confirmation from the design firm that the design firm has been properly compensated and the plans have been released for construction."

Specifically, House Bill No. 1555 proposes to add the following language to the MPC: "No plat may be finally approved unless the plat contains a notice from the design consultant stating that: (1) the design consultant has been properly compensated for the creation of the development plan; and (2) the provisions of the development plan have been released for use by the municipality and any applicable regulatory agency."

The MPC does not define the term "design consultant" as used in House Bill No. 1555, but the MPC defines "professional consultants" as "[p]ersons who provide expert or professional advice, including, but not limited to, architects, attorneys, certified public accountants, engineers, geologists, land surveyors, landscape architects or planners."

As for the status of House Bill No. 1555, it was referred to the local government committee where it remains.

Author

David H. Comer
610.397.7963
dcomer@foxrothschild.com

New Jersey Legislative Update

By Bridget A. Sykes

Senate Bill 1126 proposes to create a "Land Use Court" made up of six to 12 judges who will have the power to hear and decide land use disputes throughout New Jersey. The bill statement likens the Land Use Court to the Tax Court. Appeals would be made to the Appellate Division.

Jurisdiction is sweeping and would extend to any land use decision of a state, county or municipal government, department or agency — including any land use approval that is required as a prerequisite for the issuance of a construction permit — and any dispute regarding the adoption or implementation of a county or municipal master plan or development regulation or the State Development and Redevelopment Plan. The bill provides the broad power to exercise jurisdiction in any action cognizable in the Superior Court, which raises issues where judicial expertise in matters involving land use is desirable. The bill expressly declares that the Land Use Court shall not have jurisdiction over Mount Laurel litigation pursuant to the Fair Housing Act.

The stated intent of the bill is to improve the quality and consistency of land use decisions and to enhance the fairness of process for the public, local governments and developers, and to minimize protracted litigation in the land use realm. The potentially positive impact would be efficient adjudication of land use matters by a specialized branch of the judiciary. Importantly, the bill directs the governor to take into account a potential judge's "knowledge of the law governing land use and development and experience in these matters" when making appointments.

What remains unclear and unsettled is the procedural process for the court. Currently, appeals from local land use boards are governed by the court rules pertaining to actions in lieu of prerogative writs. Those rules provide for expedited disposition and individual case management outlining the scope of discovery. Whether these rules would be carried over or whether new procedural rules will be implemented remains to be seen. Also uncertain is whether matters involving land use claims and other causes of actions would be heard by the Land Use Court or whether the court would have concurrent jurisdiction with the Superior Court. If both the Superior Court and Land Use Court have the power to exercise jurisdiction over all claims, lawyers would be faced with a tactical decision when deciding where to file.

The bill was introduced only recently, on February 8, 2016, and has not yet been passed. However, it is a bill to watch as it may dramatically change land use litigation practice. A copy of the bill can be found on the New Jersey Legislature website at http://www.njleg.state.nj.us/2016/Bills/S1500/1126_I1.PDF.

Author

Bridget A. Sykes
609.572.2257
bsykes@foxrothschild.com

Zoning Approvals

- Kimberly A. Freimuth obtained a use variance from the Bensalem Township Zoning Hearing Board to allow a martial arts/personal training facility use in an industrial district.
- Kimberly A. Freimuth obtained approval from the Uwchlan Township Board of Supervisors to allow outdoor seating for a coffee shop.
- Kimberly A. Freimuth obtained approval from the Upper Gwynedd Township Board of Commissioners to rezone a parcel from LI Limited Industrial to R-4 Residential and obtained dimensional relief from the Upper Gwynedd Township Zoning Hearing Board to allow a twin development on the same former industrial property.
- Carrie B. Nase-Poust obtained a variance from the Newtown Township Zoning Hearing Board to exceed the permitted sign area and sign height.
- Carrie B. Nase-Poust obtained several variances from the Zoning Board of Adjustment to exceed the number of permitted signs, the maximum sign area and the maximum sign height, as well as a zoning permit to install such signage.

Fox Rothschild LLP
ATTORNEYS AT LAW