



RILEY RIPER HOLLIN & COLAGRECO

ATTORNEYS AT LAW

CHESTER COUNTY ENGINEERS

FALL CONFERENCE

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Legal, Legislative & Regulatory News for Engineers

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PA SUPREME COURT UPDATE

- Environmental Rights Amendment-
Pennsylvania Environmental Defense Foundation v. Commonwealth, et al., 161 A.3d 911 (2017)
- Kardon Park - *In re: The Petition of the Borough of Downingtown*, 161 A.3d 844 (2017)



Environmental Rights Amendment

161 A.3d 911 (2017)

- Supreme Court decision addressing the Environmental Rights Amendment (Article 1, Section 27 of the Pennsylvania Constitution) and how to determine whether the use of land violates the Amendment.

- Article 1, Section 27 states:

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. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As a trustee of the resources, the Commonwealth shall conserve and maintain them for the benefit of all people.



Environmental Rights Amendment

- In a 1973 decision, the Commonwealth Court developed a three-part test used to evaluate whether the use of land violated the Environmental Rights Amendment, which became known as the “*Payne Test*”.
- Although a recent plurality decision pertaining to the Oil and Gas Act, *Robinson Township v. Commonwealth* 83 A.3d 901 (2013), called into question the *Payne* test, the Supreme Court’s new decision now confirms that the *Payne* test is no longer the applicable standard.
- The Supreme Court decision does not specify a new test that should be used.
- While the decision requires the Commonwealth to act as a trustee with respect to the Commonwealth’s natural resources, it does not clearly address whether additional legislation or regulation is needed to attempt to enforce the Environmental Rights Amendment against private landowners.



KARDON PARK

161 A.3d 844 (2017)

- Supreme Court decided this case this summer after 10 yrs. of litigation.
- Downingtown wanted to sell portions of the park to private developer and grant easements for stormwater management, utilities and future maintenance of park improvements.
- Lower Courts issued various conflicting opinions.

Court Decided

- Once a public facility has been “dedicated” to public use, only court can approve sale or grant of easements of land or facilities.
- “Public facility under DDPA is any park, theater, open air theater, square, museum, library, concert hall, recreation facility or other public use.”
- Court must determine that “original use of property is no longer practicable or possible and has ceased to serve public interest” – DDPA.
- Even the grant of easement is for private use, it must be approved by court. Doesn’t matter if the easement use is consistent with, or even improves, the current public use.



KARDON PARK

Practical Engineering Implications

- Utility, stormwater, access or other easements over public lands could require court approval.
- Could affect road improvements if improvement is proposed over public lands.
- Cell tower implications – some municipalities want tower cited on municipal land – court approval needed?



Pennsylvania Commonwealth Court Case Law

- *Delchester Developers, L.P. v. Zoning Hearing Board of the Township of London Grove*, 161 A.3d 1081 (2017) – Court held that the Township’s stand-alone stormwater management ordinance is not a “land use ordinance” under the Pennsylvania Municipalities Planning Code as its primary purpose is to regulate stormwater, not land.
- *Cornell Narberth, LLC v. Borough of Narberth*, ___ A.3d ___ (2017) – Developer brought action against the Borough and its inspector in response to the Borough’s refusal to issue certificates of occupancy for new houses where sprinklers were not installed (although a Borough Code requirement) and sprinkler requirement was not referenced in building permits issued by the Borough. Developer’s claims were not successful.
- *Smith v. Ivy Lee Real Estate, LLC*, 165 A.3d 93 (2017) – Section 617 of the Pennsylvania Municipalities Planning Code allows for private causes of action to enforce land development ordinances, including subdivision and land development ordinances.



“Waters of the United States” Rule

- 2/28/17 – Presidential Executive Order on “Restoring the Rule of Law, Federalism and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”
- E.O. requires publication of a proposed rule rescinding or revising the WOTUS rule for review and comment.
- E.O. requires consideration be given to interpreting the term “navigable waters” in a manner consistent with Justice Scalia’s opinion in *Rapanos v. U.S.*, 547 U.S. 715 (2006).



Two Step Process – WOTUS Rule

- 6/27/17 – EPA announced that it would follow a two-step process to address the Executive Order.
 - Step 1: July 27, 2017 – Proposed rule published in the Federal Register.
 - Deadline to submit comments is September 27, 2017.
 - Proposed rule would reinstate the text in place prior to the 2015 Clean Water Rule.
 - 2015 Clean Water Rule is currently stayed by a 6th Circuit U.S. Court of Appeals decision.
 - Intent of this rulemaking is that the current interpretation/application of the WOTUS Rule would remain unchanged.
 - Step 2: Re-evaluation and Revision of the WOTUS definition per the Executive Order.
 - Will involve public outreach.
 - Goal is to establish a new definition of “WOTUS” – which could change when federal permitting is required.



