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Re: **Model Riparian Buffer Protection Overlay District**
Proposed Regulations for Use in a Municipal Zoning Ordinance
Brandywine Conservancy and Pennsylvania Land Trust Association
"Second Edition" of March 11, 2016

John and Andy:

Per your request, I have reviewed the Second Edition (March 11, 2016) of the Model Riparian Buffer Protection Overlay District, including the Preface thereto.

In my opinion, subject to individual tailoring of the model ordinance for compatibility with the existing zoning regulations of a particular municipality, the model ordinance is a strong and technically defensible regulation (as needed, given the importance of riparian buffers to stream quality) and not unreasonably restrictive of private property rights.

A. Constitutional Limitations:

There are two constitutional concepts that come into play in evaluating the validity of any municipal regulatory ordinance including, of course, the regulation of uses and activities within a riparian buffer area. The regulation must serve a valid public purpose in promoting the protection of public health, safety, morals and general welfare (the "due process" standard). Secondly, the impact of the regulations as applied to a particular property must not be so extreme as to constitute a "regulatory taking" of the property.

1. Due Process Issue. It is common practice for municipal zoning ordinances in Pennsylvania to provide more restrictive regulations on critical areas of natural resources—for example, wetlands, steep slopes, floodplains and, as here applied, riparian buffer areas. Our courts and legislature have clearly recognized the propriety of imposing stricter regulations upon such critical natural features, the disturbance of

which would have an adverse impact on public health, safety and welfare. In Pennsylvania, the leading case is *Jones v. Zoning Hearing Board of the Town of McCandless*, 578 A.2d 1369 (Pa. Cmwlth. 1990). In that case, the intensity of development was regulated not only by the gross acreage of the tract in question, but by reducing the otherwise available intensity of development in the case of steep slope areas, forest areas, and floodplain areas. The property owner challenged the validity of these protective provisions in the zoning ordinance, as both being unreasonable and as confiscatory. Commonwealth Court framed the test to be applied in this type of situation:

> "An ordinance which promotes the public health, safety, morals and general welfare of the community and is substantially related to the purpose which it purports to serve substantially advances a legitimate state interest ... however, ordinances may not be unreasonable, arbitrary or confiscatory." *Jones*, 578 A.2d at 1370.

The science which supports the regulation of riparian buffer areas, substantially as set forth in the Model Ordinance, includes two components of riparian buffer protection, being (i) limiting any intrusion by impervious coverage or land disturbance within such areas, and (ii) restoration of riparian buffer areas to a "forested" condition. Both components are well substantiated by studies such as the Sweeney and Newbold study quoted above. Thus, in my opinion, regulation of riparian buffer areas (i.e., both restricting land disturbances within such areas and requiring restoration of forested conditions therein) is clearly based upon compliance with the substantive due process test.

2. This brings us then to the question of when, and under what circumstances, would a property owner succeed in challenging these regulations as constituting regulatory takings and, thus, unconstitutionally confiscatory. This test will in all situations be an "as applied" test. In other words, if the impact of the regulations were to deny the property owner of all reasonable use of the land within which the riparian buffer is situated, then a regulatory takings claim would be sustained. Our courts have looked upon the "property as a whole" in applying this test. In other words, where some reasonable use and development of the land may take place in the context of compliance with the riparian buffer regulations, the regulations will not be seen as confiscatory.

In the *Jones* case, *supra,* Commonwealth Court acknowledged that the property was substantially constrained in its development potential by the natural features overlay regulations which were challenged by Mr. Jones. The Court sustained the validity of these regulations in spite of the substantial adverse impact on the development potential of the property.

The same result was reached by the Commonwealth Court in the case of *Mock v. Pennsylvania DER*, 623 A.2d 940 (Pa. Cmwlth. 1993). In that case, DER (now DEP) denied an application for a wetlands fill permit to enable development of a 5.2 acre tract of land, of which 3.94 acres were wetlands. The remainder of the land was upland—constituting approximately 1-1/2 acres of the lot—and the Court concluded that the property owner had not been deprived of all reasonable use of the land by virtue of the DER refusal to issue the wetlands fill permit.

