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**CONTENTS**

*Page*



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# Getting Ready For Revised Article 9 Of The Uniform Commercial Code—Transition Rules

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TABLE OF CONTENTS



## INTRODUCTION[2]

Revised Article 9 of the Uniform Commercial Code ("Revised Article 9" or the "Revision") takes effect in most states on July 1, 2001 (the "Uniform Effective Date"). The transition rules, found in Part 7 of Revised Article 9, govern the transition from former Article 9 to Revised Article 9. The transition rules contemplate that all states will adopt Revised Article 9 by July 1, 2001 (the "Uniform Effective Date" or the "UED"). Throughout this article it is assumed that all states have enacted Revised Article 9 by July 1, 2001. The significant complications that result from some states not having adopted Revised Article 9 are beyond the scope of this article.

As a policy matter, the transition rules attempt to balance the desirability of having Revised Article 9 apply to all transactions immediately, against the undesirability of upsetting transactions completed prior to the Uniform Effective Date or requiring burdensome steps to be taken with respect to such completed transactions. The balancing of these concerns, together with the scope of the changes created by Revised Article 9, has produced a very complex set of transition provisions. Many commentators have noted that the provisions of Part 7 of Revised Article 9 are so complex that they cannot be read and understood merely by themselves, but must be read in conjunction with the voluminous Official Comments that accompany them. Some people have even suggested that it is just as well for the uninitiated to skip Part 7 altogether and simply read the Official Comments.

Even assuming uniform enactment (as is done throughout this article), the transitional rules defy brief summary. This article identifies certain basic provisions of the transition rules that are likely to be most relevant in ordinary secured transactions and gives examples for the application of the transition rules in some common situations. The following descriptions and examples are not exhaustive.

## PRE-UED SECURITY INTEREST PERFECTED—PERFECTION REQUIREMENTS UNDER REVISED ARTICLE 9 ALSO MET

A security interest that is enforceable (attached) and perfected on the Uniform Effective Date under former Article 9 or other law and

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[2] As used in this article, "Revised Article 9" refers to the Official Text of Revised Article 9 rather than to the Pennsylvania codification (e.g., "Rev. §9-115", not "13 Pa.C.S. §9115). This article generally speaks as of May 1, 2001.

that is enforceable and perfected under Revised Article 9 remains for the time being enforceable and perfected under Revised Article 9.[3] This states the obvious rule that if the requirements of both existing law and Revised Article 9 are met, the secured party does not need to take any action with respect to its security interest after the Uniform Effective Date.

EXAMPLE: *Debtor, a Delaware corporation, grants a security interest in equipment located in Delaware to Secured Party ("SP") on January 1, 1999. SP files a financing statement in the office of the Delaware Secretary of State. SP is properly perfected under existing Article 9 (having filed where the equipment is located) and will be properly perfected under Revised Article 9 (having filed in the jurisdiction of organization of the Debtor as required by Revised Article 9). No further action is required to maintain perfection after the UED (until a continuation statement is required).*

PRE-UED SECURITY INTEREST PERFECTED—PERFECTION REQUIREMENTS UNDER REVISED ARTICLE 9 NOT MET

A security interest that is perfected under former Article 9 or under other law on the Uniform Effective Date, but that fails to meet the enforceability or perfection requirements of Revised Article 9, will continue to be enforceable and/or perfected for a *specific period* after the Uniform Effective Date without further action by the secured party.[4]

- ***Five-Year Period for Financing Statements.*** In the case of a security interest that was perfected by filing a financing statement under former Article 9, but which is filed in the wrong location under Revised Article 9, the financing statement will continue the perfection of the security interest until the earlier of its normal lapse date or June 30, 2006. In order to continue the financing statement prior to such date, the secured party must file an initial financing statement in lieu of a continuation statement, referring to the pre-UED financing statement that is being continued, in the correct location under Revised Article 9.[5] The requirements for this "in lieu" continuation statement are discussed below.

EXAMPLE: *Debtor is a Delaware corporation with its chief executive office in Pennsylvania. Prior to the UED, SP obtains a security interest in Debtor's accounts, including after-acquired accounts, and files a financing statement with the Pennsylvania Secretary of State on May 1, 1999. The security interest will remain perfected until May 1, 2005 (i.e., the earlier of the normal lapse of the financing statement and June 30, 2006). This is the case even though the financing statement would not be effective under Revised Article 9 to perfect the security interest insofar as it is not filed in the state where the Debtor is organized (i.e., the correct location for filing under Revised Article 9).*

*Same example, but SP files its financing statement in Pennsylvania on August 1, 1996. Perfection will lapse on August 1, 2001 (one month after the UED). The financing statement may be continued in accordance with former Article 9 during the six months preceding lapse (and before the UED). However, the extension will only result in the old financing statement remaining effective until June 30, 2006 (and not until five years after the lapse date, as would normally be the case for continuations).*

- ***One-Year Rule for Perfection by Means Other Than Filing.*** In the case of security interests that are perfected by means other than filing under existing Article 9 or other law, but are not perfected under Revised Article 9, the perfection of the security interest will continue for a period of **one year** after the Uniform Effective Date and will lapse at the end of such one-year period. In order to have its perfection continue after the expiration of the one-year period (and to maintain its priority), a secured party must take the steps necessary to achieve perfection under Revised Article 9 during such one-year period.[6]

EXAMPLE: *SP obtains a security interest in a letter of credit and perfects by possession under former Article 9. Perfection by possession is not a permitted perfection method for letter of credit rights under Revised Article 9. The security interest will remain perfected for one year following the UED, but then will lapse unless SP can maintain its perfection and priority by giving notice to the issuer of the letter of credit (as required by Revised Article 9) prior to the end of such one-year period.*

EXAMPLE: *Debtor, a Delaware corporation, sells credit card receivables to SP1 on April 1, 2000 (assume that under existing law this is effective against third parties without filing). SP2 buys the same credit card receivables on May 1, 2000, and files a financing statement in Delaware. On May 1, 2000, SP1 has priority. After the UED, by application of the one-year rule, SP1 still has priority even though it*

[3] Rev. §9-703(a).
[4] Rev. §§9-703(b), 9-705, 9-706.
[5] Rev. §§9-705(c), 9-706.
[6] Rev. §§9-703(b), 705(a).

*has not taken the necessary action to perfect under Revised Article 9. On July 1, 2002, however, SP2 has priority, because the one-year period has lapsed for SP1. SP1 could have maintained its priority by filing a financing statement in Delaware during this one-year period.*

## PRE-EFFECTIVE DATE FILING UNDER REVISED ARTICLE 9 (PRE-FILING)

In the case of a security interest for which a financing statement has been filed prior to the Uniform Effective Date that is effective to perfect a security interest under Revised Article 9, but which was not effective to perfect a security interest under former Article 9, the security interest is perfected on the Uniform Effective Date without further action by the secured party.[7]

EXAMPLE: *Debtor is a Delaware corporation with its chief executive office in Pennsylvania. Prior to the UED, SP obtained a security interest in Debtor's accounts, and filed a financing statement in Delaware. SP does not have a perfected security interest in the accounts prior to the UED because it has filed in the wrong location under former Article 9. SP's security interest in accounts does, however, become effective on the UED, since the financing statement is filed in the correct location under Revised Article 9.*

## CONTINUING FINANCING STATEMENTS FILED UNDER FORMER ARTICLE 9

### *General*

The transition rules provide for two types of filings to be used to continue the effectiveness of financing statements filed before the Uniform Effective Date. If the pre-UED financing statement was filed in an office that is the correct location under Revised Article 9, it should be continued by use of a "true" continuation statement.[8] If a pre-UED financing statement was filed in an office that was not the correct place to file under Revised Article 9, then it should be continued by use of an "initial financing statement filed in lieu of a continuation statement."[9] These two options are discussed in more detail below.

### *True Continuation Statements*

The requirements and effects of true continuation statements are as follows:

- True continuation statements should be filed to continue the effectiveness of a financing statement filed prior to the Uniform Effective Date in an office that was correct under former Article 9, and that is also correct under Revised Article 9.[10]
- True continuation statements may be filed only within the six-month period prior to the lapse of the original financing statement.[11]
- True continuation statements continue the effectiveness of the original financing statement for a period of five years after the lapse date of the original financing statement.[12]
- True continuation statements, together with the original financing statement, must comply with the requirements for initial financing statements (i.e., they must include the name and address of the debtor and secured party, the type and jurisdiction of organization of the debtor, the organizational identification number of the debtor, and a description of the collateral using Revised Article 9 terminology). True continuation statements must identify the financing statement being continued by file number.[13]

### *In Lieu Continuation Statements*

The requirements and effects of "in lieu" continuation statements are as follows:

- In lieu continuation statements should be filed to continue the effectiveness of a financing statement filed prior to the Uniform Effective Date in an office that was correct under former Article 9, but that is incorrect under Revised Article 9.[14]
- In lieu continuation statements must contain the following information[15]:
  - — The filing office, filing date and filing number of the pre-UED financing statement and the most recent continuation statement, if any
  - — An indication that the pre-UED financing statement remains effective
  - — The information required in an initial financing statement (i.e. name and

[7] Rev. §9-705(b).
[8] Rev. §9-705(d).
[9] Rev. §9-706.
[10] Rev. §9-705(d).
[11] Rev. §§9-515(d); 9-705(d).
[12] Rev. §§9-515(e), 9-705(d).
[13] Rev. §§705(f), 9-512(a), 9-05, 9-516. (*See* Shurlow, Nancy J., *Getting Ready for Revised Article 9 - New Requirements for Financing Statements*, LXXII Pa. Bar Ass'n Q. 42 (2001) for a discussion of the requirements applicable to initial financing statements under Revised Article 9.)
[14] Rev. §§9-705(c), 9-706(a).
[15] Rev. §§9-706(c), 9-705(f), 9-502, 9-516.

address of debtor, name and address of secured party, type and jurisdiction of organization, organization identification number, and description of collateral using the Revised Article 9 terminology).

- An in lieu continuation statement may relate to more than one pre-UED financing statement.[16]
- In lieu continuation statements may be filed at any time prior to the lapse of the pre-UED financing statement (i.e., even before the customary six-month period for continuations).[17]
- An in lieu continuation statement filed after the UED will lapse five years after the date on which the in lieu continuation statement was filed (*and not five years after the lapse of the initial financing statement*).[18]

Note that if a secured party continues a financing statement by filing an in lieu continuation statement, it should obtain a certified copy of each financing statement (and any related continuations or amendments) that is being continued. The original financing statements will be purged by the original filing office one year after their termination dates (notwithstanding the fact that they have been continued in another office by filing in lieu continuation statements).[19] In the absence of such a copy, the secured party may be unable to prove the existence of the original financing statements.

## PRIORITY

### *General Rule*

Priorities that are "established" under former Article 9 before the Uniform Effective Date remain established after the Uniform Effective Date under Revised Article 9.[20]

### *Rule for Competing Pre-filings*

If two secured parties file financing statements with respect to the same collateral that are ineffective under existing Article 9, but that are effective under Revised Article 9, the first to file will have priority.[21]

EXAMPLE: *Former Article 9 Filing vs. Pre-filing under Revised Article 9. Debtor is a Delaware corporation with its chief executive office in New York. SP1 files against Debtor's accounts in Delaware on May 1, 2000. SP2 files against Debtor's accounts in New York on August 1, 2000. On August 1, 2000, SP1 is not perfected (having failed to file in the correct location under former Article 9), but SP2 is properly perfected under former Article 9. In August 2001 (after the UED), both SP1 and SP2 are perfected, but SP2 has priority. SP2's filing has priority from August 1, 2000; SP1's priority dates from the UED.*

EXAMPLE: *Pre-filing under Revised Article 9 vs. Post-filing under Revised Article 9. Debtor is a Delaware corporation with its chief executive office in New York. SP1 files against debtor's accounts in Delaware on May 1, 2000. SP2 files against Debtor's accounts in Delaware on August 1, 2001. On August 1, 2000, neither SP1 nor SP2 is perfected since neither filed in the correct location under former Article 9. On August 1, 2001, both SP1 and SP2 are perfected. SP1, however, has priority. Its priority dates from the UED (because it pre-filed); SP2's priority dates from August 1, 2001.*

EXAMPLE: *Pre-filing vs. Pre-filing. Debtor is a Delaware corporation with its chief executive office in New York. SP1 files against Debtor's accounts in Delaware on May 1, 2000. SP2 files against Debtor's accounts in Delaware on August 1, 2000. On August 1, 2000, neither SP1 nor SP2 is perfected since neither filed in the correct location under former Article 9. On July 1, 2001, both SP1 and SP2 are perfected. SP1, however, has priority. In the case of two competing pre-filings under Revised Article 9, the first to pre-file wins.*

EXAMPLE: *Failure to Continue. Debtor is a Delaware corporation with its chief executive office in New York. SP1 files against Debtor's accounts in New York on March 1, 2000. SP2 files against Debtor's accounts in Delaware on April 1, 2000. SP1 files in Delaware on May 1, 2000, but does not continue its New York filing. SP1 is perfected for five years (until March 1, 2005) as a result of its New York filing. After the lapse of its New York filing SP1's perfection will continue via its Delaware filing. Until the lapse of its New York filing SP1 will have priority. After the lapse of the New York filing, SP2 will have priority (when two parties rely on pre-filing, the first to pre-file wins). SP1 could have protected its prior position by filing an in lieu continuation statement in Delaware prior to the lapse of its New York filing. A pre-filing under Revised Article 9 is not a substitute for continuation.*

## TRANSITION TIPS

### *Database and Procedures*

Secured parties need to make modifications to their database and procedures to insure that:

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[16] Rev. §9-706 cmt 2.
[17] Rev. §9-706.
[18] Rev. §9-706(b).
[19] Rev. §9-522.
[20] Rev. §9-709(a).
[21] Rev. §§9-322(a), 9-709(b).

- Information necessary for proper treatment of existing financing statements is gathered in sufficient time to ensure proper continuation (i.e., correct debtor name, type of organization, jurisdiction or organization and state identification number).
- New termination dates are entered into the database to reflect the fact that "in lieu" continuations will expire five years from the date of filing (not the date of lapse of the old financing statement).
- Filings after the Uniform Effective Date reflect the correct collateral categories. In particular any amendment or continuation of a pre-UED financing statement must use the Revised Article 9 categories. Particular attention should be given to transactions in which the collateral consists of accounts and/or general intangibles, commercial tort claims or health care receivables.
- Pre-closing searches are conducted in the correct filing office under Revised Article 9 *and* the correct filing offices under former Article 9 for transactions closing before July 1, 2006.
- At the time any pre-UED financing statement is continued by means of an in lieu continuation statement, a certified copy of the original financing statement (and any prior continuations and amendments) should be obtained. In the absence of such a certified copy it may be impossible to prove that the original filing existed, since the original filing office will treat the original financing statement as lapsed and purge it from the records one year following the apparent lapse.

*Special Focus on Transactions that May Be Subject to One-Year Rule*

Transactions involving collateral that is perfected by means other than filing a financing statement should be reviewed to ensure that no action needs to be taken within one year following the Uniform Effective Date. Particular attention should be given to transactions involving letter of credit rights, deposit accounts, commercial tort claims or health care receivables as security, transactions for which the security interest may not have attached prior to the Uniform Effective Date, and transactions with respect to which perfection is achieved through notice to a bailee. In all these situations, action may well have to be taken by the lender during the one-year period after the Uniform Effective Date.

*Training*

Personnel should be trained in the new procedures for filing in lieu and regular continuation statements, including information regarding change in collateral categories, and dates on which continued financing statements lapse.

*Policy for Continuations*

Policies should be adopted as to when secured parties will implement certain types of Revised Article 9 procedures. In particular, will "in lieu" continuations be filed on a portfolio basis or will in lieu continuations be filed on an as-needed basis?

# A Civil Practitioner's Guide To Permissive Appellate Review Of Interlocutory Orders

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TABLE OF CONTENTS Page



## INTRODUCTION

One of the more misunderstood aspects of civil litigation is the proper method for obtaining appellate review of an interlocutory order. In other words, what can counsel do if the trial court issues an adverse order that does not qualify as a final, appealable order? Many litigants, unaware of the proper procedure, either do nothing or file direct appeals that are subsequently quashed. Those litigants who are aware that there is a procedure for seeking permissive interlocutory review often make serious mistakes that hurt their chances of success.

The purpose of this article is to provide the civil litigator with an introduction to the process of seeking permissive appellate review of interlocutory orders in the Superior and Commonwealth Courts. This article will not examine permissive interlocutory review of orders in criminal cases or administrative proceedings.

## OVERVIEW

There are two ways a litigant can seek permissive appellate review of an interlocutory civil order. The first is pursuant to Rule of Appellate Procedure 341(c) and the second is pursuant to Rule of Appellate Procedure 312.[2] In order to determine which of these two courses to pursue, counsel should first determine why the order sought to be appealed does not qualify as final.[3] This article will first examine the two main categories of interlocutory orders and the corresponding two modes of seeking permissive appellate review in the trial court. The article will next examine the requirements for filing petitions for permis-

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[1] Staff Attorney, Central Legal Staff, Superior Court of Pennsylvania. The opinions expressed herein are solely those of the author, and are not to be attributed to the Superior Court of Pennsylvania. The author would like to thank Ernest N. Gennaccaro, Chief Staff Attorney, and Leonard R. Blazick, Assistant Chief Staff Attorney, for their editorial assistance.

