In the Zone

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

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Due Diligence on Wetlands May Save Millions

By Philip L. Hinerman

John Duarte, the CEO of Duarte Nurseries in Tehama County, California, provides a perfect example of the need to consider the possible effect on wetlands prior to purchasing or developing property.

Duarte saw 450 acres that could be farmed after years of cattle grazing. Less than a year after his nursery bought the property, the Army Corps of Engineers ordered him to stop plowing up "vernal pools." The Corps later sued for violation of the Clean Streams Law. A federal judge has since ruled that the nurseries are liable and has scheduled a penalty hearing. Duarte told reporters that the court is being asked to fine him $8 to 10 million for plowing.

Although Duarte denies the claims and intends to appeal, he is still looking at fines in the millions and significant, costly litigation.

The case offers several important lessons and warnings about wetlands that other property developers would be wise to consider.

It has long been the Corps' interpretation that "vernal pools" are wetlands. If, like most, you don't know what a vernal pool is, it is defined as a temporary pool of water where things can seasonally grow. The Corps have long stated that lands can be wetlands if they are "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life and saturated soil conditions."

So, how do people who don't know what a vernal pool is determine whether they own property with wetlands? The Corps looks at:

- Whether the property has typical plants that exist in wetlands, discussed in the National Wetland Plant List available online.
- Whether or not water stands or sits at or above soil surface during a growing season. In other words, wetlands can exist for part of the year and still be considered regulated.
- Whether there are typical soils found in wetlands, like peat.
- Whether areas are typically floodedby tides.

Mr. Duarte, like most people, probably isn't trained to determine what fits these categories. If he purchased the property during a dry season, he may not have seen anything indicating a wetland. Nonetheless, the lawsuit could put him out of business or cost him significantly in fees and costs.

If you use a standard ASTM phase one in your purchase, those audits expressly state that they do not include a review of wetlands. Wetlands are also not identified on deed records. So, what should you do before you buy?

You may want to consult with a trained wetlands delineator. Also, you may need to review site records and talk with the current owner about areas you intend to develop.

Consider, during purchase negotiations, getting formal statements from the seller about his/her knowledge of wetlands. Also, ask questions about where standing water may be throughout the year. Finally, you can check the Corps' records online to see if there are known wetlands.

Even that may not be enough. The Corps have not evaluated all wetlands and are constantly adding new ones. If you close on the property and then discover what may be wetlands, you may still be able to develop the property.

The Corps can be asked to make one of two determinations regarding wetlands. The Corps make a verified "preliminary jurisdictional determination" of wetlands if you provide initial information on the site. This is not binding on the Corps as it is only a desktop review of the property. Still, it can quickly alert you of a potential problem.

There is also a more formal determination called a "jurisdictional determination" from the Corps. This typically takes several months and the Corps actually visit the site with a representative trained to identify wetlands. A Corps JD can be considered final. But, if wetlands are found where you want to develop, you can still get a permit to develop them, but that can be a costly and long process.

But as John Duarte can tell you, the risk of doing nothing can be a $10 million error.

In This Issue:

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A New Technical Requirement in Securing Zoning Relief

By William F. Martin

For many years, securing variances or special exceptions in the City of Philadelphia has required careful dealings with local neighborhood associations. Obtaining either letters of support or letters of non-opposition from neighborhood organizations has been a necessary step. And now a new notice requirement is about to be added.

In August 2012, in connection with its broader amendment to the city's Zoning Code, the Philadelphia City Council codified many of the practices relating to neighborhood associations that had previously been a matter of custom. Associations were required to become registered community organizations (RCOs) under Section 14-303(11)(a) of the Zoning Code. Once an RCO had registered, any property owner or developer seeking either a variance or a special exception in Philadelphia was required to provide notices and secure meetings before each RCO that asserted jurisdiction over a particular address.

Section 14-303(12) of the Zoning Code specifies the required notices to be delivered by property owners who file an appeal with the Zoning Board of Adjustments (ZBA) for a special exception or variance or for a development that requires review under the city's Civic Design Review process. As a matter of law, the Planning Commission staff is required to provide applicants with notices specifying the RCOs for the subject property, including identification of a "coordinating RCO" in circumstances where there are more than one and a list of properties that are required to receive an individual notice of the appeal seeking a variance or special exception. The requisite notices are required to be sent within 10 days of receipt of the information from Planning Commission staff (see 14-303(12)(d)). The code specifies what is required to be included in the notice to the RCOs and the specified near neighbors and the Planning Commission staff provides a template for notice letters that can be utilized by a property owner or its attorney.