There is, however, one additional component of the regulations within the Model Ordinance that distinguishes it from the types of regulations which were unsuccessfully

challenged in the *Jones* and *Mock* cases, being the requirement that non-forested areas of a riparian buffer be restored to a forested condition. Under these circumstances, a property owner is therefore required to take affirmative action (and, hence, expend additional dollars) to restore a riparian buffer area that is already impaired. In general, the cost of such restoration must be kept in proportion to both the public benefit to be achieved and the adverse financial impact on the property owner. As long as this reasonableness test is adhered to, then the concept of requiring affirmative action should not invalidate the riparian buffer regulations as set forth in the Model Ordinance. Here, we draw upon the analogy of stormwater management. Any increase in impervious coverage attributable to development activities requires the landowner to expend substantial dollars in managing the increase in stormwater runoff (both in terms of rate of runoff during a storm, and the additional volume of runoff attributable to the impervious coverage under various design storms). The legality of requiring landowners to expend substantial dollars in order to protect the environment (and downstream property owners) from the additional stormwater runoff attributable to development is now a well settled concept. The same principle should apply to a requirement that riparian buffer areas be restored to a forested condition, in conjunction with development of a property within which a riparian buffer area is located; in each case (stormwater management and riparian buffer restoration) the purpose to be served is the enhancement of water quality.

No hard and fast rule can be reached on the confiscatory/regulatory takings issue. For example, in *C&M Developers, Inc. v. Bedminster Township ZHB*, 820 A.2d 143 (Pa. 2002), the Supreme Court issued a "cautionary flag" in the context of Bedminster Township's zoning regulations, which restricted agricultural lands and natural resources to the point where the impact on the property at issue was so severe that the property owner was entitled to relief from the strict imposition of the ordinance requirements. It was the combination of strict "net outs" of environmentally sensitive areas of lands (slopes, floodplains, etc.) and agricultural zoning restrictions in tandem that the Court found to unduly restrict the development potential of the property.

As is the case with any restrictive provision in a zoning ordinance, there may be individual cases where strict compliance with the regulations (for example, the planting requirements for restoration of a forested buffer area) may be so costly in comparison to the proposed use or improvement of the remainder of the tract, that the property owner will be entitled to relief. The ordinance recognizes this possibility, providing authority for the granting of modifications to the provisions of Sections 400 or 600, and also recognizing that any proposed modification of the use regulations of Section 500 will be treated as an application for a use variance, with the burden of proof upon the property owner to demonstrate unnecessary hardship.

B. Preemption Issues:

Municipal regulation of various subjects, as authorized under state law (as is here the case) are generally considered to be supplements to state regulations dealing with the same subject matter, unless (i) the state regulations clearly state an intention to preclude such supplementary municipal regulation, or (ii) if they are clearly inconsistent with (rather than supplements to) the state regulations. There are two conceivable preemption issues here presented, as discussed below.

1. DEP Regulation. Title 25, Chapter 102 of the Pennsylvania Regulations (Erosion and Sediment Control) contains a subsection entitled "Riparian Buffer Requirements," being subsection 102.14. The scope of this regulation is limited to (i)

activities for which a DEP permit is required (generally, at least one acre of land disturbance) and (ii) earth disturbance activities occurring within 150 feet of a watercourse when (and only when) the project site is located in an exceptional value or high quality watershed (collectively known as "Special Protection Watersheds").

This limited scope of regulation by DEP does not serve to preempt overlapping municipal regulation[1] for two reasons. First, the Model Ordinance is generally consistent with and supplementary to the Chapter 102 DEP regulations, where the coverage would overlap. Secondly, DEP has taken the position that municipal zoning is one of the "tools" recognized by DEP for protection of riparian buffers.[2] DEP, in conjunction with the Pennsylvania Department of Conservation and Natural Resources and the Alliance for the Chesapeake Bay, published in 2010 a document entitled "Riparian Forest Buffer Management Plan Toolkit: Restoring and Protecting Pennsylvania's Riparian Forest Buffers" (August 2010). That document is attached as Exhibit "C" to DEP's Riparian Forest Buffer Guidance (Document No. 394-5600-001). That document recognizes that "zoning that protects riparian wetland buffers may be part of an existing natural resource protection ordinance, stormwater ordinance or floodplain ordinance ... an overlay zoning ordinance pertaining to riparian forest buffer protection is appropriate in a municipality that already has a zoning ordinance in place." (See Page 73 of this document.)