[2] *Bonner* v. *Fayne*, 657 A.2d 1001, 1002 (Pa. Super. 1995).

[3] Prior to reaching this point, counsel should have confirmed that the order is not a final order as defined by Pa.R.A.P. 341(b)(1) & (2), an interlocutory order appealable as of right pursuant to Pa.R.A.P. 311, or a collateral order pursuant to Pa.R.A.P. 313. If it falls into any of these categories there is no need to seek permissive appellate review. *See Techtmann* v. *Howie*, 720 A.2d 143, 145-46 (Pa. Super. 1998). Litigants who seek permissive appellate review of an

sion to appeal and petitions for review in the appellate courts. At the conclusion of the article is a summary of the main points.[4]

## WHY IS THE ORDER INTERLOCUTORY?

Before taking any action to secure permissive appellate review counsel must first determine why the order is interlocutory. This is an important determination since it will decide which of the two modes of seeking permissive appellate review counsel should pursue. Failure to select the proper mode can result in the loss of the right to seek permissive review.[5]

Interlocutory orders are by definition any orders that are not final.[6] Rule 341(b) defines a final order, in pertinent part, as one that disposes of all claims or parties, or is expressly defined as final by statute.[7] If the order does not meet the foregoing definition of finality either because it does not dispose of all parties in a multiple party action, or because it does not dispose of all claims in a multiple claim action, counsel should file an application for determination of finality with the trial court pursuant to Rule 341(c).[8] If the order is interlocutory for any other reason, counsel should seek permissive appellate review pursuant to Rule 312.[9] If it is unclear whether permissive review should be sought under Rule 341(c) or Rule 312, counsel can seek permissive review under both Rules.[10] Regardless of which of the two modes of permissive review counsel chooses to pursue, the first step is always in the trial court.[11]

## PERMISSIVE APPEAL PURSUANT TO RULE 341(C)

### *Procedural Considerations*

If the order disposes of less than all claims or parties, counsel should file an application for a determination of finality in the trial court pursuant to Rule 341(c).[12] The purpose of this application is to cause the trial court to amend its order to add an express determination that "an immediate appeal would facilitate resolution of the entire case."[13] The process of asking the court to amend its order to add a determination of finality is also often referred to as certification.

Although there is no express statement in Rule 341(c) of how long a litigant has to file an application for determination of finality, the Rule does state that the trial court is required to act upon the application within 30 days of the entry of the order.[14] Thus as a practical matter, since the trial court must act upon the application within 30 days of the entry of the interlocutory order, the would-be appellant must file the application within this time period. Therefore, the longer counsel waits to file the application for determination of finality,

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order that is appealable as of right rather than filing a notice of appeal risk losing their appellate rights altogether. *See Thermo-Guard, Inc.* v. *Cochran*, 596 A.2d 188, 193 (Pa. Super. 1991). If counsel is unsure whether an order is interlocutory he or she can file a notice of appeal in addition to seeking permissive review. *Id*. If the order is final, the appellate court will deny the petition for permission to appeal/petition for review and the direct appeal will proceed. *Id*. If the order is interlocutory, the appellate court will quash the direct appeal and address the petition for permission to appeal/petition for review. *Id*.

[4] A party need not seek permissive interlocutory review of an interlocutory order to preserve that issue for later appeal. *See Borough of Mifflinburg* v. *Heim*, 705 A.2d 456, 463 (Pa. Super. 1997) (appellant's failure to file petition for review from trial court order refusing to certify original order for permissive interlocutory appeal pursuant to Rule 312 did not result in waiver of issues pertaining to original order on direct appeal); *Advantage Development, Inc.* v. *Board of Supervisors of Jackson Township*, 688 A.2d 1237, 1239 (Pa. Cmwlth. 1997) (although appellate court quashed appeal where appellant failed to obtain timely certification pursuant to Rule 341(c), appellant was still free to raise issue again on direct appeal from final order); *McKinney* v. *Albright*, 632 A.2d 937, 939 (Pa. Super. 1993) (failure of aggrieved party to seek determination of finality pursuant to Rule 341(c) does not constitute waiver of the matter).

[5] *See Womeldorf by Womeldorf* v. *Cooper*, 654 A.2d 238 (Pa. Cmwlth. 1995) (appeal of order certified as final pursuant to Rule 341(c) quashed where appellant filed petition for permission to appeal pursuant to Rule 1311 instead of a notice of appeal).

[6] H.R. and R.R. v. Department of Public Welfare, 676 A.2d 755, 758 (Pa. Cmwlth. 1996).

[7] *Nationwide Mutual Ins. Co.* v. *Wickett*, 763 A.2d 813, 816 (Pa. 2000).

[8] *See Matukonis* v. *Trainer*, 657 A.2d 1314, 1315 (Pa. Super. 1995), *appeal denied*, 666 A.2d 1057 (Pa. 1995) (stating that Rule 341(c) constitutes the exclusive method by which a party may seek review of an order disposing of fewer than all claims or parties).

[9] *Bonner*, 657 A.2d at 1002.

[10] *See Redevelopment Authority of Cambria County* v. *International Ins. Co.*, 685 A.2d 581 (Pa. Super. 1996), *appeal denied*, 695 A.2d 787 (Pa. 1997) (appellant filed a notice of appeal and sought permissive review pursuant to both Rule 341(c) and Rule 312; Superior Court denied the petitions for permissive review but allowed direct appeal to proceed).

[11] *See* 42 Pa.C.S. §702(b); Pa.R.A.P. 341(c).

[12] *Matukonis*, 657 A.2d at 1315.

[13] *Id*. The trial court is not required to wait until a party requests certification; it can amend its order to add the language of Rule 341(c) *sua sponte*. *See* DARLINGTON, MCKEON, SCHUCKERS, BROWN, *Pennsylvania Appellate Practice* §341:4 (2nd ed. 2000) [hereinafter Darlington].

[14] Pa.R.A.P. 341(c)(1); *Korn* v. *DeSimone Reporting Group, Inc.*, 685 A.2d 183 (Pa. Super. 1996); *but see*

the less time the trial court has to consider it. The action is stayed while the application is pending.[15] In addition to Rule 341(c), counsel should consult any applicable local rules as well as the trial court prothonotary to determine if there are any other provisions governing the filing of an application for determination of finality.

*Content of the Application for Determination of Finality*

The goal of the application for determination of finality is to persuade the trial court that an immediate appeal would facilitate resolution of the entire case. The Note to Rule 341 sets forth four factors that should be considered by the trial court when deciding whether to grant certification pursuant to Rule 341(c):

(1) whether there is a significant relationship between the adjudicated and unadjudicated claims;

(2) whether there is a possibility that an appeal would be mooted by further developments;

(3) whether there is a possibility that the court . . . will consider issues a second time;

(4) whether an immediate appeal will enhance prospects of settlement.[16]

In addition to the foregoing factors, counsel should be aware that trial courts certify orders pursuant to Rule 341(c) only in the most extraordinary circumstances where the failure to certify would result in an injustice that a later appeal cannot correct.[17] Therefore, the application for determination of finality should address this standard in addition to the four factors.

*Disposition of the Application for Determination of Finality*

If the trial court grants the application for determination of finality within 30 days of entry of the order, counsel has 30 days to file a notice of appeal pursuant to Chapter Nine of the Rules of Appellate Procedure.[18] At this point, the case will proceed as if it were a direct appeal of a final order. The fact that the trial court grants an application for determination of finality, however, is no guarantee that the appellate court won't decide that this grant was improper and thus counsel for appellee can always argue on appeal that certification was erroneously granted.[19] Counsel should note that the amended order must contain the requisite language of Rule 341(c). If it does not the appeal will be quashed.[20]

If the trial court denies the application for determination of finality, or it is deemed denied because the court fails to act upon it within 30 days of the entry of the order,[21] counsel can file a petition for review in the proper appellate court.[22] The procedure for filing a petition for review is discussed below.

PERMISSIVE APPEAL PURSUANT TO RULE 312

*Procedural Considerations*

If the order does not qualify for certification under 341(c), counsel can seek certification pursuant to Rule 312. Rule 312 states that "[a]n appeal from an interlocutory order may be taken by permission pursuant to Chapter 13 of the Rules of Appellate Procedure."[23] Rule 1311 states that appeals by permission may be taken pursuant to 42 Pa.C.S. 702(b),[24] which in turn states:

> (b) Interlocutory appeals by permission.—When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a *controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter*, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.[25]

An application for §702(b) certification must be filed in the trial court within 30 days

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*Muntz* v. *Commonwealth*, 674 A.2d 328 (Pa. Cmwlth. 1996), *rev'd on other grounds sub nom.*, *Cellucci* v. *General Motors Corp*. 706 A.2d 806 (Pa. 1998) (Commonwealth Court allowed petitioner to request certification more than 30 days after order was entered and ignored trial court's failure to act on the request within 30 days).

[15] Pa.R.A.P. 341(c)(1).

[16] Note to Pa.R.A.P. 341.

[17] *Pullman Power Products of Canada, Ltd.* v. *Basic Engineers, Inc.*, 713 A.2d 1169, 1172-73 (Pa. Super. 1998).

[18] Pa.R.A.P. 341(c)(2).

[19] *See Pullman*, 713 A.2d at 1172-74 (appellee filed cross-appeal challenging amendment of order pursuant to Rule 341(c) and appellate court agreed that certification was improper).

[20] *See Campbell* v. *Fitzgerald Motors, Inc*, 707 A.2d 1167, 1169 (Pa. Super. 1998) (appeal quashed where trial court did not make the requisite determination under Rule 341(c) that immediate appeal would facilitate resolution of the entire case but instead "clarified" that its original order was final pursuant to Rule 341(b).

[21] Pa.R.A.P. 341(c)(3).

[22] Pa.R.A.P. 341(c)(2).

[23] Pa.R.A.P. 312.

[24] Pa.R.A.P. 1311(a).

[25] 42 Pa.C.S. §702(b) (emphasis added).

of the entry of the interlocutory order.[26] Unlike Rule 341(c), proceedings in the trial court are not automatically stayed while an application for §702(b) certification is pending.[27] In addition, the filing of a motion for reconsideration does not toll the thirty-day period for seeking certification.[28] As with Rule 341(c) certification, the trial court can amend its order to add the §702(b) language *sua sponte*.[29] The Rules of Appellate Procedure do not prescribe any particular procedure for seeking §702(b) certification in the trial court but counsel should consult the appropriate local rules prior to filing.[30]

*Content of the Application for §702(b) Certification*

In the application for § 702(b) certification, counsel must persuade the trial court that the order in question contains the three elements of §702(b): (1) controlling question of law; (2) substantial ground for difference of opinion; and (3) material advancement of the ultimate termination of the matter. There is nothing in the text to §702(b) that defines the terms controlling question of law, substantial ground for difference of opinion, or material advancement, and no appellate court has undertaken a comprehensive examination of what these terms mean. In the absence of an explicit definition of the elements of §702(b), counsel must look to the cases in which permissive appeal has been granted for guidance.[31]

For example, as to what kinds of questions of law might be considered controlling, it appears that many of the cases in which permission to appeal has been granted involve appeals of orders denying petitions, motions, preliminary objections, or other filings that would have ended the litigation if they had been granted.[32] In addition, courts have granted permissive appellate review where the issue involved an affirmative defense,[33] jurisdiction,[34] or the admission or exclusion of evidence.[35] These types of orders are arguably controlling since questions of jurisdiction go to a court's ability to hear a case while orders allowing or disallowing affirmative defenses or admitting or precluding evidence have the potential to destroy or severely weaken one of the parties' cases. Thus it appears that whether or not an issue is considered controlling depends in large part on whether its disposition could resolve the entire case.

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[26] Pa.R.A.P. 1311(b).

[27] 42 Pa.C.S. §702(c).

[28] *See Mente Chevrolet, Oldsmobile, Inc.* v. *Swoyer*, 710 A.2d 632 (Pa. Super. 1998) (request for §702(b) certification untimely where petitioner waited for trial court to rule on motion for reconsideration before seeking certification and trial court denied reconsideration more than 30 days after entry of the original order).

[29] *See Hanselman* v. *Consolidated Rail Corp.*, 664 A.2d 680, 682 (Pa. Cmwlth. 1995), *appeal denied*, 673 A.2d 337 (Pa. 1996).

[30] DARLINGTON, §1311:4.

[31] The cases discussed below are not intended as an exhaustive list of authority on the three prongs of §702(b), but rather a sampling for illustrative purposes.

[32] *See*, e.g., *Stone* v. *York Haven Power Co.*, 749 A.2d 452 (Pa. 2000) (permission to appeal granted to review order denying summary judgment motion); *St. Clair Area School District Board of Education* v. *E.I. Assocs.*, 733 A.2d 677 (Pa. Cmwlth. 1999) (permission to appeal granted to review denial of judgment of *non pros*); *Herb* v. *Snyder*, 686 A.2d 412 (Pa. Super. 1996) (permission to appeal granted to review denial of judgment of *non pros*); *State Public School Building Authority* v. *Hazelton Area School District*, 671 A.2d 272 (Pa. Cmwlth. 1996) (petition for review granted to review order overruling preliminary objections); *Zeigler* v. *Klay*, 640 A.2d 511 (Pa. Cmwlth. 1994) (permission to appeal granted to review trial court's order denying motion to quash land use appeal).

[33] *See*, e.g., *Citicorp North America, Inc.* v. *Thornton*, 707 A.2d 536 (Pa. Super. 1998) (permission to appeal granted to review order denying motion for judgment on the pleadings based upon statute of limitations); *McKeesport Municipal Water Authority* v. *McCloskey*, 690 A.2d 766 (Pa. Cmwlth. 1997), *appeal denied*, 700 A.2d 445 (Pa. 1997) (permission to appeal granted to review order denying summary judgment motion based on governmental immunity); *Gerard* v. *Penn Valley Constructors, Inc.*, 495 A.2d 210 (Pa. Super. 1985) (permission to appeal granted to review order denied summary judgment motion based on defense of indemnification and choice of law; *but see City of Philadelphia* v. *Agresta*, 590 A.2d 1314 (Pa. Cmwlth. 1991) (petition for permission to appeal denied where order sought to be appealed barring an affirmative defense was based solely on the facts as perceived by the trial court regarding the defendant's conduct and was thus more in nature of a discovery sanction and not a controlling question of law).

[34] *See*, e.g., *Fawber* v. *Cohen*, 532 A.2d 429 (Pa. 1987) (permission to appeal granted to address question of original jurisdiction of civil rights suit seeking equitable or declaratory relief against state officials); *Balshy* v. *Rank*, 490 A.2d 415 (Pa. 1985) (permission to appeal granted to address question of original jurisdiction of civil rights suit seeking monetary damages from state officials).

[35] *See*, e.g., *Central Bucks School District* v. *Cogan*, 719 A.2d 7 (Pa. Cmwlth. 1998), *appeal denied*, 745 A.2d 1225 (Pa. 1999) (permission to appeal granted to review order granting motion *in limine*); *Jennings* v. *Dept. of Transportation*, 395 A.2d 582 (Pa. Cmwlth. 1978) (permission to appeal granted to review order granting protective order barring defendant from presenting certain evidence).

As for what constitutes substantial ground for difference of opinion, permissive review has been granted in many cases where the issue involves a matter of first impression or an unsettled area of law.[36] Permissive review has also been granted in order to clear up confusion caused by conflicting case law.[37] In addition, although appellate courts are generally loath to conduct interim supervision of civil discovery orders absent unusual circumstances,[38] in rare instances, the courts have granted permissive review of discovery orders.[39] Finally, although many of the cases where the appellate courts have granted permissive review involve claims of abuse of discretion, there is nonetheless a general reluctance to consider claims of abuse of discretion, as they are considered unlikely to constitute a substantial ground for difference of opinion.[40]

As for material advancement, merely arguing that some time might be saved by immediate appellate review is not persuasive, as that may be said of any interlocutory ruling that might potentially be reversed on direct appeal.[41] In addition, when preparing an argument regarding material advancement, counsel should bear in mind that the appellate courts have a long-standing policy interest in favor of avoiding piecemeal litigation.[42] Therefore, if allowing immediate appeal of an issue would not eliminate the need for future proceedings, even if it is decided in favor of the appellant by the appellate court, it will be difficult to show that immediate appeal would materially advance the ultimate termination of the matter.

### *Disposition of the Application for §702(b) Certification*

If the trial court grants the application and amends its order to add the language of §702(b), counsel must then file a petition for permission to appeal in the proper appellate court within 30 days of the entry of the amended order.[43] Failure of the order to include all three elements of §702(b) will cause the appeal to be quashed.[44] The filing of a petition for permission to appeal is discussed in more detail below. If the trial court fails to act upon the application for amendment within 30 days after it is filed it "shall no longer consider the application and it shall be deemed denied."[45]

If the trial court denies the application for amendment, or it is deemed denied because

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[36] *See*, e.g., *Rump* v. *Aetna Casualty and Surety Co.*, 678 A.2d 1197 (Pa. Super. 1996), *aff'd*, 710 A.2d 1093 (Pa. 1998) (permission to appeal granted to review issue of first impression regarding applicability of limited tort option); *Cellucci* v. *General Motors Corp.*, 676 A.2d 253 (Pa. Super. 1996), *rev'd on other grounds*, 706 A.2d 806 (Pa. 1998) (permission to appeal granted to address issue of whether plaintiff's product liability action was preempted by federal law); *Harleysville Insurance Co.* v. *Wozniak*, 500 A.2d 872 (Pa. Super. 1985) (permission to appeal granted to review issue of first impression regarding interplay between Worker's Compensation Act and the No-Fault Act); *Schuylkill Township* v. *Overstreet*, 454 A.2d 695 (Pa. Cmwlth. 1983) (permission to appeal granted to review issue of first impression regarding whether township was required to join tenants of mobile home park as indispensable parties in land use action).