Following delivery of the notice, the coordinating RCO is required to schedule a meeting for review of the appeal with interested members to be held within 45 days after the applicant has received the requisite notice from the Planning Commission staff.

This complicated notice and meeting process codifies the role of the Philadelphia neighborhood associations and imposes upon a property owner or developer the burden of delivering the requisite notices within the timeframe specified by the Zoning Code.

In a bill introduced in Philadelphia City Council on October 6, 2016, (Bill No. 160865) and passed through the Rules Committee with a positive recommendation on November 15, 2016, the City of Philadelphia seeks to propose an additional requirement on property owners and developers. While currently there is an obligation to post at a property at least 21 days in advance of a ZBA hearing, an orange zoning notice poster advising neighbors of a pending hearing, this requirement has been deemed insufficient by certain community organizers and members of the City Council. The new ordinance, which is likely to be approved by the City Council prior to the end of 2016, and which will take effect 60 days after being signed into law by Mayor Kenney, will require a posting of the refusal or referral received from the Department of Licensing and Inspections, alongside the orange zoning notice.

This new requirement is designed to provide additional information to interested passersby regarding not just the nature of the proposed development and the scheduling of a hearing, but the details regarding the variances or special exceptions being required for the project to move forward. While this incremental obligation may provide some additional information to interested neighbors, it also generates one more requirement that must be carefully followed by property owners and developers as they complete the complicated journey to securing zoning relief in Philadelphia.

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Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 1440 proposes to amend the Pennsylvania Municipalities Planning Code (MPC) by providing for educational impact fee and assessment in certain school districts.

Rep. John A. Lawrence, who represents portions of Chester and Lancaster counties from the 13th District of Pennsylvania, is the bill's prime sponsor.

The proposed legislation, which would add a section to the MPC entitled "Educational Impact Fee and Assessment," includes the following relevant definitions:

- **Educational Impact Assessment** – "A report required of all applicants for subdivision plan approvals and building permits that includes an assessment of the impact the plan approval or building permit would have on the school district in which the subdivision or building is located."
- **Educational Impact Fee** – "A charge or fee imposed by a school district against new residential development in order to enable the school district to develop programs and facilities necessary to accommodate increased student enrollment."
- **Older Adult Housing** – "Housing built to house individuals in compliance with regulations promulgated by the Department of Aging pertaining to older adult daily living centers under 6 Pa. Code Ch. 11 (relating to older adult daily living centers)."
- **Open Space Uses** – "Uses that include, but are not limited to, the following: (1) parks; (2)playgrounds; (3) golf courses; (4) wildlife preserves; (5) land used for drainage or flood control; (6) other recreation purposes permitted by the municipal governing body; and (7) land used for buffer zones between residential and commercial or industrial uses."

The proposed legislation provides a board of school directors with the authority to levy an educational impact fee on each subdivision plan and building permit "issued for the construction of new residential units located within its geographic boundaries in accordance with this section. Prior to the adoption of an educational impact fee, the school board shall give public notice of its intention to adopt the fee and entertain public comments. The educational impact fees shall be collected by the school district."

The proposed legislation adds that no subdivision plan approval or building permit may be issued "without the applicant providing proof that the educational impact fee has been paid in full."

Furthermore, under the proposed legislation, the amount of the educational impact fee levied on each proposed subdivision plan shall be a fixed fee of $2,500 and imposed upon each bedroom in excess of one for each separate proposed residential dwelling unit in the subdivision plan. The fee may not exceed $7,500 for each residential dwelling in a proposed subdivision plan.

As for the fee for building permits, the amount of the educational impact fee levied on each building permit for new residential construction shall be a fixed fee of $2,500 and imposed upon each bedroom in excess of one for each proposed residential dwelling for which the building permit is issued. There is no ceiling for the building permit fee.

The proposed legislation provides certain exemptions and deductions from impact fee. For example, a school district shall waive the educational impact fee for building permits issued for the replacement of existing dwelling units, even if the permits are nonconcurrent. Additionally, a school district shall waive the educational impact fee for subdivision plans or building permits for residential dwellings built for older adult housing.