There is no indication of an intent by DEP to preempt municipal regulation of riparian buffer areas by the Department's Chapter 102 regulations.

2. ACRE and Related Agricultural Protection Laws. Act 38 of 2005 is generally referred to as the "ACRE" statute, being the "Agriculture, Communities and Rural Environment" Statute. It is designed to give additional protection to "normal agricultural operations" from unauthorized local regulation. The Act authorizes the Attorney General, upon the request of an owner or operator of a normal agricultural operation, to review local ordinances for compliance with state law and, in the Attorney General's discretion, to bring a legal action against a local government unit in Commonwealth Court to invalidate or enjoin the enforcement of an unauthorized local ordinance. While ACRE does not in and of itself create substantive preemption issues, it provides a streamlined procedure for owners/operators of normal agricultural operations to contest the validity of municipal ordinances that unduly restrict such activities. Agricultural operations are subject to many state regulations, some of which are under the jurisdiction of DEP and some of which are regulated by the State Conservation Commission. State statutes governing such subject matter (and authorizing regulations thereunder) include the Nutrient and Odor Management Act ("NOMA"), 3 P.S. §501, et. seq., the "Right to Farm Act" 3 P.S. §951, et. seq. (which defines "normal agricultural operations" in the same way as ACRE), the Agricultural Area Security Law, 3 P.S. §901, et. seq. and the Clean Streams Law itself, 35 P.S. §691.1 et. seq. Section 603(b) of the MPC precludes a municipality for enacting a zoning ordinance that regulates activities related to commercial agricultural production if it exceeds the requirements imposed under the NOMA, RTFA or AASL.

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[1] The Model Ordinance regulates all riparian buffers, not just those within Special Protection Watersheds and at least one acre of land disturbance.

[2] The Chapter 102 regulations were the subject to additional regulation by the enactment of House Bill No. 1565 of 2013, being Act No. 162 of 2014. We do not see that the impact of this Act affects the issue of whether municipal regulation could be conceivably preempted by the Chapter 102 regulations.

In December of 2014, the Attorney General's Office issued the Ninth Annual Report on its ACRE activities. None of the matters contained in this report (cumulative activities since the enactment of ACRE) deals with a challenge to riparian buffer ordinance requirements within a municipal ordinance. For the most part, the Attorney General's Office has dealt under its authority in ACRE with larger agricultural operations issues, including municipal ordinances seeking to regulate large-scale operations such as "concentrated animal feed operations" ("CAFO").

It is not inconceivable, however, that the Attorney General's Office might construe riparian buffer regulations, as set forth in the Model Ordinance, to be inconsistent with a specific, state approved, agricultural practice, if such practice were, for example, included within an approved "manure management manual, pursuant to regulations codified at 25 Pa. Code, 91.36(b)(1)(i). Such a case has not been alleged either before or after the enactment of ACRE.

In response to a possible ACRE claim regarding municipal buffer regulations, it is important to note that the Pennsylvania Supreme Court recently underscored the municipal role in protection of sensitive natural resources in the context of Article 1 Section 27 of the Pennsylvania Constitution, in the case of *Robinson Township v. Commonwealth of Pennsylvania Public Utility Commission,* 83 A.3d 901 (Pa. 2013).

The guide for Pennsylvania municipalities that you have drafted as a companion document to the Model Ordinance and the Preface to and Annotations within the Model Ordinance, constitute a thorough documentation of the purposes to be served by enactment of riparian buffer protections as an overlay district within municipal zoning ordinances. As sated at the beginning of this letter, the Model Ordinance has been carefully drafted (i) to conform in its scope and specifications to the underlying scientific basis, (ii) to provide procedures for administrative relief in the event that, as applied to a specific fact situation, the property owner would suffer unnecessary hardship, and (iii) to avoid conflict with state agency regulations. As such, it is a valid exercise of municipal zoning authority, to protect environmental resources both in the municipality itself and in areas of the Commonwealth downstream therefrom.

Please do not hesitate to contact me if you have any further questions at this stage.

Sincerely yours,

Fronefield Crawford, Jr.

FCJR/ljb