[37] *See*, e.g., *Southeastern Pennsylvania Transportation Authority* v. *Dunham*, 668 A.2d 272 (Pa. Cmwlth. 1995) (permission to appeal granted to allow court to resolve apparent conflict between two lines of cases); *Sanderson* v. *Bryan*, 522 A.2d 1138 (Pa. Super. 1987), *appeal denied*, 538 A.2d 877 (Pa. 1988) (permission to appeal granted due to the importance of the issue and to resolve conflicting trial court decisions).

[38] *Strain* v. *Simpson House*, 690 A.2d 785, 787 (Pa. Cmwlth. 1997); *Robec* v. *Poul*, 681 A.2d 809, 811 (Pa. Super. 1996).

[39] *See Leonard* v. *Latrobe Area Hospital*, 549 A.2d 997 (Pa. Super. 1988) (permission to appeal granted of order directing defendants to produce patient records protected by the Mental Health Procedures Act where those records had been transferred to defendants' non-party attorney and insurance carrier); *Sanderson*, 522 A.2d at 1138 (permission to appeal granted to determine whether the Peer Review Protection Act is violated by a discovery order that gives plaintiff access to peer review information that is not directly related to his case); *Shoyer* v. *City of Philadelphia*, 506 A.2d 522 (Pa. Cmwlth. 1986) (permission to appeal granted to determine whether a provision of the Motor Vehicle Code prevented discovery of certain documents); *Jaden Electric Division of Farfeld Co.* v. *Wyoming Valley West School District*, 493 A.2d 746 (Pa. Super. 1985) (permission to appeal granted to determine issue of whether a judge of coordinate jurisdiction has power to order a party to produce materials which had been sealed by judicially supervised settlement in another litigation).

[40] *See Miller* v. *Krug*, 386 A.2d 124, 127 (Pa. Super. 1978) (court refused to allow appeal from order striking pre-trial statement effectively precluding plaintiff's expert from testifying; court opined that it was unlikely any claim of abuse of discretion would constitute substantial grounds for difference of opinion, as courts find abuse of discretion only in the most flagrant cases, and flagrant cases by definition do not involve a substantial ground for difference of opinion).

[41] *Miller*, 386 A.2d at 127.

[42] *Pugar* v. *Greco*, 394 A.2d 542 (Pa. 1978).

[43] *In re Kelly*, 704 A.2d 172, 175 (Pa. Cmwlth. 1997); *Hoover* v. *Welsh*, 615 A.2d 45, 46 (Pa. Super. 1992), *appeal denied*, 634 A.2d 222 (Pa. 1993).

[44] *Id*.

[45] Pa.R.A.P. 1311(b).

the trial court failed to act within 30 days, counsel should file a petition for review in the proper appellate court.[46] In addition, if the trial court grants §702(b) certification, and later vacates the order granting certification after the petition for permission to appeal has been filed, the petition for permission to appeal must be withdrawn and a petition for review filed in its place.[47] Petitions for review are discussed in detail below.

## PETITION FOR PERMISSION TO APPEAL

### *Procedural Considerations*

Once the trial court grants the application to amend the order to add the language of §702(b), Rule 1311(b) states that counsel has 30 days to file a petition for permission to appeal in the appropriate appellate court.[48] Although Rule 1301 sets forth the requisite number of copies of the petition for permission to appeal that must be filed, the Note to Rule 1301 advises that counsel consult with the prothonotary of the appropriate appellate court before filing the petition, as the required number of copies can be changed without formal amendment of the Rules.[49] Generally, a petition for permission to appeal is considered filed on the day it is received by the appellate court unless the petitioner files it by mail and uses a Postal Service Form 3817 certificate of mailing, in which case the date of filing is the date of mailing.[50] More than one party may file a joint petition for permission to appeal where permitted by Rule of Appellate Procedure 512, which governs joint appeals.[51]

Counsel should be aware that the filing of a petition for permission to appeal does not stay the proceedings below unless the trial court, the appellate court, or a judge of the appellate court so orders.[52] If counsel wishes to stay proceedings pending resolution of the petition for permission to appeal, it is generally good practice to seek a stay in the trial court.[53] If the trial court denies the application for stay, counsel can then file an application for a stay in the appellate court pursuant to Pa.R.A.P. 1702(b).[54] According to the Note to Rule 1702(b), the application for stay can be filed prior to the filing of the petition for permission to appeal.[55] In addition, if the court grants a temporary stay pursuant to Rules 1313 and 1702(b), the petitioner has 30 days to file a petition for permission to appeal, otherwise the stay will be automatically vacated.[56]

Rule 1312(b) states that all parties to the trial court proceedings except the petitioner are to be named as respondents.[57] Respondents supporting the petition for permission to appeal must follow the time schedule for filing prescribed for the petitioner in Chapter 13 of the Rules of Appellate Procedure, except that any response to the petition by the respondents is to be filed "as promptly as possible after receipt of the petition."[58] Where a party named as a respondent does not wish to participate in the petition for permission to appeal proceedings, that party must file a praecipe to strike its counsel's appearance within 30 days of filing of the petition, otherwise leave of the court must be sought, unless another attorney has entered or simultaneously enters an appearance for the respondent.[59]

Respondents have fourteen days from the date of filing of the petition to either file a brief in opposition or a letter stating that a brief in opposition will not be filed.[60] If the petition for permission to appeal is served by mail, the deadline for filing a brief in opposition or a letter of no-opposition is extended to seventeen days.[61] A respondent's failure to file a brief in opposition will not be construed as concurring in the petition for permission to appeal.[62]

### *Content of the Petition for Permission to Appeal*

Rule of Appellate Procedure 1312 sets forth the seven required components of the petition for permission to appeal.[63] The first component is a statement of the basis for the jurisdiction of the appellate court.[64] The statement of jurisdiction for a petition for permission to appeal should reference 42 Pa.C.S. §702(b) and Rules 312 and 1311, since these are the means by which you are seeking appellate review.[65]

The second component of the petition is the text of the order, or at least the relevant por-

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[46] Note to Pa.R.A.P. 1311.

[47] *See Atlantic Richfield Co.* v. *J.J. White, Inc.*, 448 A.2d. 634, 636 n.1 (Pa. Super. 1982) (where appellant filed a petition for permission to appeal following §702(b) certification but did not seek or receive a stay, trial court was free to vacate the amended order; proper recourse was to file a petition for review).

[48] *See Kelly*, 704 A.2d at 175; *Hoover*, 615 A.2d at 46 (Pa. Super. 1992).

[49] Note to Pa.R.A.P. 1301.

[50] Pa.R.A.P. 1311(b).

[51] Pa.R.A.P. 1312(e).

[52] Pa.R.A.P. 1313.

[53] DARLINGTON, §1313:1.

[54] *Id*.

[55] *Id*.

[56] DARLINGTON, §1313:2.

[57] Pa.R.A.P. 1312(b).

[58] *Id*.

[59] Pa.R.A.P. 1311(d).

[60] Pa.R.A.P. 1314.

[61] Pa.R.A.P. 121(e).

[62] Pa.R.A.P. 1314.

[63] Pa.R.A.P. 1312.

[64] Pa.R.A.P. 1312(a)(1).

[65] See Pa.R.A.P. 2114.

tions, sought to be reviewed.[66] The text of the order must contain the § 702(b) amendment of the trial court.[67] If the order is too voluminous, it may be appended to the petition.[68]

The third component is a concise statement of the facts containing "the facts necessary to an understanding of the controlling questions of law determined by the order of the lower court."[69] In addition to including all necessary facts, it is very important for counsel to remember that all of the elements necessary to a ready and adequate understanding of the points requiring consideration by the appellate court must be presented with "accuracy, brevity, and clearness," as the failure to do so is sufficient reason for the court to deny the petition.[70]

Fourth, the petition must contain the controlling questions of law "expressed in the terms and circumstances of the case without unnecessary detail."[71] Once again, counsel should keep in mind the requirements of accuracy, brevity, and clearness of Rule 1312(d) that permeate all of the components of the petition for permission to appeal.

The fifth component of the petition is a concise statement of the reasons why substantial ground for difference of opinion exists as to the questions presented and why an immediate appeal would materially advance the ultimate termination of the matter.[72] All arguments in support of these reasons must be contained in the body of the petition as no separate brief in support of the petition for permission to appeal is allowed.[73] As always, counsel should make sure to remember the accuracy, brevity, and clearness requirements when preparing the statement of reasons.

The sixth component requires that counsel attach to the petition any opinion related to the order he or she is attempting to appeal along with any other trial court opinions in the case.[74] In addition, opinions from companion cases must be attached to the petition "if reference thereto is necessary to ascertain the grounds of the order."[75] If these opinions are too voluminous to be attached to the petition, they may be separately presented.[76]

Finally, counsel should append verbatim copies of all pertinent constitutional provisions, statutes, ordinances, regulations "or other similar enactments which the case involves, and the citation to the volume and page where they are published, including the official edition, if any."[77] The petitioner should bear in mind when preparing the petition for permission to appeal that since the appellate court reviewing the petition does not have access to the original record, the petition should be easy to use and have all necessary documents readily accessible.[78]

As for the brief in opposition to the petition for permission to appeal, Rule 1314 states that it "shall set forth any procedural, substantive or other argument or ground why the interlocutory order should not be reviewed by the appellate court and shall comply with Rule 1312(a)(7) (content of petition for permission to appeal)."[79] Respondents should focus their arguments on the fact that the order petitioner seeks to appeal does not meet the three elements of §702(b).[80]

### *Disposition of the Petition for Permission to Appeal*

The decision whether to grant a petition for permission to appeal is at the discretion of the appellate court.[81] In the petition for permission to appeal, counsel must persuade the appellate court that the order in question contains the three elements of §702(b).[82] For examples of situations where the appellate courts have granted petitions for permission to appeal, the reader is referred to the cases cited in the "Content of the Application for §702(b) Certification" section, above.[83]

If the court grants the petition for permission to appeal, the prothonotary of the appellate court will give notice of the entry of the order granting permission to appeal to the clerk of the trial court and it will be docketed in the same manner as a notice of appeal.[84] The appeal then proceeds in the same manner as if a notice of appeal had been filed in the trial court; there is no need for appellant to file a notice of appeal.[85] The notice of a grant of petition for permission to appeal will specify the questions to be considered by the appellate court if permissive appeal has been granted to less than all of the questions presented.[86] Only the questions certified by the trial court and accepted by the appellate court will be consid-

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[66] Pa.R.A.P. 1312(a)(2).
[67] *Id*.
[68] *Id*.
[69] Pa.R.A.P. 1312(a)(3).
[70] Pa.R.A.P. 1312(d).
[71] Pa.R.A.P. 1312(a)(4).
[72] Pa.R.A.P. 1312(a)(5).
[73] Pa.R.A.P. 1312(d).
[74] Pa.R.A.P. 1312(a)(6).
[75] *Id*.
[76] *Id*.
[77] Pa.R.A.P. 1312(a)(7).
[78] DARLINGTON, §1312:2.
[79] Pa.R.A.P. 1314.
[80] DARLINGTON, §1314:2.
[81] 42 Pa.C.S. §702(b).
[82] *Id*.
[83] *See* Notes 31-42, *supra*.
[84] Pa.R.A.P. 1322.
[85] DARLINGTON, §1322:1.
[86] *Id*.

ered.[87] In addition, grant of the petition for permission to appeal stays the proceedings before the trial court pursuant to Pa.R.A.P. 1701(a), but the trial court is only precluded from proceeding as to those matters for which permission to appeal has been granted.[88] Although the appellate court has granted a petition for permission to appeal, they may nonetheless review the propriety of that grant before addressing the merits of the appeal.[89]

If the appellate court denies the petition for permission to appeal, the appellate court prothonotary will send notice to the parties and the clerk of the trial court.[90] If a stay had been granted pursuant to Rule 1313, denial of the petition for permission to appeal will dissolve it.[91] Following denial of the petition for permission to appeal, counsel can file a petition for allowance of appeal in the Supreme Court of Pennsylvania pursuant to Rule of Appellate Procedure 1112.[92] Alternatively, some commentators suggest that the petitioner can also file an application for reconsideration in the court that denied the petition for permission to appeal.[93] An application for reconsideration, however, does not stay the proceedings before the trial court.[94]

## PETITION FOR REVIEW

### *Procedural Considerations*

If the trial court refuses to certify the order pursuant to either Rule 341(c) or Rule 312, counsel can file a petition for review in the appropriate appellate court pursuant to Chapter 15 of the Rules of Appellate Procedure.[95] Regardless of whether he or she is proceeding under Rule 341(c) or Rule 312, counsel has 30 days from the date of entry of the order denying the application for determination of finality or the deemed denial of the application to file a petition for review, unless a shorter time period is provided by Rule 1512(b).[96] In addition, the filing of a petition for review does not result in an automatic stay; a stay must be affirmatively requested.[97] As with the petition for permission to appeal, counsel should contact the appellate court prothonotary to determine the correct number of copies for filing and other filing-related issues.[98] Respondents have fourteen days to file a response to the petition for review, seventeen if the petition is served by mail.[99]

### *Content of the Petition for Review*

Regardless of whether counsel is proceeding under Rule 341(c) or Rule 312, he or she must seek review of the order refusing certification by filing a petition for review pursuant to the Note to Pa.R.A.P. 1311.[100] Since the grant of a petition for review filed pursuant to Pa.R.A.P. 1311 eliminates the need for filing an additional petition for permission to appeal, it is suggested that the litigant incorporate all of the required components of a petition for permission to appeal into the petition for review.[101] This approach has been cited with approval.[102] Therefore, counsel should follow the same guidelines for content of the petition for review as for the petition for permission to appeal discussed above, with the following adaptations.

First, the petition should be captioned as a "Petition for Review From the Order of the Court of Common Pleas of _____ County Refusing to Amend its Order Pursuant to

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[87] *See Central Bucks*, 719 A.2d at 8 n. 1 (court would not consider issue for which permission to appeal was not granted).

[88] DARLINGTON, §1313:4, n. 91. Moreover, the grant of a stay of proceedings is not identical to the grant of a *supersedeas*, which prevents the disputed order from taking effect. *Id.* A *supersedeas* must be sought separately pursuant to Chapter 17 of the Rules of Appellate Procedure. *Id.*

[89] *See Herb*, 686 A.2d at 415; *Donegal Mutual Ins. Co.* v. *Ferrara*, 552 A.2d 699, 700 (Pa. Super. 1989).

[90] Pa.R.A.P. 1323.

[91] DARLINGTON, §1323:1.

[92] *See* Pa.R.A.P. 1112; *Redevelopment Authority of Cambria County*, 685 A.2d at 585 (petitioner filed petition for allowance of appeal with Supreme Court following Superior Court's denial of its petition for permission to appeal).

[93] *See* DARLINGTON, §1323:2 (since nothing in the Rules explicitly prohibits the filing of a motion/petition for reconsideration, there is always the possibility that the court might treat it like a petition for reargument).

[94] *See* Pa.R.A.P. 1313.

[95] *Commonwealth* v. *Boyle*, 532 A.2d 306, 308 (Pa. 1987); *Redevelopment Authority of Cambria County*, 685 A.2d at 584; *Hoover*, 615 A.2d at 105.

[96] Pa.R.A.P. 341(c)(4); Pa.R.A.P. 1512(a); Note to Pa.R.A.P. 1311.

[97] *See Boyle*, 532 A.2d at 309.

[98] *See* DARLINGTON, §1301:2.

[99] The provision of Chapter 15 concerning answers to petitions for review does not specify a time limit for filing an answer. *See* Pa.R.A.P. 1515. Nevertheless, the General Provisions of the Rules of Appellate Procedure specify a fourteen-day response period to respond to an application, as do the provisions concerning petitions for allowance of appeal and permission to appeal. *See* Pa.R.A.P. 123(b), 1116, and 1314.

[100] Note to Pa.R.A.P. 341, and Note to Pa.R.A.P. 1311.

[101] DARLINGTON, §1311:8.

[102] *Mifflinburg*, 705 A.2d at 462-63; *Hoover*, 615 A.2d at 46 n.2.