As for deductions, a school district may provide (1) a $1,500 deduction for each acre of land preserved within the proposed development for open space uses by the community; and (2) a $1,000 deduction from the impact fee owed if the developer provides for a designated school bus loading area and an area for a school bus turnaround if necessary.

The proposed legislation restricts the use of the fee to new construction for additional classrooms or renovation of existing buildings to expand classrooms or classroom space. The money in the account may not be used for personnel costs.

Additionally, the subdivision plan shall include an educational impact assessment, a copy of which must be filed with the school district. No subdivision plan may be accepted that does not include an educational impact assessment.

House Bill No. 1440 was referred to the local government committee where it remains.

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Distinction Regarding Acquired Real Estate Companies Under Pennsylvania's Realty Transfer Tax Act and Philadelphia's Realty Transfer Tax Act

By Sarah K. Minteer

Pennsylvania's Realty Transfer Tax Act[1] and Philadelphia's Realty Transfer Tax Act[2] are similar in many respects, however, an important distinction exists with regard to whether a change in ownership interest in a real estate company has occurred for purposes of determining whether a real estate company becomes an "acquired" company subject to realty transfer tax. Counsel for the City of Philadelphia has indicated that Philadelphia will take a position contrary to the position asserted under the Pennsylvania Act and find that transfers between family members of ownership interests in a real estate company are considered a "change in ownership" for purposes of determining whether a real estate company becomes an "acquired" company subject to realty transfer tax under the Philadelphia Act.

Background

Under the Pennsylvania Act, every person who transfers ownership of real estate located in Pennsylvania must pay in connection with the transfer realty transfer tax equal to one percent of the value of the real estate that is being transferred, unless the transfer is excluded from taxation under the Pennsylvania Act.

Under the Philadelphia Act, every person who transfers ownership of real estate located in the City of Philadelphia must pay in connection with the transfer an additional realty transfer tax equal to three percent of the value of the real estate that is being transferred, unless the transfer is excluded from taxation under the Philadelphia Act.

Therefore, a transfer of ownership of real estate located in the City of Philadelphia is potentially subject to realty transfer tax in the amount of four percent of the value of the real estate that is being transferred. Both the transferee and the transferor of the ownership of real estate are jointly liable for the payment of realty transfer tax under the Pennsylvania Act and the Philadelphia Act.

In addition to outright transfers of ownership of real estate, realty transfer tax is imposed in connection with the transfer of ownership interests in a real estate company[3] under certain circumstances that cause the real estate company to be considered an "acquired" company and thereby subject to realty transfer tax under the Pennsylvania Act and the Philadelphia Act.

Under both the Pennsylvania Act and the Philadelphia Act, a real estate company becomes an "acquired" company when a "*change in ownership interest*" in the company, however effected, "(i) does not affect the continuity of the company and (ii) of itself or together with prior changes has the effect of transferring, directly or indirectly, ninety percent or more of the total ownership interest in the company within a period of three years."[4] That is, if during any three-year period 90 percent or more of the ownership interests in a real estate company are transferred, whether through one "change in ownership interest" or through several "changes in ownership interests," then the company becomes "acquired" and must pay realty transfer tax on the cumulative value of the ownership interests transferred.

Discussion

Under the Pennsylvania Act, a transfer between members of the same family of an ownership interest in a real estate company is excluded from Pennsylvania's realty transfer tax. Additionally, regulations have been promulgated under the Pennsylvania Act that state that a transfer between members of the same family of an ownership interest in a real estate company is not considered a "change in ownership interest" for purposes of determining whether a real estate company becomes "acquired" and thereby subject to Pennsylvania's realty transfer tax.

