In the Zone

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

Fox Rothschild LLP
ATTORNEYS AT LAW

Third Quarter 2016

New PADEP Act 2 Statewide Health Standards Approved

By M. Joel Bolstein

On June 30, 2016, Pennsylvania's Independent Regulatory Review Commission approved revisions to the Act 2 regulations (25 PA Code Chapter 250), which will change many of the statewide health standards applicable to remediating contaminated sites in Pennsylvania, with some being more strict and others less strict. Act 2 is Pennsylvania's voluntary cleanup program that allows developers and remediators of brownfield properties to choose from one of three cleanup standards and obtain a release of liability from the commonwealth once the Pennsylvania Department of Environmental Protection (PADEP) approves the Act 2 Final Report for the project.

Under Act 2, the PADEP is required to update the statewide health standards every three years. The statewide health standards are the medium specific concentrations for all regulated substances, which are essentially look-up numbers in charts that provide the applicable soil and groundwater numeric cleanup concentrations based on the property use (residential or nonresidential). In looking over the newly adopted statewide health standards, the one change that could be most problematic for site developers in Pennsylvania involves changes to the soil standards for vanadium. Vanadium is a naturally occurring metal. In fact, it's the 22nd most abundant element in the Earth's crust according to the Agency for Toxic Substances and Disease Registry (ASTDR). Vanadium can get into the environment naturally from dust and volcanic emissions. It can also be created by the combustion of fossil fuels. It's also found in coal and vitamin supplements.

The newly adopted Act 2 regulations will have the residential statewide health standard for vanadium in soil go from the current standard of 1,500 parts per million (ppm) all the way down to 15 ppm. That's a significant drop. The nonresidential standard for vanadium in soil would similarly drop from 20,000 ppm to 220 ppm (for the 0-2 foot interval). One of the commenters on the proposed regulations pointed out that naturally occurring levels of vanadium in Pennsylvania soils range from 15 ppm to 150 ppm, with an average of 80 ppm, which means the residential statewide health standard will now be set below the level reflective of naturally occurring conditions in most parts of Pennsylvania.

So, the vanadium soil standards are dropping, is that really a big deal? Will it affect my development plans? The answer is yes, it is a big deal and yes it could impact your development plans, especially if you are redeveloping a brownfield site for residential use. Let's say you want to purchase an old industrial site in PA. You do a Phase I Assessment and the consultant recommends a Phase II, because there was a long industrial history, there were likely spills and releases of hazardous substances and the site was also built on fill material. The Phase II is likely to involve some soil borings in the areas of concern, which would test for metals, including vanadium. In the past, the likelihood of those soil sampling results exceeding the statewide health standard for vanadium was pretty low, because the standards were set much higher and greatly exceeded the naturally occurring levels in PA. Now, it wouldn't be surprising for those results to come back above the statewide health standards for vanadium, given how much the standards have been lowered. So, say you get the results back and you have a couple exceedances for vanadium, now what do you have to do? Act 2 requires that you characterize the vertical and horizontal extent of the vanadium in the area where it exceeds the applicable standards. So you are likely to have to collect additional samples, even if there's no obvious source of any spills or releases that could involve the use of vanadium on the site. You could try to demonstrate that the vanadium was naturally occurring and attempt to get a release of liability under the background standard, but the Act 2 Technical Guidance Manual requires that to meet the background standard for soil, a remediator has to collect 12 soil samples on-site and 12 soil samples off-site to compare. That means you'd have to get access to off-site property or properties in order to take the background samples. Alternatively, the remediator could decide to either delineate all the vanadium above the statewide health standards and remove it; or cap the contaminated area with two feet or clean dirt, asphalt or concrete and then demonstrate attainment with the Act 2 Site Specific Standard, which might require deed notices in the form of an environmental covenant.

In This Issue:

No matter what, the significantly reduced standards for vanadium in soil could add time, costs and unnecessary complications to remediating brownfield sites in Pennsylvania. The lower standard is the result of changing toxicity values used by the U.S. Environmental Protection Agency (EPA), so there isn't much that the PADEP could do about this. Act 2 doesn't allow the PADEP to choose the higher of the health-based standard or the naturally occurring levels when it is setting statewide health standards for residential and nonresidential property. Developers and consultants need to be aware of the change in the vanadium standard. One idea is to be very careful in choosing what substances are being sampled for when a Phase II is needed as part of due diligence. If there is no reason to sample for vanadium, then don't sample for vanadium. So, for example, if the Phase I reveals former USTs on the property, then the Phase II should only test for petroleum products in that area and not metals in the soil. Again, remediators and consultants dealing with brownfield sites in Pennsylvania will need to be thoughtful in their approach to due diligence and recognize that the vanadium soil standards are now so low that decisions will need to be made on whether or not to even sample for it based on the Phase I findings.