1311(b)/341(c)."[103] Second, if counsel is seeking permissive appellate review pursuant to Pa.R.A.P. 341(c), the "statement of reasons" section should emphasize that the trial court erred in refusing to amend the order by demonstrating how an immediate appeal would facilitate resolution of the entire case.[104] According to the text of Rule 341(c), the appellate court deciding a petition for review filed pursuant to Rule 341(c) must determine whether the trial court committed an abuse of discretion in refusing to amend its order.[105] The Note to Rule 341, however, states that the standard of review of a petition for review of an order denying 341(c) certification is whether the case is so egregious as to justify prerogative appellate correction.[106] Thus there appears to be a contradiction between the standard of review in the Rule and the Note, and some commentators advise the petitioner to argue that the court employ the broader standard of review under Rule 341(c)(2).[107] While the text of the Rules arguably takes precedence over the standard enunciated in the Notes,[108] counsel should nevertheless keep in mind the fact that Rule 341(c) certification is typically only granted in extraordinary circumstances where the failure to certify would result in an injustice that a later appeal cannot correct when formulating the "statement of reasons" section.[109]

If, however, counsel is seeking permissive review pursuant to Rule 312, the "statement of reasons" section should demonstrate how the trial court's refusal to amend the order was "so egregious as to justify prerogative appellate correction" by showing how the order involved a controlling question of law, about which there is substantial ground for difference of opinion, and an immediate appeal would materially advance the ultimate termination of the matter.[110] Appellate courts have granted petitions for review filed pursuant to Rule 312 in situations where they would have granted petitions for permission to appeal if the trial court had certified its order.[111]

*Disposition of the Petition for Review*

If the court grants the petition for review the effect is the same as if a petition for permission to appeal had been filed and granted, and there is no need to file a separate petition for permission to appeal or notice of appeal.[112]

If the court denies the petition for review, counsel can file a petition for allowance of appeal with the Supreme Court pursuant to Rule 1112.[113] In addition, counsel could also file a motion for reconsideration in the court that denied the petition for review, as the same rationale for doing so in the case of denial of a petition for permission to appeal also seems to apply where the court denies a petition for review.[114] A motion for reconsideration, however, does not stay the proceedings before the trial court.[115]

## CONCLUSION

The foregoing illustrates the procedure for seeking permissive appellate review of an interlocutory order not appealable by right. The most critical aspect is the determination of what mode of seeking appellate review to pursue: Rule 341(c) or Rule 312. In order to make this determination, counsel must first determine why the order is interlocutory. If it is interlocutory because it disposes of some, but not all, claims or parties, counsel should seek permissive review under Rule 341(c). If it is interlocutory for any other reason, counsel should seek permissive review pursuant to Rule 312.

After determining which of the two modes is appropriate, counsel must apply to the trial court for amendment of its order either to add the language of Rule 341(c) or 42 Pa.C.S. §702(b). If the trial court amends its order pursuant to Rule 341(c), counsel should file a notice of appeal in the appropriate appellate court within 30 days. If the court amends its order pursuant to §702(b), counsel should file a petition for permission to appeal in the appropriate appellate court pursuant to Chapter 13 of the Rules of Appellate Procedure within 30 days. If the trial court refuses to amend its order counsel should file a petition for review in the appropriate appellate court pursuant to Chapter 15 of the Appellate Rules and the Note to Rule 1311. If the appellate court denies the petition for permission to appeal or the petition for review, counsel can then file either a motion for reconsideration in the court that denied the petition, or a petition for allowance of appeal in the Supreme Court.

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[103] DARLINGTON, §1311:8.
[104] Pa.R.A.P. 341(c)(2).
[105] *Id.*
[106] Note to Pa.R.A.P. 341.
[107] DARLINGTON, §341:10.
[108] *See* 1 Pa.C.S. §1939; Pa.R.A.P. 107.
[109] *Pullman*, 713 A.2d at 1172-73.
[110] *Mifflinburg*, 705 A.2d at 462-63; *Hoover*, 615 A.2d at 46 n.2.
[111] DARLINGTON, §1311:13; *see* Notes 31-42, *supra*.
[112] Note to Pa.R.A.P. 1311.
[113] *See* Pa.R.A.P. 1112.
[114] *See* Note 93, *supra*.
[115] *See* Note 94, *supra*.

# Strategies For Financing College Education—A Comparison—Qualified Stock Tuition Programs §529 Plans

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Allegheny County
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TABLE OF CONTENTS Page



## STATE TUITION PROGRAMS-GENERALLY

Certain states and agencies maintain education funding programs which allow credits or certificates to be purchased or contributions to be made to an account to subsidize future education costs. A qualified state tuition program is one that is established and maintained by a state or agency and that 1) allows a person to buy tuition credits or certificates for a designated beneficiary who would then be entitled to a waiver or payment of qualified higher educational expenses, or 2) allows a person to make contributions to a Section 529 account in order to meet the qualified higher educational expenses of a designated beneficiary of the account.[1] Both programs require that all purchases or contributions be made only in cash and prohibit the contributor and the beneficiary from directing the amount invested. Prepaid tuition plans assure that tuition will be paid at one of the state's public universities with the overall goal to keeping up with tuition inflation. Additionally, prepaid tuition plans according to the Department of Education as contrasted with §529 savings plans, may be considered assets of the student and may negatively affect the child's ability to qualify for financial aid.

## QUALIFIED STOCK TUITION PROGRAMS OR "529 PLANS"

Section 529 was added to the Internal Revenue Code by Section 1806 of the Small Business Job Protection Act of 1996, Public Law 104-188, 110 Stat. 1895. Section 529 was modified by sections 211 and 1601(h) of the Taxpayer Relief Act of 1997, Public Law 105-34, 111 Stat. 810 and 1092. Section 529 provides tax-exempt status to Qualified State Tuition Programs ("QSTPs") established and maintained by a state or agency or instrumentality thereof.[2] Such programs, however, may be subject to taxes imposed by Section 511 of the Internal Revenue Code relating to the imposition of tax on unrelated business income of charitable organizations. The term "qualified higher education expenses" includes tuition, fees, books, supplies, and equipment required for the enrollment or attendance of a designated beneficiary at an eligible educational institution.[3] In the case of an individual

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[1] IRC §529.

[2] IRC §529.

[3] IRC §529.

who is an eligible student,[4] expenses shall also include reasonable costs incurred by the designated beneficiary for room and board.[5] The term "eligible educational institution" means an institution which is described in section 481 of the Higher Education Act of 1965 (20 U.S.C. 1088) and eligible to participate in a program under title IV of such Act or other student aid programs. A "designated beneficiary" means the individual designated as the beneficiary of the account at the time an account is established with the QSTP or the individual who is designated as the new beneficiary when beneficiaries are changed.

QSTPs must require all contributions to the program be made only in cash. Neither contributors nor designated beneficiaries may direct the investment of any contributions or any of the earnings on those contributions. A separate accounting must be provided to each designated beneficiary in the program. Upon disbursement for qualified educational expenses, the income on program contributions is taxed at the beneficiary's federal income tax rate, usually 15%, which in most cases is lower than the account "owner's" federal income tax rate. Unlike educational IRAs with severe means tests, section 529 plans are open to all individuals regardless of income tax bracket.

## ESTATE, GIFT AND GENERATION-SKIPPING TRANSFER TAX IMPLICATIONS

There are many reasons why section 529 plans are unlike anything else in estate planning. One of the reasons is the way in which "control" is treated. The contributor can retain control over disbursements and revoke it at anytime. Despite the control, the contributions are not disqualified and count as completed gifts to any designated beneficiary and are removed from the donor's estate for federal estate tax purposes. This has never been permitted under the Tax Code before insofar as the ability to allow revocable gifts as a means of reducing one's estate. Under section 529 as amended by the 1997 Act, a contribution on behalf of a designated beneficiary to a QSTP after August 5, 1997, is a completed gift of a present interest in property under section 2503(b) from the contributor to the designated beneficiary.[6] The portion of a contribution excludible from taxable gifts under §2503(b) satisfies the requirements of §2642(c)(2) and is also excludible for purposes of generation-skipping transfer tax imposed under §2601.[7] Secondly, the contributions are considered present gifts which are available under the annual $10,000 exclusion per beneficiary rules and permitted to shelter the donor's income. Under Section 2503(b) of the Internal Revenue Code, $10,000 of transfers per year to an unlimited number of donees is excluded from Federal Gift Tax.[8] Lastly, the donor or account owner may change the beneficiary on the account and is not restricted in how many times this is done. Presumably no state will allow large amounts, such as $500,000 to be placed in an account, however, this potential impediment can be overcome by setting up accounts in multiple states. Furthermore, the IRS does not require that accounts in different states be aggregated in calculating the maximum allowed contribution. Contributions in excess of these amounts will incur gift taxation which is credited against a participant's lifetime gift exclusion of $675,000.00. This exclusion may be shared by spouses, so that by consent evidenced on a gift tax return one spouse may elect to have his exclusion apply to gifts made by the other spouse, resulting in gifts of up to $20,000 to any donee excluded from tax. This is equally applicable to the Section 529 contributions. By splitting the gift a better use is made of the progressive nature of the gift tax rate schedule because one half of the gift is taxed to the husband and one-half to the wife. To qualify for gift splitting, the spouse who does not actually contribute to the gift must consent to this tax treatment by signing the gift tax return. This is necessary even if the combined annual exclusion results in no gift tax being owed and no unified credit being used, such as when making a $20,000 gift to a child.

Section 529 provides for an election allowing a contributor to gift $10,000 to a 529 plan account and treat it as a contribution over five years.[9] This translates into sheltering $50,000 or $10,000 per year for each of the five years per beneficiary. Under section 529, a transfer which occurs by reason of a change in the designated beneficiary in a QSTP, or a rollover from the account of one beneficiary to another beneficiary's account, will not be treated as a taxable gift if the new beneficiary is a member of the family, as defined in section 529(e)(2), of the old beneficiary, and is assigned to the same generation as the old beneficiary. If the transfer is to a lower generation, the transfer is treated

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[4] IRC §25A(b)(3).
[5] IRC §529(3)(b).
[6] IRC 2503(b).
[7] IRC §2503(b); §2601.
[8] IRC 2503(b).
[9] IRC §529.

as a taxable gift. The definition of "member of the family" is very broad. It includes the beneficiary's parents, grandparents, children, sisters, uncles, aunts and spouse's parents and siblings.

What many do not realize is that the 529 plan assets may be used for other uses aside from secondary education. Other uses may subject the funds to a 10% penalty but the advantages of the tax deferral may offset this cost.

Selecting the right plan and the right investment option is critical. This is because you are not allowed to exercise active control over the investment of the money while it is managed under the plan. Under IRS rules, one can move the investment from one state's plan to another state's plan without penalty, so long as the account beneficiary is changed. This ability to change the account beneficiary does not apply to traditional "prepaid" state tuition plans of the past. The investor should be wary of some state plans and should compare their applicable rules which in some cases may further limit what the IRS requires, for example, by forcing you to withdraw the funds earlier that you would like or limiting the gift amounts.

## EXPENSES OF 529—COLLEGE SAVINGS PLANS

The types of expenses associated with these plans include:

a) management fees paid by the fund to the portfolio manager or investment advisor together with other custodian and operating expenses; and

b.) distribution fees or "12b-1 fees" Some 529 plans invest in no load funds or ones without the common 12b-1 fees; and

c.) annual brokerage costs associated with some funds. Typically described as "annual brokerage costs" or "brokerage expense".

The above costs can easily exceed 1-5% annually of the total dollar amount of investments under management, so these expenses should be compared among the various mutual fund and directly offered state plans. Some states have layered their own restrictions on top of the strict federal rules governing the plans. One must study the fine print in the plan documents themselves, as well as the fees. Moreover, a growing number of states give residents tax deductions for money contributed to their own plans and exempt earnings withdrawn for education from state tax. Keep in mind, the annual fee amounts will impact the total net rate of return to the investor.

## FINANCIAL AID CONSIDERATIONS

Although a 529 account may not technically be in the student's name, a recent ruling from the Department of Education sets out the treatment of 529 plans as it relates to financial aid consideration. Typically, prepaid tuition plans will be considered assets of the student, while college savings plans will be considered assets of the account owner. The student is more likely to qualify for more assistance with assets sheltered within college savings accounts and owned by their parents. When the parent is the account owner, 529 plan assets are treated as other parental assets and have minimal impact on the application for financial aid. The U.S. Department of Education Letter Ruling dated April 1, 1999 and drafted by Jeff Baker, Director of Policy Development Division of the U.S. Department of Education determined that assets held in Section 529(b)(1)(A)(ii) accounts not owned by a parent will not be considered in the student's need analysis at all and jeopardize assistance except to the extent any proceeds are received from the QSTD vehicle for that applicable year.

## COMPARISON TO MINOR'S TRUST

The above is to be contrasted to the Minor's or 2503(c) trust. A minor's trust is also designed to take advantage of the $10,000 annual gift tax exclusion as well. The donor is entitled to the annual gift tax exclusion for any gift to a trust if the trustee:

a. has the discretion to distribute income and principal to the donee before age twenty-one, irrespective of whether any income or principal is in fact distributed;
b. distributes the entire trust principal and any accumulated income to the donee when the donee reaches age twenty-one; and
c. distributes the trust to the donee's estate should the donee die before reaching age twenty-one, or pursuant to the terms of a general power of appointment granted to the donee in the trust.

The trust may prohibit distributions that would have the effect of offsetting a parent's obligation to support the child. Otherwise, the trust may not limit the trustee's ability to use the trust property for the benefit of the child. In Pennsylvania, the trust funds may be used for the college education of the child.

The duration of the trust can last beyond age twenty-one as long as the donee is granted the "right" to withdraw the entire trust at age twenty-one but elects not to do so. This type of trust is yet another means of permitting regular gifts to a trust in order to establish a funding source for college education. The existence of a "Crummey" withdrawal power will cause the beneficiary to be treated as the trust's owner under IRC §678(a)(1). This section provides as follows:

"A person other than the grantor shall be treated as the owner of any portion of the trust with respect to which:

(1) such person has a power exercisable solely by himself to vest the corpus of the income therefrom in himself, or

(2) such person has partially released or otherwise modified such a power and after the release or modification retains such control as would, within the principles of §671-§677, inclusive, subject a grantor of a trust to treatment as the owner thereof."

In a typical irrevocable trust, the trustee would have the authority to make discretionary payments of income and/or principal to or for the benefit of the beneficiary. In order to obtain the present interest exclusion, the beneficiary typically has a 30 day window in which to exercise a right to withdraw the contributions up to $5,000 in most cases. For gift tax purposes, the beneficiary will be deemed to have made a gift to the trust of the amount which exceeds $5,000 per year or 5% of the amount in the trust, whichever is greater. For income tax purposes, the IRS originally held that the failure to exercise the Crummey power would be considered a contribution to the trust resulting in the beneficiary becoming the grantor for income tax purposes.[10] The IRS has since changed its position by treating the lapsed power as a partial release under IRC §678(a)(2).[11] Currently, under IRC §678(a)(1), the beneficiary is considered the owner of that portion of the trust in which the beneficiary has the right to withdraw since this would be a power "exercisable solely by himself to vest the corpus of the income therefrom in himself."[12] Upon expiration of the 30-day period, the question is whether §678(a)(2) should apply which provides that the beneficiary remains the owner to the extent the beneficiary has

"(1) previously partially released or otherwise modified such a power, and (2) after the release or modification retained such control as would" within the principles of §671-§677, inclusive, subject a grantor of a trust to treatment as the owner thereof."

By treating the withdrawal power as a release, the holder of the power is subject to tax under §678(a)(2). The IRS would ignore the lapse, and the trust would have dual status providing that neither IRC §678(a)(1) nor IRC §678(a)(2) will apply if the original grantor would be taxable under the grantor rules as outlined in IRC §671-677. If the goal is to have the beneficiary or the child the "owner" for purposes of income taxation, the trust must be structured as a grantor trust so that the original grantor would be considered the owner under IRC §671-§679. In this regard, §675(4)(c) provides two benefits. First, the grantor will be treated as the owner for the portion of the trust in which the grantor holds a power of administration without requiring the consent of the fiduciary. The power of administration is defined as the "power to reacquire the trust corpus by substituting property of an equivalent value".[13] For income tax purposes, the outcome would be for the grantor to continue as the owner of the property. For estate tax purposes, this power does not cause the assets in the trust, even if the assets consist of life insurance, to be includible in the grantor's estate.[14] In *Jordahl*, the Court held that the possession of a right to substitute assets was not a power to alter, amend or revoke the trust for purposes of IRC §2038.[15] In PLR 9413045, the IRS ruled that §675(4)(C) power to reacquire would not be considered an incident of ownership for purposes of including the life insurance proceeds in the decedent's estate under IRC §2042.

The income earned from the investments is taxed to the trust and not to the settlor, despite the amount of the income earned or capital gains distributed to the trust. This is the tax result irrespective of the "kiddie tax." The 1986 Tax Reform Act introduced the so-called "kiddie tax" which taxes the net unearned income of children under the age of 14 at the parents' tax rate. While at first this seems to be straightforward, it is a very complicated calculation. The capital gains tax reduction further complicated this calculation. Under certain very limited circumstances, parents can elect to include their children's income on their return. However, the election is not available for parents of a child with any earned income, unearned income in excess of a certain dollar amount, capital gains, withholding or estimated tax payments. Similarly, if a child is subject to the AMT, additional calculations are required. If a parent must pay AMT, the children's income is still taxed at the parent's regular marginal tax rate, while the parent is taxed at the AMT rate without taking into account the child's income or the child's regu-

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[10] PLR 8142061; PLR 8545074.

[11] PLR 9034004.

[12] IRC §678(a)(1).

[13] IRC §675(4)(c).

[14] *Jordahl* v. *Commissioner*, 65 T.C. 92 (1975), acq. 1977-1, C.B.-1.

[15] *See* PLR 9413045.

lar tax liability. This results in taxpayers paying more tax than if the parent and children's income are both included in the parent's AMT calculation. The undistributed income is taxed to the trust if someone other than the donor's spouse serves as trustee if the child is under age 21. If the income is distributed to the child, it is taxed to the child while the child is under 21. If the trust would continue, after the child has turned 21, all income, distributed or undistributed, would be taxed to the child.