For example, if a father who owns 90 percent of the ownership interests in a real estate company transfers all 90 percent of his interests in the real estate company to his daughter or other lineal descendent or ascendant, the transfer

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[1] 72 P.S. §§ 8101-C *et seq.*

[2] Phila. Code §§19-4400 *et seq.*

[3] Under the Pennsylvania Act, a "real estate company" is defined as a corporation, general partnership, limited partnership, limited liability partnership or any other form of unincorporated enterprise owned or conducted by two or more persons other than a private trust or decedent's estate that meets any of the following: "(1) [the company is] primarily engaged in the business of holding, selling or leasing real estate, *ninety percent* or more of the ownership interest in which is held by thirty-five or fewer persons and which, (i) derives sixty percent or more of its annual gross receipts from the ownership or disposition of real estate; or (ii) holds real estate, the value of which comprises ninety percent or more of the value of its entire tangible asset holdings exclusive of tangible assets which are freely transferable and actively traded on an established market; or (2) ninety percent or more of the ownership interest in [a company] is held by thirty-five or fewer persons, and [the company] owns, as ninety percent or more of the fair market value of its assets, a direct or indirect interest in a real estate company. An indirect ownership interest is an interest in [a company], ninety percent or more of the ownership interest which is held by thirty-five or fewer persons whose purpose is the ownership of a real estate company." 72 P.S. § 8101-C (emphasis added).

Under the Philadelphia Act, a "real estate company" is similarly defined as a corporation, general partnership, limited partnership, limited liability partnership or any other form of unincorporated enterprise owned or conducted by two or more persons other than a private trust or decedent's estate that meets any of the following: "(1) [the company is] primarily engaged in the business of holding, selling or leasing real estate, ninety percent or more of the ownership interest in which is held by thirty-five or fewer persons and which, (i) derives sixty percent or more of its annual gross receipts from the ownership or disposition of real estate; or (ii) holds real estate, the value of which comprises *fifty percent* or more of the value of its entire tangible asset holdings exclusive of tangible assets which are freely transferable and actively traded on an established market; or (2) [a company] which holds, directly or indirectly, as ninety percent or more of the value of its assets, an interest in a real estate company." Phila. Code § 19-1402(11) (emphasis added).

[4] 72 P.S. § 8102-C.5(a); Phila. Code § 19-1407 (emphasis added).

would not be subject to realty transfer tax under the Pennsylvania Act because no "change in ownership interest" has occurred, despite the fact that 90 percent of the total ownership interests in the real estate company were transferred.

By promulgating this regulation, the Pennsylvania legislature has taken the position that transfers between members of the same family of an ownership interest in a real estate company are not taxable transfers regardless of the total percentage of ownership interests that are transferred. This reasoning is aligned with Pennsylvania's outright exemption from realty transfer tax of transfers of ownership of real estate between family members owned outright; that is, under the Pennsylvania Act, transfers of ownership of real estate between family members are not taxable transfers regardless of whether the real estate is owned outright or through a real estate company.

Like the Pennsylvania Act, the Philadelphia Act provides that a transfer between members of the same family of an ownership interest in a real estate company is excluded from Philadelphia's realty transfer tax. Unlike Pennsylvania, however, no regulation has been promulgated under the Philadelphia Act that clarifies whether a transfer between family members of an ownership interest in a real estate company qualifies as a "change in the ownership interest" for purposes of determining whether a real estate company has become "acquired" and thereby subject to Philadelphia's realty transfer tax.

No formal opinion on the issue has been handed down by the City of Philadelphia, however, Counsel for the City of Philadelphia has stated that Philadelphia will likely not follow Pennsylvania on the issue.

Therefore, under the Philadelphia Act, if a father owns 90 percent of the interests in a real estate company and transfers 90 percent of his interests in the real estate company to his daughter or other lineal descendant or ascendant, the real estate company would become an "acquired" real estate company and subject Philadelphia's realty transfer tax in the amount of three percent of the value of the real estate that is being transferred.

Similarly, under the Philadelphia Act, a transfer between members of the same family of 90 percent or more of an ownership interest in a real estate company will be subject to Philadelphia's realty transfer tax despite the fact that the transfer of ownership of real estate owned by family members outright would not be subject to Philadelphia's realty transfer tax regardless of the percentage of ownership being transferred. That is, under the Philadelphia Act, transfers of ownership of real estate between family members are taxed differently based on whether the real estate is owned outright or through a real estate company.

This statement by Counsel for the City of Philadelphia has a significant potential impact for owners of real estate companies with real estate located in Philadelphia who are planning on transferring their interests in the real estate companies to family members for business succession or estate planning purposes. This distinction is also an important consideration when deciding whether to purchase real estate located in Philadelphia outright or through a holding company.