Author

M. Joel Bolstein
215.918.3555
jbolstein@foxrothschild.com

Time of Application Rule Clarified

By Jack Plackter

The New Jersey Appellate Division clarified the "Time of Application Rule" in the case of *Jai Sai Ram, LLC vs. The Planning and Zoning Board of the Borough of South Toms River and Wawa Inc.*

Prior to the adoption of the Time of Application rule, courts applied the Time of Decision Rule, under which a decision concerning a land use application would be based on the municipal ordinance as it existed at the time of decision of the application or appeal.

The Time of the Decision Rule allowed a municipality to block a proposed development by changing the applicable zoning ordinance during the period when a development application was being considered by the appropriate land use board.

The clear purpose of the Time Application Rule at *N.J.S.A. 40:55D – 10.5* was to assist developers and property owners by eliminating the Time of Decision Rule and fixing the rules applicable to a development application at the time the application was filed.

The New Jersey Legislature was concerned about situations where a developer would spend time and money pursuing an application only to have a municipality change the zoning to the developer's detriment while the application was pending.

In this case, Wawa's site was located partially in a highway development zone and partially in a residential zone. At the time the application was filed the proposed use was not permitted in either zone.

While the application was pending, the borough amended its zoning ordinance to permit on the property, Wawa's combined gas station and convenience store and designated as a "single-use" retail sales and gasoline filling stations operated by a single business entity.

Nevertheless, the objectors argued that the application and the developer were constrained by the Time of Application Rule and asserted that the court apply the zoning in effect at the time the application was filed to be consistent with the time of application statute.

The developer argued, on the other hand, that the Time of Application Rule was not meant to constrain the developer from taking advantage of a later adopted more favorable ordinance.

Prior to this case land use practitioners discussed a proper procedure for taking advantage of a later adopted favorable ordinance under the Time of Application Rule. Many practitioners thought that the better practice was to withdraw, without prejudice, and then refile the application relying on the later adopted ordinance there by obviating the issue of the Time of Application Rule.

The court clarified the matter by acknowledging that while the literal terms of the statute could be construed to prevent a favorable land use amendment from applying to a pending application, that reading would be completely contrary to the purpose of the legislation.

The court indicated that in construing legislation the overriding goal is to give effect to the legislature's intent. Ordinarily the best indicator of that intent is the plain language of the statute. However, the court does not follow that rule when to do so would produce an absurd result at odds with a clear purpose of the legislation.

Accordingly, the court concluded that the statute does not apply where the local zoning is amended to specifically permit the use which is the subject of a variance application.

In that situation the variance is no longer necessary, and it would be absurd, as well as contrary to the legislatures purpose to hold the applicant to the less favorable standards of the pre-existing ordinance.

As a result the court found that Wawa could use the later adopted favorable ordinance, which eliminated the need for variances in spite of the Time of Application rule and the board's approval of Wawa's application was affirmed.

Author

Jack Plackter
609.572.2200
jplackter@foxrothschild.com

Deed Restrictions: To Be or Not To Be Specific?

By John Grossman

In a very recent case, decided by the Appellate Division on August 15, 2016, the court construed what appeared to be similar deed restrictions in very different fashions. In this case, *Welch, et al., v. Chai Center for Living Judaism, et al.*, consolidated Docket Nos. A-4088-13T1 and A-4163-13T1, two deed restrictions, among others, were placed on a variety of tracts in a subdivision, purporting at first glance to limit the use of the tracts to single-family residences. The case arose from the objections by neighbors to the Chai Center's existing and proposed uses of its lot for religious activities, specifically a house of worship and ancillary activities. The existing activities were conducted from a private residence; the proposed activities were in connection with a 16,000-square-foot house of worship to be constructed on two contiguous lots, one of which currently housed the private residence.