An advantage of the Minor's Trust as compared to §529 plans, is the ability to actively manage one's investments and purchase and trade individual securities. Control over day-to-day investment activity is lost with §529 plans and loss of control is required and mandated in order to receive favorable tax deferral treatment and estate tax implications. If you invest in the stock market and the market plummets, the funds may not be moved to a bond portfolio offered by the same state plan. This is not to say, the account may not be moved from one state's plan to another state's plan as long as the beneficiary is changed. Note that the same financial services company may differ in each of its separate state plans in terms of overall fees charged and asset allocation of the portfolio.

## FUNDING COLLEGE EXPENSES WITH IRA FUNDS

Another option for funding the costs of a college education is tapping an IRA early. One can withdraw the monies, without penalty, from an IRA to pay for qualifying educational expenses for yourself, spouse, child or grandchild.[16] Where a large estate is involved and there are several children, grandchildren or great-grandchildren, grandparents may assist children with their education expenses rather than having the parents invade their IRA accounts. Withdrawn funds must be used to pay for qualified higher education expenses at a post-secondary institution. These include tuition, room and board, fees, books and supplies. The parents can enjoy continued tax-deferral growth and some protection from creditors if they are also business owners or other professionals concerned about asset protection. Even so there may be instances in which the grandparents wish to make a withdrawal to fund education expenses without incurring penalties and excise taxes. The income tax will be incurred but this may be offset by the future estate tax saved. From a tax perspective, the penalty can be avoided. Normally, if you withdraw funds from a traditional IRA before one is 59½ years old, a 10% penalty is assessed in addition to the income tax owed on the distribution. A method to circumvent the penalty is to have the distribution spread in a series of substantially equal payments based on the amount in the account and the contributor's life expectancy. If an early withdrawal schedule is chosen, one must abide by the payout schedule for at least five years and until one has reached aged 59½. Once these limitations are met, the schedule and payment amounts may be adjusted to take more or less. The two simplest methods for determining the withdrawal amounts are the life expectancy method and the amortization method. In the life expectancy method, the balance is divided by the life expectancy at that moment of the anticipated first withdrawal. In the amortization method, one is permitted to assume the balance will be earning a rate of return on the balance amount. The IRS has approved reasonable earnings rates based on investments in mutual funds and the effects of compound interest.

In January of 2001, the Treasury Department issued new IRA Distribution Rules applicable to IRAs. The IRS has created the New Uniform Expectancy Table which may be used to calculate the minimum distribution one can take. Under the new rules, nonspouse beneficiaries can take withdrawals from an inherited IRA over the lifetime of the beneficiary, a child or grandchild. This permits continued compounding and growth of the IRA while providing for an income stream to the beneficiary. Benefits are maximized when distribution can be deferred or minimized for as long as possible while granting the beneficiaries the option to take larger distributions if desired.

## COMPARISON TO UNIFORM GIFT TO MINORS ACT TRUSTS

In 1956, the Uniform Gifts to Minors Act (the Model Act), was promulgated with the approval of the New York Stock Exchange, the Association of Stock Exchange Firms, and the American Bar Association. 8A ULA 405 (1983); Revised as the Uniform Gift to Minors Act, 1966 Revised Act, 8A ULA 317 (1983); Revised and restated as the Uniform Transfers to Minors Act, 8A ULA 98 (Supp. 1991).

A transfer to a minor under the Model Act, constitutes a completed gift for federal gift tax purposes at the time the transfer is made.[17] A

[16] IRC 72(t)(2)(E).

[17] Rev. Rul. 59-357, 1959-2 C.B. 212.

custodian is authorized to apply as much of the income or principal for the benefit of the minor as she or he may deem advisable. Income or principal not so applied is deliverable to the donee at the age of majority. A shortfall of this strategy is that the value of property transferred to the minor is includible in the gross estate of the donor for federal estate tax purposes if the donor appoints herself as custodian and dies while serving in that capacity prior to the donee reaching 21 years of age.[18] The custodian possesses sufficient control to warrant inclusion in his estate pursuant to Code section 2038(a)(10).[19] Additionally, the assets are considered the minor's and 35% of these assets are considered available for college expenses. The result is these funds may hinder the student or minor from qualifying for financial aid. Current tax law undermines these custodialships by requiring all unearned income of the child under the age of 14 in excess of a certain amount be taxed at the rate of the child's parents.

A better option may be to utilize both the Section 2503(c) trust with the UTMA account to provide different savings options for the children when the children are within various age brackets. For example, when a child is under 14, Section 2503(c) can produce tax savings by avoiding the "kiddie tax". If the income generated by the portfolio exceeds the dollar amount taxed at the lower rate, the 2503(c) trust may be set up to receive the excess income. In situations whereby the 2503(c) trust and custodial account were used together, when distributions begin to be made for expenses, it generally would make sense to pay down the custodial account first. Then after the child reaches 21 years of age, most of the funds would still be sheltered in the 2503(c) trust and could be held beyond 21 years of age. However, Section 643(f) of the Internal Revenue Code provides that two trusts if "substantially the same" will be taxed as one trust unless the grantors and beneficiaries are dissimilar.[20] It may be possible, however, for parents to set up a 2503(c) trust for a child and the grandparents set up a separate one for the same child and have the trusts treated as separate trusts and taxed accordingly.

## INTEREST-FREE LOAN ALTERNATIVE

Despite restrictions on interest-free loans, they still can be a valuable estate planning tool and college funding tool. For example, a parent generally can lend money to his child to help pay for the child's education without any income tax consequences. In essence, when a parent makes an interest-free loan to his child, he is making a taxable gift to the child equal to the amount of interest that could have been charged but was not. The parent pays tax on the interest income yet the child does not recognize the gift as income and can take a deduction for the interest cost which was not actually paid.

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[18] Rev. Rul. 59-357, 1959-2 C.B. 212.

[19] *See Estate of Prudowsky* v. *Commissioner*, 55 T.C. 890 (1971), aff'd, 465 F.2d 62 (7th Cir. 1972).

[20] IRC §643(f).

# The "Wexler Mistake": Trade Secret Protection in Pennsylvania

By WILLIAM T. MACMINN AND STEPHEN C. SMITH[1]

Bucks County

TABLE OF CONTENTS Page



## INTRODUCTION

A married couple runs a small company, which we'll call Company A, that manufactures maintenance and sanitation chemicals for industrial customers. Company A hires an individual to be its chief chemist. He becomes responsible for formulating all of Company A's products. He does so primarily by analyzing and duplicating competitors' products and using the resulting information to develop new formulas. During the course of his employment, the chief chemist accumulates a body of knowledge concerning the best ways to incorporate newer and better ingredients in the formulas he creates for Company A. He also acquires detailed knowledge of the manufacturing costs of those products and the most efficient and economical methods of producing them.

The chief chemist works for Company A for over eight years. During all this time, there is no oral or written contract of employment or any type of restrictive covenant between the parties. This is a small business, a literal "mom and pop" operation. The parties trust each other, if they think about the issue at all.

Company A sells its products through distributors, including one we'll call Company B, which does most of its purchasing of chemical products from Company A. Sometime in the middle of his ninth year, the chief chemist secretly approaches Company B. By this time, Company B is dealing exclusively in Company A's products, which it repackages and sell under its own brand.

The chief chemist offers to come to work for Company B and radically change the scope of its business. The president of Company B is receptive to his proposal. Negotiations ensue. Two months later, the chief chemist abruptly quits his job with Company A and joins Company B as a director, treasurer and chief chemist. As additional compensation, the chief chemist acquires 25% of Company B's stock. Company B, which had heretofore been strictly a distributor of Company A's products, begins buying a factory full of chemical manufacturing machinery and equipment under the direct supervision of its new chief chemist.

As soon as the machinery and equipment are up and running, Company B abruptly stops buying Company A's products and goes into direct competition with it, using formulas which are virtually identical to those which Company A's former employee developed during the preceding eight years. Company B doesn't even bother to change its labels or advertising materials. It sells its new products in the same packaging which was previously used for Company A's products.

You are representing Company A and your clients come to you in a state of outrage, demanding their former employee and distributor be stopped. What do you do?

Your clients might have a cause of action against Company B for raiding Company A of one of its most valuable employees. Inducing employees to leave their present employment for the purpose of obtaining their employer's

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trade secrets is actionable.[2] However, injunctive relief, the remedy your clients really want, could be very difficult to obtain. The chief chemist was an at-will employee with no written employment contract. Further, Company B didn't try to recruit him; he approached them.

Your clients' most likely chance of success would seem to lie in an action to enjoin Company B and the chief chemist from disclosing and using your clients' formulas and other proprietary information, as well as demanding an accounting for the losses your clients have suffered. However, if your clients' business is located in Pennsylvania, you may have no remedy under this fact pattern.

## DISCUSSION OF THE WEXLER DECISION

The foregoing events actually occurred. The chief chemist was a man named Alvin Greenberg, and his employers were Irving and Mildred Wexler. The case is *Wexler* v. *Greenberg*, decided by the Supreme Court of Pennsylvania over forty years ago.[3] The Wexlers filed suit in Philadelphia County Court of Common Pleas against Greenberg, as well as his new employer and fellow shareholders, seeking injunctive relief and an accounting. The trial court ruled that Greenberg had appropriated the Wexlers' formulas in violation of an implied duty arising out of his employment relationship with their company and granted the requested injunction against the defendants. However, the Supreme Court overturned the injunction despite expressly assuming, for the purposes of the appeal, that the formulas at issue constituted trade secrets.

The Court didn't discuss in much detail what constitutes a trade secret other than to say, in a footnote, that "the burden of establishing a trade secret is upon the alleged owner"[4] and "the subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Substantially, a trade secret is known only in the particular business in which it is used."[5]

One of the cases cited in the footnote, *MacBeth-Evans Glass Co.* v. *Schnelbach*, is one of the first decisions of the Pennsylvania Supreme Court to articulate what constitutes a trade secret. The Court stated, in this 1913 decision, that "[t]he character of the secrets, if they be peculiar and important to the business, is not material. They may be secrets of trade, or secrets of title, or secret processes of manufacture or any other secrets important to the business of the manufacturer. They, however, must be the particular secrets of the complaining employer, not general secrets of the trade in which he is engaged."[6]

The 1939 Restatement of Torts, generally accepted in Pennsylvania at the time of the *Wexler* decision, states:

> "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers."[7]

One might think these definitions, coupled with the Court's assumption that the Wexlers had met their burden of establishing the formulas in question were trade secrets, would be dispositive of the case. However, the Court placed great emphasis on the fact that these formulas had been created by Greenberg himself. The Court noted:

> "The usual situation involving misappropriation of trade secrets in violation of a confidential relationship is one in which an employer *discloses to his employee* a pre-existing trade secret (one already developed or formulated) so that the employee may duly perform his work. In such a case, the trust and confidence upon which legal relief is predicated stems from the instance of the employer's *turning over to the employee* the pre-existing trade secret. It is then that a pledge of secrecy is impliedly extracted from the employee, a pledge which he carries with him even beyond the ties of his employment relationship."[8]

The Court was clearly concerned by the converse situation in which the employee creates the proprietary information which the employer then seeks to claim as its trade secrets. It also felt that the absence of any agreement between Greenberg and the Wexlers setting

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[2] *Morgan's Home Equipment Corp.* v. *Martucci*, 390 Pa. 618, 136 A.2d, 838 (1957).

[3] *Wexler* v. *Greenberg*, 399 Pa. 569, 160 A.2d 430 (1960).

[4] *Pittsburgh Cut Wire Co.* v. *Sufrin*, 350 Pa. 31, 38 A.2d 33 (1944); *MacBeth-Evans Glass Co.* v. *Schnelbach*, 239 Pa. 76, 86 A. 688 (1913).

[5] *Wexler*, 160 A.2d at 432, note 2, *citing 4 Restatement, Torts*, pp. 5-6 (1939).

[6] *MacBeth-Evans Glass Co.*, 86 A. 688 at 690.

[7] *Restatement of Torts*, Sec. 757, comment b (1939).

[8] *Wexler*, 160 A.2d at 434.

forth the parties' respective rights to these formulas was significant. The Court, quoting from two of its earlier decisions, stated:

> "[A] court of equity will protect an employer from the unlicensed disclosure or use of his trade secrets by an ex-employee provided the employee entered into an enforceable covenant so restricting his use,[9] or was bound to secrecy by virtue of a confidential relationship existing between the employer and employee.[10] Where, however, an employer has no legally protectable trade secret, an employee's aptitude, his skill, his dexterity, his manual and mental ability, and such other subjective knowledge as he obtains while in the course of his employment, are not the property of his employer and the right to use and expand these powers remains his property unless curtailed through some restrictive covenant entered into with his employer."[11]

The Court also discussed at length the problem of accommodating competing policies in the law, namely, "the right of a businessman to be protected against unfair competition stemming from the usurpation of his trade secrets and the right of an individual to the unhampered pursuit of the occupations and livelihoods for which he is best suited."[12]

This clash of competing policies was the point upon which the Court's decision turned.

> "Without some means of post-employment protection to assure that valuable developments or improvements are exclusively those of the employer, the businessman could not afford to subsidize research or improve current methods. In addition, it must be recognized that modern economic growth and development has pushed the business venture beyond the size of the one-man firm, forcing the businessman to a much greater degree to entrust confidential business information relating to technological development to appropriate employees. While recognizing the utility in the dispersion of responsibilities in larger firms, the optimum amount of 'entrusting' will not occur unless the risk of loss to the businessman through a breach of trust can be held to a minimum.
>
> On the other hand, any form of post-employment restraint reduces the economic mobility of employees and limits their personal freedom to pursue a preferred course of livelihood. The employee's bargaining position is weakened because he is potentially shackled by the acquisition of alleged trade secrets; and thus, paradoxically, he is restrained, because of his increased expertise, from advancing further in the industry in which he is most productive."[13]

The Court resolved these competing concerns in the employee's favor, holding that, in the absence of any express employment contract or restrictive covenant dealing with his work product, Greenberg "violated no trust or confidential relationship in disclosing or using formulas which he developed or was developed subject to his supervision . . . [t]his information forms part of the technical knowledge and skill he has acquired by virtue of his employment with [the Wexlers' company] and which he has an unqualified privilege to use."[14]

## SUBSEQUENT COMMENTARY AND CASES

The Pennsylvania Supreme Court's decision has been referred to as "the Wexler mistake" in James Pooley's 1997 treatise on trade secret law in the U.S.[15] In Pooley's opinion, this decision is at odds with the general rule of ownership regarding employee inventions and has been strongly criticized.[16]

The Court in *Wexler* stated it was "conceptually impossible [emphasis added] to elicit an implied pledge of secrecy from the sole act of an employee turning over to his employer a trade secret which he, the employee, has developed."[17] No supporting authority or argument was given for this conclusion, yet it's the linchpin of the Court's decision. Why isn't it reasonable to infer that an employee, whose main responsibility is to develop new and improved formulas for his employer's business, implicitly understands that the fruits of his research and labor belong to his employer and may not be disclosed to or used by others without his employer's consent?

Pooley, quoting Milgrim, states that, "By and large, the reasoning of Wexler is typically not applied, and the general rule is that whether a former employee is or is not a developer of the matter claimed to be a trade secret is without legal relevance."[18]

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[9] *Fralich* v. *Despar,* 165 Pa. 24, 30 A. 521 (1894).
[10] *Pittsburgh Cut Wire Co.* 350 Pa. 31; 38 A.2d 33.
[11] *Id.* 350 Pa. at p. 35; 38 A.2d at p. 34.
[12] *Wexler,* 160 A.2d at 434.
[13] *Id.* at 435.
[14] *Id.* at 437.
[15] Pooley, *Trade Secrets,* Law Journal Press (2000), Sec. 5.01[2][a].
[16] *Id.*
[17] *Wexler,* 160 A.2d. at 434.
[18] Milgrim, *Milgrim on Trade Secrets,* Sec. 5.02[3][e] at 5-53, quoting from a comment in 74 Harv. L. Rev. 1473, 1475 (1961).

In a case whose facts were virtually identical to those in *Wexler*, the Iowa Supreme Court ruled, in a 1977 decision, that formulas developed by the defendant employee during the course of his employment were trade secrets and could not be used by him in a subsequent job.[19]

There's no doubt the formulas Greenberg developed for the Wexlers could certainly have been reverse-engineered by Greenberg's new employer within a given period of time. However, the fact that information cannot remain secret forever does not disqualify it from being protectable as a trade secret. Greenberg developed and refined these formulas throughout his eight years with the Wexler's company. The Court's decision allowed his new employer, in the words of a later decision of the Pennsylvania Superior Court, "to compete without the burden of testing and market analysis borne by [the plaintiff]"[20] simply by hiring Greenberg and acquiring the information he carried with him.

The Court's decision in *Wexler* is hard to reconcile with its decision a year earlier that employees hired to gather, prepare and analyze information about prospective customers in preparation for submitting bids to install and supervise central alarm systems and supporting services should be enjoined from using this information to set up a competing business, even though they had not signed any restrive covenants with their employer.[21] In affirming the lower court's grant of a preliminary injunction, the Court stated: "an employer is entitled to protection against competitive use of information acquired by employees as a result of positions of trust."[22]

Pooley notes the "Wexler mistake" and its progeny have been displaced by modern formulations such as the Uniform Trade Secrets Act (U.T.S.A.), which has been adopted by 41 states and the District of Columbia, but not by Pennsylvania.