Presidential Executive Orders – Infrastructure

- 1/24/17 – Presidential E.O. “Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects”
 - Requires the Chairman of the White House Council on Environmental Quality to work with the head of the relevant federal agency to establish expedited procedures and deadlines for completion of environmental reviews and approvals for “high priority” projects.
- 8/17/17 - Presidential Executive Order on “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure”
 - Requires that the Office of Budget and Management establish goals for evaluating, authorizing and processing environmental reviews within 180 days of the issuance of this Executive Order.
 - Federal agencies are required to utilize a process called “One Federal Decision” under which one federal agency is the lead.



PADEP Update

Recommendations made by the Director of the Bureau of Clean Water after seven listening sessions:

- A new Erosion and Sedimentation Control General Permit for low impact projects of 5 acres or less.
- Update Stormwater BMPs Manual and change the function of it – use as guidance.



New NOT Forms

- PADEP has issued new Notice of Termination forms.
- The old forms will no longer be accepted after October 13, 2017.
- The new requirements eliminate the use of the Post Construction Instrument Filing Notice.
- The sample form Instrument for the Declaration of Restrictions and Covenants has also been updated.



Pennsylvania Legislative Update

- Act 26 of 2017 (Senate Bill 144) – Amendment to Pa. Sewage Facilities Act to permit the use of alternate septic systems in sewage facilities planning and to establish a process for re-classifying certain alternate systems as conventional systems.
- Senate Bill 561 – Would amend the Regulatory Review Act to require General Assembly approval of any regulation with an expected direct or indirect cost to Pennsylvania, to its political subdivisions and to the private sector over \$1 million on an annual basis – defined as an “economically significant regulation”.
- Senate Bill 487 and House Bill 587 – Would require PADEP to establish and utilize an online permit tracking system to track permit applications.
- House Bill 542 – Revenue bill containing provisions that would require PADEP to establish a third party review program for permit applications.
- House Bill 566 – Would amend the Contractor and Subcontractor Payment Act to permit a contractor or subcontractor to suspend performance after notice if payment has not been received in accordance with the contract.



COPYRIGHT PROTECTION OF PLANS

- Plans are typically requested from municipalities using Right-to-Know requests.
- Municipalities are not permitted to reproduce or release plans under the copyright exclusion to the Right to Know Law. 65 P.S. § 67.305(a)(3); *Belden v. London Britain Township*, OOR Docket No. AP 2010-0447.
- The federal Copyright Law does not preclude third parties from obtaining plans, but it requires that the engineer authorize the reproduction.
- Municipalities still must make plans available for public review but may not copy and distribute to a third party or allow plans to be reproduced.
- Municipalities must contact the engineer and obtain authorization before reproducing and distributing plans.



COPYRIGHT PROTECTION OF PLANS

(CONTINUED)

Make clients and third-parties aware of your copyright by including a copyright notice on all plans, which includes the copyright owner's name, the date and ©.

Recourse for Copyright Infringement:

- Monetary damages for copyright infringement include
 - Profits the owner of the copyright would have made;
 - Profits earned by the infringing party;
 - Statutory damages up to \$30,000 for each work and \$150,000 for intentional infringement (only for registered copyrights).
- Injunctive relief to cease production of designs and structure.
- Attorney's fees and costs if owner prevails.



WHO OWNS THE WORK PRODUCT?

- Governed by Contract with the Client
- Contracts should include the following:
 - Definition of “work product” – tangible items prepared by engineer
 - Engineer owns the work product and has a copyright
 - Identify any license you intend to grant to client or third-parties and number of reproductions the license permits
 - Licenses should be conditional upon compliance with Service Contract
 - Mandate destruction of all work product at completion of project by client and third parties
 - Identify liability on the client for copyright infringement



WHO OWNS THE WORK PRODUCT?

(CONTINUED)

- Contracts for “work made for hire” should include the following:
 - Indemnification of the engineer by the client for unauthorized use of the work product, use of the work product for other projects, and owner’s negligence in modifying the work project
 - Disclaim warranty of the fitness of the work product for use other than the designated project
 - Additional cost for ownership of the work product
 - State whether engineer will retain a non-exclusive license for future use of the work product in addition to client’s ownership
- The Engineers Joint Contract Documents Committee publishes standard “Agreement Between Owner and Engineer for Professional Services” (EJCDC E-500)

(available at: <https://www.ejcdc.org/>)



HYPOTHETICALS

- Hypo 1: Engineer completes but has not yet distributed plans.
Client fails to pay.
- Hypo 2: Engineer completes and distributes plans. Client fails to pay.
- Hypo 3: Engineer completes and distributes plan and client pays.
Client retains a new engineer to alter plan for 3rd phase of development.
- Hypo 4: Engineer completes and distributes plan and client pays.
Client uses the plan for a second project at a later date.
- Hypo 5: Engineer completes and distributes plan and client pays.
Client sells the development to a new developer.