Although other deed restrictions were discussed in this decision, the two primarily at issue read as follows:

> **The 1899 Restriction**
>
> And the said party of the second part do for themselves, their heirs, executors, administrators and assigns, covenant to and with the said party of the first part, its successors and assigns, as follows: That there shall not be erected on said land or any part thereof any brewery, slau[gh]terhouse, glue or chemical factory of any kind; that no business of any kind shall be conducted on these premises, that no beer saloon, garden or cellar or place in which beer, wine or liquors shall be sold or any building in which shall be carried on any business offensive, noxious or detrimental to the use of said land or the adjoining or contiguous land or any part thereof for private residences, nor shall said land be used for any purpose which could create a nuisance and that any houses to be erected on the land thereby conveyed shall cost not less than five thousand dollars each, and that but two dwelling houses shall be erected on the premises hereby conveyed and that such houses shall be used as private and for two families only. [Concerned two tracts]. [Emphasis supplied].
>
> **The 1949 Restriction**
>
> [The deed at issue was subject to] easements and restrictions of record only insofar as same are now valid and effectual, and the said parties of the second part ... agree with the said parties of the first part ... that the premises hereby conveyed shall be restricted to one private dwelling house for one family with garage appurtenant thereto. [Emphasis supplied].

The Chai Center argued successfully that the 1899 Restriction did not preclude the existing or proposed use of its lot for a house of worship. It argued that, if an entity was not among the list of exclusions, it was not precluded. The lower court, on the Chai Center's motion for summary judgment, found that the provision precluded various business operations, but these limitations did not encompass a house of worship. Moreover, it found that a house of worship was not a business and, thus, was not proscribed by the deed restrictions.

The Appellate Division affirmed, finding that the terms of the 1899 Restriction were ambiguous and could not be found to solely restrict use of the property to a single-family residence. It reasoned that the 1899 Restriction was directed to exclude specified businesses, leaving for conjecture whether the design included all businesses, which doubt defeats certainty and creates ambiguity.

Not so with the 1949 Restriction. Again in the context of a motion for summary judgment, the lower court determined, unlike the 1899 Restriction, that the 1949 Restriction was unambiguous, directly limited the use of the premises, was not incidental to a personal promise between the parties, but rather was intended to run with the land, binding subsequent owners, such as the Chai Center.

The Appellate Division affirmed, this time overruling the Chai Center's argument that unless a use is proscribed, it may be permitted. It found that the 1949 Restriction met the requirements of being manifest and clear, prohibiting all structures, religious or otherwise, which are not private residential dwellings. In so doing, the Appellate Division noted that it did not find the interpretations of the 1899 and 1949 Restrictions incompatible or interdependent.

Separately, and as to the 1949 Restriction, the Chai Center argued that it unconstitutionally prohibited private religious observances within the confines of one's own home. The Appellate Division, in rejecting that argument, reasoned that neither the existing nor proposed use could be characterized as "a few folks gathering at someone's home." The intensity was dissimilar to "the humble residence of [the] minister," as was the subject of review in a previous case. Borrowing a phrase from precedent, the Appellate Division stated, "[N]either at law nor in equity is it written that a license has been granted to religious corporations, by reason of the high purpose of their being, to set covenants at naught."

On the record before the court, the 1899 Restriction was interpreted as not proscribing the Chai Center's existing or proposed uses, but the 1949 Restriction was interpreted to the contrary. Active, rather than passive, language prevailed.

Author

John L. Grossman
215.299.3805
609.572.2322
jgrossman@foxrothschild.com

Landlords of Multifamily Dwellings Must Disclose Smoking Policy in Writing

By Carrie Nase-Poust

On June 25, 2016, a new ordinance affecting landlords in Philadelphia went into effect. Pursuant to Section 9-805 of the Philadelphia Code, landlords of multifamily buildings who enter into or renew a lease for a residential dwelling unit shall disclose in writing to the tenant the building's policy on smoking in individual dwelling units. The disclosure must be made part of the lease and shall state whether smoking is prohibited in all dwelling units, permitted in all dwelling units or permitted in some dwelling units. If smoking is permitted in some dwelling units, the lease shall identify the units where smoking is permitted.

Under current Philadelphia ordinances, landlords are required to obtain a housing license for residential dwelling units. Landlords are also required to provide tenants with a certificate of rental suitability. On certain occasions, the Philadelphia Municipal Court has refused to enter a judgment against a tenant for failure to pay rent if the landlord was not in compliance with the foregoing requirements during the time of the lease.

It is likely that the Philadelphia Municipal Court would view the requirement to notify tenants of the building's smoking policy the same way. Therefore, it is important for landlords to ensure that they properly notify their tenants, and potential tenants, of the building's smoking policy in order to avoid any potential for losing the right to obtain a judgment against a tenant in default.