Even in these states, there are certain circumstances in which ideas and inventions developed by an employee remain or become his property. The determining factor seems to be whether the employee was "hired to invent."[23] "If an invention results from work done by the employee within the scope of his employment, the employer owns it."[24]

Because this rule derives from the employment relationship, it applies even if the employer and employee, as in *Wexler*, have no written agreement requiring the employee to assign his rights to any inventions he creates for his employer.[25]

As the Court of Appeals for the Federal Circuit noted in a 1996 decision, "[Even] without . . . an express agreement, employers may still claim an employee's inventive work where the employer specifically hires or directs the employee to exercise inventive faculties. When the purpose for employment thus focuses on invention, the employee has received full compensation for his or her inventive work."[26]

But, in Pennsylvania, the holding in *Wexler* that an employee hired to invent still owns his inventive ideas, absent an express agreement to the contrary, has been the law for over forty years and remains so today.

The Supreme Court cited its decision in *Wexler* a few months later in *Spring Steels* v. *Molloy*,[27] another case involving, among other claims, an alleged appropriation of trade secrets, this time in the form of the plaintiff company's customer list. In this instance, the vice president, salesman, shop foreman, warehouseman and office manager of the plaintiff company quit their jobs simultaneously, formed a new, directly-competing business and began calling on the customers identified in the list.

The Court noted that "in many businesses, permanent and exclusive relationships are established between customers and salesmen. The customer lists and customer information which have been compiled by such firms represent a material investment of employers' time and money. This information is highly confidential and constitutes a valuable asset. Such data has been held to be properly in the nature of a 'trade secret' for which an employer is entitled to protection, independent of a non-disclosure contract, either under the law of agency or under the law of unfair trade practices."[28]

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[19] *Basic Chems., Inc.* v. *Bemson*, 251 N.W.2d 220 (1977).

[20] *Air Products and Chemicals, Inc.* v. *Johnson*, 442 A.2d 1114 at 1121 (Pa. Super. 1982).

[21] *Robinson Electronic Supervisory Co., Inc.* v. *Johnson*, 397 Pa. 268; 154 A.2d 494 (1959).

[22] *Id.* 397 Pa. 268 at 269.

[23] *Pooley* Sec. 5.01[2][b].

[24] *Id.*; *Restatement(3rd) of Unfair Competition*, Sec. 42, comment e (relying on *Restatement (2nd) of Agency*, Sec. 397) (rule applies when end result is the product of employee's skill and knowledge).

[25] Pooley Sec. 5.01[2][b].

[26] *Teets* v. *Chromaloy Gas Turbine Co.*, 83 F.3d 403, 407.

[27] *Spring Steels, Inc.* v. *Molloy*, 162 A.2d 370 (1960).

[28] *Morgan's Home Equipment*, 136 A.2d at 842.

However, as in *Wexler*, the property in question had been created by a defendant employee, a salesman, rather than the plaintiff employer. More significantly, much of it was created prior to the time the salesman began working for the plaintiff. There was no allegation or evidence that the plaintiff company bought the list when it hired the salesman. Although he made additions to it during the course of his employment, the Court observed that the bulk of these additions had apparently been gleaned from trade journals and ordinary listings in the telephone directory.[29]

It's difficult to believe such a list contained nothing other than information the defendant salesman brought with him from previous jobs plus a supplemental list of potential customers culled from public domain sources. Logically, it should have contained some proprietary information the salesman obtained while he was working for the plaintiff, i.e., information on the plaintiff's actual, as opposed to prospective, customers, including bidding strategy, special pricing and discounts, material specifications (the plaintiff's business involved cutting and edging previously-manufactured spring steel to its customers' specifications), credit history, etc. This isn't the type of information that would be in the public domain. It's valuable to the employer and would not be generally known outside the offices of the employer and its customers.

Nevertheless, the Court was silent on the subject and had little difficulty deciding that the customer list, and whatever information the defendant salesman added to it, belonged to him when he came to work for the plaintiff and he should be allowed to take it with him when he left.

The authors submit that the Court should have granted at least partial relief to the plaintiff, enjoining the defendants from using those portions of the list that were not in the public domain and were added to the customer list after the defendant salesman came to work for the plaintiff. Such a holding would have been in line with previous decisions of the Court such as *Morgan's Home Equipment Corp.* v. *Martucci*.[30]

Another Wexler progeny is the Superior Court's 1985 decision in *Fidelity Funds, Inc.* v. *DiSanto*.[31] Like the *Spring Steels* case, it involved customer information. Defendant DiSanto sold commercial insurance policies to three classes of customers, (1) those he knew from previous jobs, (2) those he developed while working for the plaintiff employer, and (3) those provided to him from "leads" given to him by his employer, Fidelity. When DiSanto left Fidelity and went to work for a competitor, Fidelity filed suit, seeking to enjoin DiSanto from contacting any of these classes of customers and to account for all commissions received from them.

The Court had no problem deciding that Fidelity could not prevent DiSanto from continuing to do business with the customers he had cultivated prior to coming to work for Fidelity. However, citing *Wexler* and *Spring Steels*, the Court held that he was also free to contact the customers he had developed during his employment with Fidelity. The Court held that DiSanto could only be restrained from soliciting customers who resulted in the leads provided by Fidelity; and this restriction was limited to two years. In effect, the Court treated a trade secret issue like a covenant not to compete and imposed a reasonable time limit on it.[32]

The *Wexler* decision has been cited numerous times since 1960; but, in virtually every instance, the trade secrets at issue had been disclosed to the employee, or the employee had signed a prior written agreement governing the ownership and disclosure of secrets he had developed.[33]

Wexler received substantial attention from the U.S. District Court in its 1986 decision in *SI Handling Systems, Inc.* v. *Heisley*.[34] The facts of the case are quite complex. Suffice it to say that the defendants, or some of them, helped develop a spinning tube, car-on-track materials handling system called CARTRAC, which embodied certain technology alleged to be the trade secrets of the plaintiff employer.

The defendants who worked on the CARTRAC project alleged that the plaintiff, their former employer, couldn't own the trade secrets embodied therein because they, rather than their employer, developed them. The District Court dismissed this assertion with the statement that "[I]t is surely a novel concept to assume or conclude that an employer is not the owner of the fruits of its employees' labor". (emphasis added)[35]

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[29] *Spring Steels*, 162 A.2d at 372.

[30] *Morgan's Home Equipment*, 136 A.2d 838.

[31] *Fidelity Fund, Inc.* v. *DiSanto*, 500 A.2d 431 (Pa. Super. 1985).

[32] *Id.* at 438.

[33] *Van Products* v. *General Welding & Fabricating Co.*, 213 A.2d 769; *Computer Print Systems* v. *Lewis*, 422 A.2d 148; *Felmlee* v. *Lockett*, 351 A.2d 273.

[34] *SI Handling Systems, Inc.* v. *Heisley*, 658 F.Supp. 362 (E.D.Pa. 1986).

[35] *Id.* at 369.

Based on this statement, as well as the ultimate decision in favor of the plaintiff employer, one could reasonably assume that the District Court was about to distinguish, if not criticize, the *Wexler* decision. However, in the footnote that follows this portion of the opinion, the District Court stated:

> "Although we have not found a case from Pennsylvania that speaks directly to this issue, it appears that if required to address it, the state courts would conclude, at a minimum, that an employer owns the trade secrets developed by its employee where the employer has specifically commissioned the project which resulted in the development of the trade secrets." (Emphasis added) In *Wexler* v. *Greenberg*, 399 Pa. 569, 160 A.2d 430 (1960), the Pennsylvania Supreme Court cited and discussed with approval *Wireless Specialty Apparatus Co.* v. *Mica Condenser Co., Ltd.*, 239 Mass. 158, 131 N.E. 307 (1921), in which the Massachusetts Supreme Court found, in circumstances analogous to those in this case, that ownership of trade secrets developed by employees was vested in the employer."[36]

This Massachusetts Supreme Court decision was, in fact, offered by the Wexler's counsel in support of their brief before the Pennsylvania Supreme Court. Additional portions of it cited in the *Wexler* decision seem to be directly on point:

> "In a case like this, the nature of the employment impresses on the employee such a relationship of trust and confidence as estops him from claiming as his own property that which he has brought into being solely for the benefit, and at the express procurement of, his employer. The want of an express agreement that the ownership shall be in the employer is not fatal under such circumstances . . . (The defendant), upon leaving the plaintiff's employ, had a right to use his general knowledge, experience, memory and skill so long as he did not use or disclose any of the secret processes which the plaintiff was entitled to keep for its own use and as to which it, as against him, had exclusive property rights."[37]

However, while the District Court appears to have been persuaded by the decision of the Massachusetts Supreme Court in the *Wireless* case, it seems to overlook the fact that the Court in *Wexler* was not. That Court stated that *Wireless* and another case cited by the Wexlers' counsel were "good examples of the kind of employment relationships in which a Court will find that a confidential relationship exists."[38] But, as noted at the beginning of this article, the Court wasn't persuaded that Greenberg's job fit this description. Incidently, Massachusetts is another state that, like Pennsylvania had not adopted the Uniform Trade Secrets Act.

The U.S. District Court's decision in *SI Handling Systems* is interesting for another proposition. It cites *Wexler* as authority for the assertion that an employer's attempts to restrict the disclosure of proprietary information by an ex-employee should be subject to the same rules and restrictions that apply to noncompete agreements.[39] This is similar to the reasoning adopted by the Pennsylvania Supreme Court in the *Fidelity Fund* case supra.

It seems the District Court was troubled by a portion of the employment contract signed by some of the defendants in which they agreed to keep secret "all information [emphasis added] received in the course of my employment."[40] The District Court held that such broad language precluded these employees from using their general knowledge and skills acquired on the job; and that is "not permissible" under *Wexler*.[41]

Clearly, a prohibition against the use or disclosure of all information employees receive during the course of their employment is excessive. If enforced literally, it would prohibit employees from using or disclosing information that is public knowledge. The District Court could have severed the agreement and declined to enforce the offensive section but, instead, seized upon the broad language of this section as a basis to refuse any enforcement of the contract.

This action by the District Court clearly illustrates the need for employers to draft their confidentiality agreements with care.

This issue of imposing a reasonable time limitation, similar to that required for noncompete covenants, on the disclosure of trade secrets is highlighted in the *Air Products* case cited above.[42] That case is primarily known for applying the "inevitability of disclosure" test to trade secrets. The defendant was enjoined for a period of two years from working in the

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[36] *Id.* at 369, footnote 8.

[37] *Wireless Specialty Apparatus Co.* v. *Mica Condenser Co., Ltd.*, 239 Mass. 158, 131 N.E. 307 at 309 (1921).

[38] *Wexler*, 160 A.2d at 436.

[39] *SI Handling Systems, Inc.* v. *Heisley*, 658 F.Supp. 362, 372 (E.D.Pa. 1986).

[40] *Id.*

[41] *Id.*

[42] *Air Products and Chemicals, Inc.* v. *Johnson*, 442 A.2d 1114 at 1121.

same area of business as his former employer, despite the absence of any non-compete agreement, because, in the Court's view, allowing him to do so would inevitably result in disclosure of his former employer's trade secrets.

As noted in a recent paper delivered by Philip Kircher, "[a]lthough the presence of an enforceable restrictive covenant makes it easier to bar post-employment competition, trade secret law coupled with a strong showing of the inevitability of disclosure offers an alternative means of getting to the same place. Regardless of the employee's intent, propensity or honesty, if he could not conscientiously and loyally perform his managerial and reporting duties for the new employer without disclosing or using trade secrets, an injunction may lie."[43]

Ironically, the trade secrets protected in *Air Products* consisted, in large part, of the same types of technical knowledge and skill which the Court in *Wexler* ruled belong to the employee, who has the unqualified right to use them in future employment. Just as in *Wexler*, some of this knowledge was developed by the defendant employee. The only difference in the material facts—and the outcome—is that, unlike the Wexlers, the plaintiff in *Air Products* did have a non-disclosure agreement with its employee.

## SUBSEQUENT DEVELOPMENTS IN THE DEFINITION OF "TRADE SECRETS"

The 1979 promulgation of the Restatement (Third) of Unfair Competition has modified and updated the definition of a trade secret found in the Restatement of Torts. Section 39 of the Restatement defines a trade secret as:

> "[A]ny information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."[44]

The information does not have to be in use to constitute a trade secret. It can consist of negative information, e.g. formulas that do not work or work less well than others.[45]

The U.S. District Court has held that a "novel combination" of otherwise well-known components which accomplishes a unique result is protectable as a trade secret.[46]

Innocent acquisition of a trade secret can be actionable. "One who learns another's trade secret from a third person without notice that it is secret and that the third person's disclosure is a breach of his duty to the other, or who learns the secret through a mistake without notice of the secrecy and the mistake, . . . is liable to the other for a disclosure or use of the secret after the receipt of such notice, unless prior thereto he has in good faith paid value for the secret or has so changed his position that to subject him to liability would be inequitable."[47]

## RECOMMENDATIONS

The holding in *Wexler* may not be followed in other jurisdictions, but it's still the law in Pennsylvania. So, how does counsel in this state advise clients who face similar issues today? At a minimum, employers should have their key employees sign a confidentiality or non-disclosure agreement, either as part of a general contract of employment or as a separate agreement. Unlike a covenant not to compete, a confidentiality agreement does not have to be supported by consideration to be enforceable[48] and may be executed after employment begins. However, the prudent course of action is to require any employee who may have access to proprietary information to sign a general non-disclosure agreement at the time of hiring, with the option of supplementing it if and when the employee's duties change.

An employer should make sure the agreement is tailored to the type of job held by each employee signing it. If he's a salesman, make sure it covers any confidential customer information gathered by the employee, as well as disclosed to him by his employer, during the course of his employment. If possible, the employer should try to negotiate the assignment of some or all of an experienced salesman's customer contacts compiled by him from prior jobs[49]; but the employer must make sure these contacts are not proprietary information belonging to his previous employer(s).[50] This may be hard to do, but it can alleviate the prob-

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[43] Kircher, *Pennsylvania Law of Trade Secrets*, Fifth Annual Northeast Employment Law Institute (1999), P.B.I., Vol. 1, C-1 at C-5.

[44] *Restatement of Unfair Competition*, Sec. 39, (1979).

[45] *Restatement*, Sec. 39, comment g.

[46] *United Centrifugal Pumps* v. *Cusimano*, 9 U.S.P.Q. 2d 1171 (W.D.Ark. 1988).

[47] *Id.*, Sec. 758(b).

[48] *Bell Fuel Corp.* v. *Cattolico*, 544 A.2d 450.

[49] *Alexander & Alexander* v. *Drayton*, 378 F.Supp. 824 (E.D.Pa. 1974).

[50] *Fidelity Fund, Inc.* v. *DiSanto*; *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Napolitano* ___ F.Supp. 2d ___ (E.D.Pa. 2000).

lem presented by the *Spring Steels* decision above.

Employers should avoid making the non-disclosure agreement too broad or vague. Language that forbids post-employment use or disclosure of "all information received by me relating to the business of my employer" may meet a chilly reception by the courts.[51]

Refusal to sign a non-disclosure agreement may entitle the employer to terminate or otherwise discipline the offending employee.[52]

If employees are working in research and development, the employer should make sure their non-disclosure agreements contain a provision assigning all intellectual property rights to any designs, computer programs, manuals, ideas, inventions, etc. which they may develop during the course of performing their jobs, regardless of whether such intellectual property is capable of governmental protection (such as issue of letters patent) or whether the employer decides to obtain such protection or keep the intellectual property a trade secret. This precaution should be taken, even if an employee is specifically hired to invent an item or solve a particular problem.[53]

Employers should, in all cases, identify and describe in reasonable detail the types of tangible and intangible property deemed to be proprietary and mark all documents pertaining thereto as "confidential" and treat them as such, including limiting access to them for any purpose, including copying.

It would be wise to include a provision stating what the parties agree is not the property of the employer. The parties in *Air Products* included such a provision in their employment contract providing:

> "Employee shall not be obligated to assign to the Corporation any invention made by him while in the Corporation's employ not relating to any business or activities in which the Corporation is or may become engaged, unless the same relates to or is based on confidential or proprietary information to which Employee shall have had access during and by virtue of his employment or arises out of work assigned to him by the Corporation . . . Nor shall Employee be obligated to assign any invention which may be wholly conceived by Employee after he leaves the employ of the Corporation unless such invention shall involve the utilization of confidential or proprietary information obtained while in the employ of Corporation."[54]

## CRIMINAL SANCTIONS

Finally, the theft of trade secrets is a crime in Pennsylvania[55]; although the types of property or information that are subject to the criminal statute are specifically defined and are more narrow in scope than those illustrated earlier in this article in the context of civil actions.

The statute defines a trade secret as "scientific or technical information, a design process, procedure, formula or improvement which has been specifically identified by its owner as confidential and which has not been published or otherwise made a matter of general public knowledge."[56]

A person is guilty of a third-degree felony if he takes an article representing a trade secret from another person by force or the implied threat of same or by maliciously entering any structure with the intent to obtain unlawful possession of or access to an article representing a trade secret.[57]

A person is guilty of a first-degree misdemeanor if he unlawfully obtains possession of or access to an article representing a trade secret or converts such an article to his own use with the intent to wrongfully deprive or withhold it from its owner.[58]

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[51] *SI Handling Systems*, 658 F.Supp. at 372.