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U.S. Department of Treasury Announces 2015-16 Round of New Markets Tax Credit Allocation for Financing Projects and Businesses in Low Income Communities

By Daniel V. Madrid

In late November, the U.S. Department of Treasury's Community Development Financial Institution (CDFI) fund announced the latest, eagerly awaited round of New Market Tax Credits (NMTC) allocations. The CDFI selected 120 community development entities (known as CDEs) out of a pool of 238 applicants. The current NMTC allocation, totaling an unprecedented $7.0 billion dollars of tax credit availability, represents a combined 2015-2016 round. NMTC's are targeted to attract private investment capital for qualifying businesses and real estate projects in urban and rural low income communities nationwide.

The highly successful federal NMTC program was created through the Community Renewal Tax Relief Act of 2000 to facilitate economic and community development in low income, distressed communities by providing investors with a 39 percent tax credit for investing in qualifying projects. Since its inception, the NMTC program has sourced significant amounts of low cost capital for projects that were otherwise difficult or impossible to finance through conventional lending. Now in its 13th year of funding, NMTCs have historically been in high demand by developers seeking creative solutions to project financing.

If you are developing a project located in an urban or low income community, we encourage you to contact the attorneys at Fox Rothschild to discuss the potential use of NMTC financing for your project.

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Opening Lines of Communication and Collaboration Between the Military and Civilians With Regards to Land Use

By Ilana Rozentsvayg

On August 1, 2016, the New Jersey State Senate and General Assembly approved Bill S1992 which "concerns land use planning nearby military installations by amending various parts of the statutory law, and supplementing Title 52 of the Revised Statutes."

Of the amended parts of the statutory law, Section 40:55D-2 of the Municipal Land Use Law (MLUL) has been amended to implement the bill's purposes of "ensuring against unnecessary encroachments upon military facilities and encouraging municipalities to collaborate with military facility commanders in planning and implementing appropriate land use controls." In order to facilitate this collaboration, the bill amends several notice provisions and submission requirements affecting municipalities' master plans.

In furtherance of this open communication, Section 40:55D-13 (notice concerning master plan), provides that the municipality planning board must give "notice to the military facility commander of all hearings on the adoption, revision or amendment of the municipal master plan."

Additionally, in furtherance of the planning and implementation of appropriate land use controls, Section 40:55D-28 (preparation, contents; modification) provides that the planning board's master plan shall show the "existing and proposed location of military facilities and incorporating strategies to minimize undue encroachment upon, and conflicts with, military facilities, including but not limited to buffering residential areas and allowing for the potential expansion of military facilities."

While Bill S1992 presents additional steps and requirements upon the municipalities, the prospect of a more open dialogue between the parties can improve both the growth and continuity of military facilities as well as diminish any negative impact on surrounding residential zones.

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Zoning Approvals

- Carrie Nase-Poust received a special exception approval from the Philadelphia Zoning Board of Adjustment to allow the construction of an indoor pool in connection with a senior center.
- Carrie Nase-Poust received a conditional use approval from Newtown Township to allow a daycare facility.
- Carrie Nase-Poust received a variance from the Municipality of Norristown Zoning Hearing Board to exceed the permitted density in a multifamily residential building.
- Carrie Nase-Poust received several variances from the Municipality of Norristown Zoning Hearing Board to exceed the maximum permitted sign area and sign height for a freestanding sign, directory sign and wall mounted sign in connection with a multifamily residential development.
- Kimberly Freimuth obtained a variance from the minimum lot size requirement from the Hilltown Township Zoning Hearing Board for a two-lot minor subdivision.
- Kimberly Freimuth obtained a use variance and various other dimensional reliefs from the Falls Township Zoning Hearing Board to allow a major chain variety store in the neighborhood commercial zoning district.
- Kimberly Freimuth obtained amended preliminary/final land development approval from the Warrington Township Board of Supervisors for a gas station and convenience store.
- Kimberly Freimuth obtained a wind permit application approval and preliminary/final land development plan approval from the Hector Township Board of Supervisors (Potter County) for a wind energy facility.
- Kimberly Freimuth obtained variances related to drive-thru signage from the Brookhaven Borough Zoning Hearing Board for a national coffee company.
- Jack Plackter obtained preliminary major subdivision approval for a 73-lot residential subdivision in Hamilton Township, NJ.
- Jack Plackter obtained final approval for Phase II of a 184-unit affordable housing project in Egg Harbor Township, NJ.