Author

Carrie B. Nase-Poust
215.918.3646
cnase-poust@foxrothschild.com

Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 1863 proposes to amend the Pennsylvania Municipalities Planning Code (MPC) by allowing municipalities to more broadly define hotels in their zoning ordinances.

Representative Tina M. Davis, who represents a portion of Bucks County from the 141st District of Pennsylvania and is one of the sponsors of House Bill No. 1863, wrote in a memorandum summarizing the proposed legislation that "[o]ur communities are under siege by fly-by-night rental units. The owners are taking advantage of the downturn in the housing market to snatch up distressed properties, convert them into boarding houses and pack them with as many weekly renters as possible. […]. The short-term nature of these rental situations creates an environment for tenants who are not invested in our communities. The sheer number of tenants that are being crammed into these units are creating traffic and safety concerns for neighboring homeowners and leading to a deteriorating quality of life in our neighborhoods. This legislation attempts to give municipalities a tool to provide better accountability and safety to keep these tenants and our neighborhoods out of harm's way. … This bill does not mandate a zoning change but simply gives the municipalities another zoning option."

Specifically, House Bill No. 1863 proposes to add the following language to the MPC as Section 603(m): "A zoning ordinance may allow a municipality to classify as a hotel for zoning purposes any residential rental property that has a lease term of less than one month and to restrict the location of the hotel accordingly. This subsection may not apply where the individuals residing in the building are related to the building owner by blood, marriage, adoption or guardianship."

As for the status of House Bill No. 1863, it was referred to the local government committee, where it remains.

Author

David H. Comer
610.397.7963
dcomer@foxrothschild.com

Fox Team Achieves Major Victory in New Jersey Affordable Housing Trial

Henry Kent-Smith and Irina B. Elgart successfully represented Richardson Fresh Ponds and Princeton Orchards Associates (RFP/POA), the owners of the Princeton Orchard Apartments, in a precedential affordable housing dispute before the Superior Court Law Division.

The declaratory judgment action, *In the Matter of the Application of the Township of South Brunswick for a Judgment of Compliance and Repose*, was the first declaratory judgment action trial in New Jersey following the Supreme Court's *Mt. Laurel IV* decision in March 2015.

Fox's successful challenge to the Township's evidence, and efforts to establish a constitutionally permissible methodology, provides a template for all trial courts in New Jersey to follow as to how to calculate the affordable housing need for the 2015-2025 housing cycle.

Zoning Approvals

- Carrie Nase-Poust obtained a variance from the Newtown Township Zoning Hearing Board to install more than one business sign for Children's Hospital of Philadelphia in a medical complex.
- Carrie Nase-Poust obtained several variances from the Montgomery Township Zoning Hearing Board to exceed the permitted sign area for wall-mounted signs and freestanding sign for Starbucks.
- Carrie Nase-Poust obtained special exceptions from the Montgomery Township Zoning Hearing Board to allow an automobile repair shop to be constructed in the zoning district as well as several variances to allow wall-mounted signage and a freestanding sign.
- Carrie Nase-Poust obtained a determination from the Hilltown Township Zoning Hearing Board that a drainage feature did not constitute an Ephemeral Stream.
- Carrie Nase-Poust and Kimberly Freimuth obtained several sign variances for Starbucks to exceed the sign area, increase the number of directional signs and allow the location of the pylon sign as well as a special exception for the three menu boards.
- Kimberly Freimuth obtained a variance from the Schuylkill Township Zoning Hearing Board to exceed the maximum lot coverage requirements to allow an expanded deck to be constructed on a residential property.
- Kimberly Freimuth obtained a special exception from the Concord Township Zoning Hearing Board to permit a juvenile care facility within a shopping center located within the Loop Road Overlay District.
- Kimberly Freimuth obtained a variance from the Hilltown Township Zoning Hearing Board to exceed the maximum woodland disturbance requirements to allow for the construction of a single-family dwelling.
- Kimberly Freimuth obtained a special exception from the East Vincent Township Zoning Hearing Board to permit the erection of a public emergency services telecommunications facility with the Industrial Mixed Use District and also obtained a variance to exceed the maximum tower height for the telecommunications facility.
- Kimberly Freimuth obtained a special exception from the Warwick Township Zoning Hearing Board (Lancaster Co.) to permit an automobile service and repair facility within the local commercial district and also received a variance to exceed the maximum front yard setback, partial variances from landscaping requirements and a variance to exceed the maximum permitted wall sign area in connection with the development of the automobile service and repair facility.