[52] *Brosso* v. *Devices for Vascular Intervention, Inc.*, 879 F.Supp. 473 (E.D. Pa. 1995) *aff'd*, 74 F.3d 1225 (3rd Cir. 1995).

[53] *University Patents* v. *Kligman*, 762 F.Supp. 1212 (E.D.Pa. 1991).

[54] *Air Products*, 442 A.2d at 1117, footnote 7.

[55] 18 Pa. Cons. Stat., Sec. 3930.

[56] *Id.*, Sec. 3930(a).

[57] *Id.*, Sec. 3930(a)(1) and (2).

[58] *Id.*, Sec. 3930(b)(1) and (2).

# The Importance Of Retaining Limits On Compulsory Arbitration Awards

By DANIEL P. LYNCH, ESQUIRE[1]

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TABLE OF CONTENTS Page



## INTRODUCTION

Regardless of the route by which a civil case arrives at the Arbitration Center of the Court of Common Pleas of Philadelphia County—whether by virtue of the prayer for damages of plaintiff's Complaint,[2] or by an order of reference to arbitration by the Court—there is and ought to be no expansion of the $50,000.00 limit[3] which the arbitrators may award.[4] Nowhere in the framework of statutory enactments, procedural rules and case law is support found for an expansion of the limit on panel awards. Nor would an expansion serve the purposes for which arbitration was intended and continues to be utilized.

## A JURISDICTIONAL LIMIT

What is casually known to practitioners as the "arbitration limit" is described by the Judicial Code as the "amount in controversy,"[5] Its designation as a jurisdictional limit, however, is suggested by the Pennsylvania Rules of Civil Procedure. The Rules permit the court to "determine the amount actually in controversy and enter an order of reference to arbitration."[6] This directive of the Rules does not permit the court to refer to arbitration a case wherein the amount in controversy exceeds the statutory limit, but, pointedly, permits only a determination of the actual amount in controversy.

Thus the Superior Court in *Flynn* v. *Casa DiBertacchi Corp.*[7] describes what can only be a jurisdictional limit:

> The statute (42 Pa.C.S.A. §7361(b)(2)(i)) clearly and unequivocally states that compulsory arbitration is not available under this section in any action in which the plaintiff seeks to recover an amount which is greater than the $50,000.00 limit. Additionally, in an action seeking compulsory arbitration, Pa.R.C.P. 1021(c) directs that "the Plaintiff shall state whether the amount does or does not exceed the jurisdictional amount requiring arbitration referral by local rule."[8]

In *Flynn*, Plaintiff entered judgment by default in a personal injury action, based on a complaint, which—although it sought compulsory arbitration—set forth prayers for recovery in excess of $50,000.00.[9] Despite Plaintiff's assertion that the amounts stated in those prayers were typographical errors, the Court vacated the trial court order denying defendant's motion to strike the default, concluding that "the complaint as filed, and upon which the prothonotary entered the default judgment, was clearly beyond the jurisdiction of the arbitration board."[10] The default judgment, in the Court's view, was "null and void for want of jurisdiction."[11] By any reading of this language, we find described a jurisdictional limit, beyond which the arbitration panel may not proceed.

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[2] Pa.R.C.P. 1021(c).

[3] Pa.R.C.P. 1021(d).

[4] 42 Pa.C.S.A. §7361(b)(2)(i).

[5] *Id*.

[6] Pa.R.C.P. 1021(d).

[7] *Flynn* v. *Casa DiBertacchi Corp.*,449 Pa. Super. 606, 674 A.2d 1099 (1996).

[8] *Id*., 674 A.2d at 1105 (citations omitted).

[9] *Id*.

[10] *Id*. at 1105-1106.

[11] *Id*. at 1106.

## SERVING THE PURPOSE OF THE ACT

The purpose of compulsory arbitration is to expedite the disposition of pending cases by providing parties with a faster and less expensive alternative to trial.[12] The system of compulsory arbitration "was adopted in order to alleviate the enormous case load of our trial courts."[13]

Indeed, compulsory arbitration in Philadelphia County provides litigants with a prompt, less formal but complete opportunity to have their day in court. It makes that opportunity available in disputes whose value may reach significant proportions—permitting awards in Philadelphia County as high as $50,000.00[14]—while nevertheless preserving the right to trial *de novo*.[15]

Whether the action arrives before an arbitration panel by election of plaintiff or order of court, it arrives on the basis of a shared understanding that the panel's award will not exceed $50,000.00. All parties may draw from the award conclusions about its assessment of liability. They may, as well, find a marker for prompt settlement, without need to resort to trial. To permit awards—binding or not—in excess of the jurisdictional limit will not serve the goal of prompt disposition. To the contrary, an award in excess of a jurisdictional limit invites appeal: if binding, the invitation is for the defendant: if not binding, for the plaintiff.

This, moreover, is medicine which the patient does not need. Voluntary arbitration, in whatever form the parties mutually choose, is always available to them outside the compulsory system, as are other forms of alternative resolution.

The defendant against whom an award is made may no longer benefit from the opportunity to settle within the arbitration limit, rather than risk a verdict in excess of the limit, at trial, since any advisory award in excess of the limit will prompt plaintiff to pursue an appeal. Finally, Philadelphia's civil judges may gain some small advantage from such advisory opinions, but their experience and the well-framed arguments on behalf of the parties will be more important in the evaluation of an arbitration case now on appeal.

## CONCLUSION

There is no foundation in statute, court rule or case decision from which to argue that Philadelphia arbitration panels are invested with subject matter jurisdiction permitting them to make awards in excess of the $50,000.00 limit. There is, likewise, no basis for them to issue advisory opinions. And neither option serves the goals for which compulsory arbitration was created, to aid in the disposition of litigation. Whether parties bring their disputes—or find them sent—to arbitration, the preservation of the current limit on awards conforms to the letter of the law and serves its spirit.

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[12] *Monahan* v. *McGrath*, 636 A2d. 1197,1199 (Pa. Super. 1994).

[13] *Pantoja* v. *Sprott*, 721 A.2d 382 (Pa. Super. 1998).

[14] 42 Pa.C.S.A. §7361(b)(2)(i).

[15] Pa.R.C.P. 1311(a); *Weber* v. *Lynch*, 375 A.2d 1278, 1283 (Pa. 1977).

# Pennsylvania "Growing Smarter" Environmental Law Developments

# "Growing Smarter"—Amendments To The Municipalities Planning Code And The Department's New Permitting Policy

By MARY D. LONG*

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TABLE OF CONTENTS Page


A hallmark of the Ridge Administration has been the streamlining of government and making it more "user friendly" to both corporate and individual citizens. This has included such things as reorganizing state agencies and simplifying regulations. With the signing of Acts 67 and 68 amending the Municipalities Planning Code (MPC),[1] the effort is brought to local governments.[2] The purpose of the amendments is to provide increased cooperation and coordination between local governments when making land-use decisions. More importantly for the purpose of this article, the amendments also require state agencies to consider these land use choices when taking certain funding and permitting actions. The purpose of this article is to provide an overview of these new provisions of the MPC and the Department of Environmental Protection's policy document implementing its new responsibilities in issuing permits.

## THE AMENDMENTS

The primary provisions of Act 67 replace Article XI of the Municipalities Planning Code to provide a mechanism for local governments to act together to coordinate land use planning. It encourages cooperative planning in the form of county or "multimunicipal" comprehensive plans and implementation agreements to achieve a level of consistency among comprehensive plans, zoning ordinances and other local government plans and agreements. Of significance to activities of the Department, Section 1105, entitled "Legal Effect," provides in relevant part:

> Where municipalities have adopted a county plan or a multi-municipal plan is adopted under this article . . .
>
> * * *
>
> (2) State agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities.

53 P.S. §11105(a)(2).

Act 68 contains a similar provision. Added to Article VI (Zoning), Section 619.2, provides:

> (a) When a county adopts a comprehensive plan in accordance with sections 301 and 302[3] and any municipalities therein have

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[1] Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§10101-11107.

[2] The MPC was further amended by Act 127, December 20, 2000. That Act did not include revisions significant for the purposes of this article.

[3] 53 P.S. §§10301, 10302.

> adopted comprehensive plans and zoning ordinances in accordance with section 301, 303(d)[4] and 603(j),[5] Commonwealth agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities.
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> * * *
>
> (c) When municipalities adopt a joint municipal zoning ordinance:
>
> (1) Commonwealth agencies shall consider and may rely upon the joint municipal zoning ordinance for the funding or permitting of infrastructure or facilities. . . .

53 P.S. §10619.2. The Department's policy document implementing these new responsibilities is discussed below.

Act 68 also contains provisions for local government to take into account natural resources in comprehensive planning and zoning. For example, municipal, multimunicipal or county comprehensive plans shall include a plan for the protection of natural resources "to the extent not preempted by Federal or State law." Such protection must be consistent with and may not be more stringent than, certain enumerated statutes such as the Clean Streams Law,[6] the Surface Mining Conservation and Reclamation Act[7] and the Nutrient Management Act.[8] 53 P.S. §10301(a)(6). Similarly, zoning ordinances "shall provide for protection of natural and historic features and resources." 53 P.S. §10603(g)(2). However, those ordinances must "provide for the reasonable development of minerals in each municipality." 53 P.S. §10603(i); *see also* 53 P.S. §11006-A(b.2) (municipalities must provide for reasonable coal mining).

In addition to these provisions, Acts 67 and 68 also add definitions to the MPC, and include significant revisions to encourage coordinated planning among the various levels of local government in the Commonwealth.

## DEPARTMENT REVIEW OF LOCAL LAND USE PLANS AND ORDINANCES

Prior to the enactment of Acts 67 and 68, the Department had no authority to base a permitting action upon local land use regulation.[9] With the new legislation, the Department is now required to consider land use regulation when reviewing permit applications. To provide assistance to its staff reviewing permit applications, the Policy Office has drafted a final policy document which describes the process to be used in gathering and reviewing information.[10]

The Department has identified over 60 permits in a wide variety of programs that may require a review of local land use regulation. Land Use Policy, Appendix A. However, General Permits and Permits-by-Rule are excluded from land use review, as are permit renewals. Land Use Policy at 4 and Appendix A. Additionally, the Department does not intend to change its review procedures for Act 537[11] permit applications, since those applications already include a mechanism for consideration of local land use.

The goal of the Land Use Policy is to "avoid or minimize conflict with local land use decisions." Land Use Policy at 1. In making a permitting decision, the Department intends to gather information from permit applicants via a questionnaire, known as a General Information Form or "GIF," and to solicit comments from the relevant municipality(ies). The Department will then make a judgment concerning whether or not there is conflict between the project proposed in the permit application and the relevant comprehensive plans and zoning ordinances. A "conflict" arises when the local government informs the Department that there is a conflict between its land use regulation and the land use proposed in the permit application, or when a permit applicant identifies a conflict in the materials submitted with the application. In any situa-

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[4] 53 P.S. §§10301, 10303(d).

[5] 53 P.S. §10603(j).

[6] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§691.1- 691.1001.

[7] Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §1396.1-1396.19a.

[8] Act of May 20, 1993, P.L. 12, 3 P.S. §§1701 – 1718.

[9] *See*, e.g., *Oley Township* v. *Department of Environmental Protection*, 710 A.2d 1228 (Pa. Cmwlth. 1998); *Community College of Delaware County* v. *Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975), *appeal dismissed as moot*, 381 A.2d 448 (Pa. 1977) (under the Sewage Facilities Act, the Department need only consider the proposed method of sewage disposal).

[10] Policy Office, Department of Environmental Protection, Doc. ID No. 012-0200-001, *Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Permits for Facilities and Infrastructure* (2001) (hereinafter "Land Use Policy"). This document is available on the Department's website at www.dep.state.pa.us/hosting/growingsmarter/applicants.htm.

[11] Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§750.1-750.20a (Sewage Facilities Act).

tion where there appears to be a conflict, the permit application is referred to the Policy Office for further review.

The Land Use Policy cautions staff that even where there is a conflict between a proposed permit and land use regulation, there are only certain situations where the Department can base a permitting decision on the conflict. Pursuant to Section 619.2(a),[12] the Department will only consider a land use conflict where (1) a local municipality is in a county with a comprehensive plan; and (2) the municipality itself has a comprehensive plan or is part of a multimunicipal comprehensive plan; and (3) the county or municipality has enacted zoning ordinances; and (4) all of these things are generally consistent with one another. The Department can rely on local land use regulation under Section 619.2(c)[13] where a municipality has adopted a joint ordinance, and under Section 1105,[14] where a municipality has entered into an implementing cooperative agreement and adopted appropriate zoning ordinances. Where there is a land use conflict, but one of the above-described conditions is not met, the Department is not permitted to consider a land use conflict when making its final decision on an application. Land Use Policy at 9.

The Land Use Policy describes alternative actions the Department might take in reliance upon local land use regulations. If one of the conditions above are met, and a conflict exists between local land use regulation and a proposed permit, the Department may deny the application, include a special condition in the permit, or approve a permit application despite the conflict. Land Use Policy at 8-9. Since "rely upon" in the MPC is not defined, the Land Use Policy states that the Department has some discretion in deciding the extent to which to consider the land use conflict in its ultimate decision on a permit application.

Finally, the Land Use Policy provides a procedure for processing permit applications which were received prior to August 21, 2000, but are still pending, and those applications received on or after August 21, 2000. The former group of permits were handled as explained in the Department's Interim Land Use Policy.[15] The Department decided on a case-by-case basis which applications required land use review, and did not require all applicants to submit the DEP Land Use Review Questionnaire. The final Land Use Policy does not explain any separate procedure for applications which were submitted after August 21, 2000, but are still pending as of January 29, 2001 (the effective date of the final Policy), but simply states that applications received after August 21, 2000, are handled in accordance with the final policy.[16] Pertinent information submitted with the GIF will be entered into the Department's eFacts system.

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[12] 53 P.S. §10619.2(a).
[13] 53 P.S. §10619.2(c).
[14] 53 P.S. §11105.

[15] Policy Office, Department of Environmental Protection, Doc. ID. No. 012-0200-001, *Interim Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Permits for Facilities and Infrastructure* (August 21, 2000).

[16] It should be noted that the final Land Use Policy modified the GIF and the text of the municipal notices provided in the interim Land Use Policy. *See* Section III.B.1. and B.2 of both documents.

**Pennsylvania "Growing Smarter" Environmental Law Developments**

# The Impact Of Acts 67 And 68 On Development: An Analysis Of The "Growing Smarter" Amendments To The Pennsylvania Municipalities Planning Code

By CLIFFORD B. LEVINE*

Partner, Thorp Reed & Armstrong, LLP

TABLE OF CONTENTS Page



## OVERVIEW

On June 22, 2000, Governor Tom Ridge signed the "Growing Smarter" Initiative contained in Acts 67 and 68. The Governor characterized this legislation, which amends the Pennsylvania Municipalities Planning Code ("MPC"), 53 P.S. §10101-11202, as "the most dramatic change in state land use in more than 30 years." Although the legislation may not have significantly altered the MPC, it contains modifications that could impact the development of projects, including those requiring permits from the Pennsylvania Department of Environmental Protection ("DEP").

The objective of the initiative is to encourage regional development and prevent unplanned sprawl. By amending the MPC, which imposes procedural and substantive land use requirements upon municipalities, the new legislation creates an incentive to engage in regional planning by offering exemptions to certain exclusionary zoning challenges. It also creates a role for DEP to consider land use issues prior to issuing a permit where municipalities are engaged in regional planning. The legislation did little to address the underlying concerns of its proponents as to urban sprawl. However, in certain situations, the amendments have the potential of creating complex legal situations for developers.

## EXCLUSIONARY ZONING CHALLENGES

Pennsylvania courts have ruled that zoning is subject to constitutional limitations including prohibitions against takings and violations of the substantive due process clause. The Pennsylvania Supreme Court has employed a substantive due process analysis in reviewing zoning schemes and has concluded that exclusionary or unduly restrictive zoning techniques do not have the requisite relationship to the public welfare. *Surrick* v. *Upper Provi-*

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*dence Township*, 476 Pa. 182, 382 A.2d 102 (1977). That Court has indicated that a zoning ordinance which totally excludes a business use from a municipality must bear more than a substantial relationship to the public health, safety, moral and general welfare than an ordinance which merely confines that use to a certain area. *Exton Quarries, Inc.* v. *Zoning Board of Adjustment*, 425 Pa. 43, 225 A.2d 169 (1967). A developer who proposes a legitimate use that has been excluded is entitled to site-specific relief and the right to develop the project regardless of the zoning classification of the property. *Casey* v. *Zoning Hearing Board of Warwick Township*, 459 Pa. 219, 328 A.2d 464 (1974).

The significance of the prohibition against exclusionary ordinances is that a municipality must zone for all legitimate uses or be subject to a substantive validity challenge. The courts require municipalities to justify an exclusion of a legitimate use. Further, the courts have ruled that activities which the DEP generally regulates, such as landfills and mines, are legitimate uses. *Moyer's Landfill* v. *Zoning Hearing Board of Lower Providence Township*, 69 Pa. Cmwlth. 47, 450 A.2d 273 (1982). The MPC reflects these constitutionally-developed parameters and provides, in Section 916.1, the mechanisms by which an owner may assert a substantive validity challenge to a zoning ordinance.

## JOINT MUNICIPAL ZONING

Prior to the "Growing Smarter" legislation, the MPC authorized municipalities to engage in joint municipal zoning and planning and to develop a unified zoning ordinance. Article VIII-A. Section 810-A specifically provides that the analysis of an exclusionary zoning challenge will be of the entire area included in the joint municipal ordinance. Municipalities have seemed reluctant to undertake the process of joint municipal zoning, due to concerns about sharing governing responsibility and the general impediments that have limited regional planning and cooperation among municipalities within Pennsylvania.

The "Growing Smarter" amendments alter the manner by which municipalities may engage in multi-municipal zoning. Rather than being required to develop a single zoning ordinance, municipalities may enter intergovernmental cooperative planning and implementation agreements. Under those agreements, municipalities must develop a joint comprehensive plan (or ensure consistency with a currently-existing county comprehensive plan). Section 1104. The municipalities may maintain separate zoning ordinances, as long as they conform to the joint comprehensive plan. If municipalities follow this process, they may defend against an exclusionary zoning challenge under newly-amended Section 916.1(h), which provides:

> Where municipalities have adopted a multi-municipal comprehensive plan pursuant to Article XI but have not adopted a joint municipal ordinance pursuant to Article VIII-A and all municipalities participating in the multimunicipal. comprehensive plan have adopted and are administering zoning ordinances **generally consistent** with the provisions of the multimunicipal comprehensive plan, and a challenge is brought to the validity of a zoning ordinance of a participating municipality involving a proposed use, then the zoning hearing board or governing body, as the case may be, shall consider the availability of uses under zoning ordinances within the municipalities participating in the multimunicipal comprehensive plan **within a reasonable geographic area** and shall not limit its consideration to the application of the zoning ordinance in the municipality whose zoning ordinance is being challenged.

(emphasis added).

Section 916.1(h) raises two questions. What is a "reasonable geographic area" within the municipalities, and how will the courts measure whether a zoning ordinance is "generally consistent" with a comprehensive plan?

### *Reasonable Geographic Area*

A municipality may attempt to defend an exclusionary challenge by asserting that another participating municipality provides for the particular use. A developer could challenge the asserted exemption if the combined ordinances fail to provide for the use within a "reasonable geographic area."

The language of Section 916.1(h) suggests that challenges to the exemption will adopt the "fair share" analysis the courts have previously employed. The "fair share" doctrine was developed in the 1970s, when courts were considering whether suburbs were making available sufficient spaces for low income housing. *See Surrick* v. *Upper Providence Township*, 476 Pa. 182, 382 A.2d 105 (1977). A "fair share" analysis includes consideration of reasonable percentages and acreage of a zoned area as compared to the size of the municipality.

A developer must now determine whether the municipality in which a project is proposed participates in an intergovernmental planning agreement. If the developer cannot locate within a district where the use is expressly permitted, it may be necessary to challenge the ordinance. In this situation, it will be

more difficult to assert that a zoning ordinance is exclusionary or that it unreasonably restricts a proposed use. The developer will have to submit evidence to establish that the joint planning effectively prohibits or unreasonably restricts the proposed use. These hearings will be very fact-intensive, and will often require expert testimony from land use planners.

*Relationship of Comprehensive Plans with Zoning Ordinances*

A developer could also present evidence that the various municipal ordinances are not consistent with the jointly-developed comprehensive plan. The MPC has recognized a relationship between a comprehensive plan and a municipality's zoning ordinance. Because comprehensive plans express the overall objectives of a municipality, they often reflect inconsistent objectives relating to both industrial growth and preservation of residential districts.

Land use planners generally agree that zoning ordinances should be based upon the comprehensive plan. However, as zoning ordinances develop, they often become inconsistent with the comprehensive plan. Section 303 of the MPC encourages a relationship between the comprehensive plan and the zoning ordinance, but explicitly provides that no action of a municipality shall be invalid or subject to challenge on the basis that its action fails to comply with or is inconsistent with the comprehensive plan. Planners have criticized this provision because it can separate zoning from the goal of long-term planning. However, that section was enacted to clarify that zoning ordinances will generally survive a developer's validity challenge based on inconsistency with the comprehensive plan.

The "Grower Smarter" amendments encourage development of updated comprehensive plans. Section 301 requires that a plan meet the needs of different dwelling types and appropriate densities for households of all income levels. However, the amendments retain the language of Section 303(c) which provides that inconsistencies between the zoning ordinance and the comprehensive plan will not invalidate the zoning ordinance.

The retention of Section 303(c) and the obligation to ensure conformity between the various zoning ordinances and a joint comprehensive plan could result in interesting court interpretations. A question likely will arise as to whether a municipality that participates in an intergovernmental agreement is exempt from an exclusionary zoning challenge if the zoning ordinance of any of the participating municipalities is not "generally consistent" with the multi-municipal comprehensive plan. For instance, if a multi-municipality comprehensive plan addresses the need for environmental uses such as landfills, but the ordinances fail to provide for such uses, is the exclusionary exemption available to the host municipality? Arguably, a municipality should not be able to rely upon Section 303(c) to excuse its failure to conform its ordinance to the comprehensive plan. Developers who are proceeding with a project should consider the relationship of the zoning ordinances of participating municipalities with a joint comprehensive plan. This will require evidence concerning land use issues, but may be the basis to assert that a municipality cannot invoke the defense of the exclusionary exemption.

## DEP INVOLVEMENT IN LAND USE ISSUES

The "Growing Smarter" amendments authorize DEP oversight in land use matters. Section 1105 now provides: "State agencies *shall* consider and *may* rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities." Section 619.2 now provides: "State agencies *shall* consider and *may* give priority consideration to applications for financial or technical assistance for projects consistent with the county or multimunicipal plan."

DEP developed an interim policy to govern consideration of local comprehensive plans and zoning ordinances, which became effective on January 29, 2001. The new policy requires developers to prepare a General Information Form ("GIF") to answer questions concerning the proposed land use. The GIF information will be forwarded to the local municipality and county, which will have 30 days to submit comments. DEP likely will find itself receiving different interpretations concerning the status and effect of the local zoning. DEP has indicated that it may withhold environmental permits that otherwise would have been issued, except for the zoning questions.

Act 67 and Act 68 contain conflicting language as to where state agency review is appropriate. Act 67 amends Section 1005 of the MPC and provides that when a municipality participates in a county or multi-municipality plan by implementing cooperative agreements **and** adopting appropriate ordinances, state agencies shall consider such comprehensive plans and ordinances. Act 68 amends Section 619.2 of the MPC and provides for state agency review when a municipality and county have adopted a comprehensive plan and generally have a consistent zoning ordinance. Note that Section 619.2

does not require that the municipality participate in a multimunicipal plan. Rather than reconcile the conflict, DEP's policy relies on both sections to describe the scope of its land use review. Under its stated policy, DEP can involve itself even where the municipality has not properly followed the procedure of multi-municipality planning necessary to qualify for an exclusionary zoning exemption. Thus, a likely battleground will involve whether the DEP can analyze land use issues where a municipality has not participated in a multi-municipality agreement.

DEP's involvement through its new policy guidelines leads to other fundamental questions concerning the court or tribunal where land use disputes are to be resolved. Typically, DEP has evaluated a permit application on its merits under environmental law and has made permit approval contingent upon the developer obtaining zoning approval. A developer then proceeds through the zoning process to reach a determination. If DEP withholds a permit in a matter involving a land use dispute, may the developer challenge that action, and if so where? Must DEP identify the basis of its refusal to issue a permit? DEP's policy does not seem to provide for clear standards and could result in the DEP having enormous discretion. If a "decision" to withhold a permit is challenged, must it be taken to the Environmental Hearing Board ("EHB"), and is that body prepared to render decisions on zoning questions? Will the EHB review DEP's inaction under the "abuse of discretion" standard, and how will that interplay with legal disputes being resolved in other forums? The involvement of the DEP will create interesting jurisdictional issues as to the enforceability of DEP's guidelines and its permissible scope of oversight of land use applications.

## CONCLUSION

The "Growing Smarter" amendments have provided a regional planning tool to municipalities. In practice, the regional planning may very well be focused on limiting industrial or land-intensive projects that typically require DEP permits. By introducing a "fair share" analysis in multi-municipal planning endeavors, the proponents of the amendments have created the potential of additional litigation. The review of DEP in land use matters is also likely to raise significant jurisdictional issues as parties attempt to determine which body can best evaluate whether the DEP acted properly in withholding an otherwise valid permit, based on the land use issues. Certainly, the developer of a project requiring both a DEP permit and land use approval will be advised to consider the consequences of these amendments prior to filing an application and engaging in evidentiary hearings.

## Pennsylvania "Growing Smarter" Environmental Law Developments

# DEP Implementation Of Acts 67 And 68

By RICHARD P. MATHER*

Director of DEP's Bureau of Regulatory Counsel

The Department of Environmental Protection's permitting programs have historically operated independently of land use decisions of local government. Although there are a few notable exceptions such as the Sewage Facilities Act, state environmental statutes, which the Department implements, do not generally provide authority for the Department to consider or rely upon local land use decisions when making permitting or funding decisions. Recently the General Assembly enacted Act 67 and Act 68 of 2000 (Act of June 22, 2000 (P.L. ___, No. 67) and Act of June 22, 2000 (P.L. ___ No. 68)), which provide the Department and other state agencies with authority to consider and rely upon certain local land use decisions in three different situations.

The purpose of this new authority is to minimize or avoid conflicts between local land use decisions and Department permitting and funding decisions. The Department may rely upon certain local land use decisions to condition or deny an application for a permit or funding, which otherwise meets all applicable environmental requirements, when the proposed activity is inconsistent with applicable local land use decisions. Acts 67 and 68 do not provide the Department with new authority to make land use decisions. Land use decisions will continue to be made by local government. The new authority is limited to the Department's consideration of and reliance upon land use decisions of local government when making permitting or funding decisions under state environmental statutes.

Acts 67 and 68 provide authority in three different situations, and they identify what local land use decisions are relevant in each situation. Under Section 619.2(a), state agencies shall consider and may rely upon county comprehensive plans, municipal comprehensive plans and zoning ordinances which are generally consistent. 53 P.S. §10619.2(a). Under Section 619.2(c), state agencies shall consider and may rely upon joint municipal zoning ordinances. 53 P.S. §10619.2(c). Under Section 1105, state agencies shall consider and may rely upon comprehensive plans and zoning ordinances when municipalities adopt a plan under Article XI of the MPC and participating municipalities conform their plans and ordinances by implementing cooperative agreements and adopting resolutions and ordinances. 53 P.S. §1105.

The Department has prepared a final technical guidance document to help guide the implementation of its new authority.[1] The final guidance identifies permitting programs which are implicated by Acts 67 and 68. The final guidance describes how the Department will process applications for permits under its new authority so that the Department can continue to make timely permitting decisions. The procedures in the Department's final guidance will identify whether there are conflicts between proposed Department permitting decisions and local land use and whether the land

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[1] Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Permits for Facilities and Infrastructures, January 29, 2001. The Policy is available at the Department Web Site at www.dep.state.pa.us under DEP Land Use Reviews.

use decisions are being challenged at the local level. There is, therefore, the possibility that the Department will have to decide how to implement its new authority—to avoid conflicts with local land use decisions—where the local land use decisions are already being challenged at the local level.

While the Department will have to evaluate each situation under its policy on a case-by-case basis, there are several guiding principles that can be identified. First, land use decisions are made at the local level, and the Department lacks the authority or expertise to assess the validity of local land use decisions. Challenges to the validity of local land use decisions will have to be resolved at the local level without the Department's active involvement. Although the Department has discretion to rely (or not rely) upon local land use decisions under Acts 67 or 68, the Department's discretionary authority in Acts 67 and 68 does not allow it to determine the validity of local land use decisions.

Second, the Department is committed to making timely permitting decisions. Local land use decisions can be challenged at the local level for any number of reasons, and challenges can be litigated in court over an extended period of time. Whether there is a conflict between the proposed project under review by the Department and the applicable local land use regulation may depend upon the outcome of the local challenge.

While local land use issues can be resolved during the Department's review of a permit application in most situations, there may be situations where challenges to local land use decisions extend beyond the time periods, established by law or policy, for timely Department permit action. In these rare cases, the Department will be asked to consider and may rely upon a local land use decision which is being challenged in court, and it will have to make a permitting decision based upon the existing circumstances and the status of the local land use decision.

Finally, the Department has broad discretion to decide how to rely upon local land use decisions to avoid conflicts between the permit decision and the local land use decision. While the facts of a particular case will influence the Department's decision, the Department may decide to condition its permit to require that the permittee obtain all necessary local land use approvals prior to beginning operations. Such a permit condition would recognize that there are outstanding local land use issues or challenges that need to be addressed. If the applicant is successful in the pending challenges to local land use decisions and obtains all necessary local approvals, the applicant will have the environmental permit in hand to begin operations as soon as the local land use challenges are resolved. If the applicant is not successful and is unable to obtain all necessary local approvals, the permit condition will preclude operations under the permit. In both situations, the public and the applicant will know that the project satisfies all environmental requirements in a timely manner, but the permit condition will recognize that there are outstanding local land use issues which will have to be addressed before the permit may be activated.

Acts 67 and 68 provide new authority to the Department to consider and rely upon land use decisions when reviewing applications for permits or funding. By avoiding conflict between Department permitting decisions and local land use decisions, Acts 67 and 68 authorize the Department to support sound land use decisions made by local government.

## Pennsylvania "Growing Smarter" Environmental Law Developments

# Growing Smarter Legislation—New Options For Multi-Municipal Planning And Implementation

By JOANNE R. DENWORTH*

President of 10,000 Friends of Pennsylvania

TABLE OF CONTENTS Page



## INTRODUCTION

Last June, the Pennsylvania legislature passed and Governor Ridge signed into law Acts 67 and 68 of 2000, which amended the Municipalities Planning Code (MPC), the statute giving Pennsylvania's municipalities authority to regulate land use. 53 P.S. §§10101-11202. While not as far-reaching as "smart growth" legislation in other states (including our neighbors Maryland and New Jersey), the more modestly-dubbed "Growing Smarter" amendments do enable counties and local municipalities to take more control of their destiny by planning together for development and conservation of resources. Most importantly, they provide mechanisms for implementing such plans through cooperative agreements and consistent ordinances and actions.

New MPC Article XI, entitled "Intergovernmental Cooperative Planning and Implementation Agreements," effects a true advance over prior law by authorizing multi-municipal planning and implementation that can be legally effective if municipalities seize the opportunities these provisions offer. They enable municipalities (including counties) to develop and implement a plan for an entire county or any area of contiguous municipalities within a county or counties using intergovernmental cooperative agreements under the Intergovernmental Cooperative Law, 53 Pa.C.S. §§2301-2348.

The most significant features of the new provisions:

- enable cooperating municipalities to designate growth areas in and around cities, boroughs, and villages where public infrastructure will be provided and rural resource areas where rural uses will be preferred and infrastructure will not be provided with public funds. Section 1103(1),(2) & (3)
- give the cooperating municipalities the ability to distribute all uses over reasonable geographic areas of the plan and to carry out that plan using their own individually-adopted ordinances so long as

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those ordinances are generally consistent with the adopted multi-municipal plan. Section 1103(c)(4)

- provide incentives in Section 1105 & 1106, including:
  - priority consideration in state funding programs of all kinds
  - required consideration of the plan and implementing ordinances by state agencies in making permitting and funding decisions
  - legal protection in curative amendment suits if all uses are provided in a reasonable geographic area of the plan
  - the availability of special tools that can be used across municipal boundaries—transfer of development rights, tax base and revenue sharing, and specific plans for commercial and industrial development

The ability to distinguish between growth areas where public infrastructure will be provided and rural areas where it will not is a major new power. It gives direction and legal authority to cooperating municipalities and the courts to recognize that every municipality that chooses to plan and zone does not have to become urbanized, which prior law often seemed to dictate.

Previously, under the MPC as interpreted by case law, municipalities had to provide for all uses in each municipality unless they established a joint planning commission and adopted a joint zoning ordinance in order to distribute uses over a broader region. While still available and a good option, joint zoning has not been much used and is perhaps only manageable in smaller regions of 2-4 municipalities.

The new law requires significant effort and commitment, but it enables municipalities to plan together on issues that need to be looked at regionally—like infrastructure, growth and rural areas—and to retain local control over consistent implementation and local land use issues, through their own governing and advisory bodies.

Encouragingly, municipalities appear increasingly interested in multi-municipal approaches. Several surveys by 10,000 Friends of Pennsylvania in the last half of 2000 indicate 42 adopted joint comprehensive plans (including 5 joint comprehensive plans and zoning ordinances), 26 joint or multi-municipal plans in the developmental stages, one joint planning commission in the developmental stage, and four joint plans adopted outside the MPC. Recent information indicates that more such initiatives are underway.

## SPRAWL AND LAND USE REFORM

The momentum for land use reform has been building over many years, but only recently has "sprawl" captured the public's attention. People in Pennsylvania and elsewhere (particularly in metropolitan areas) are experiencing traffic congestion, the and decline of cities and towns, the increasing social and economic segregation of communities, and the loss of agricultural lands and open space resulting from the ever-outward expansion of scattered new development.[1]

There is dawning recognition among both urban and suburban interests that land use decisions—determining where and how human activities are conducted upon the land—are fundamental to the economic and social health of cities and towns, the conservation of rural lands and uses, the preservation of natural, heritage, and fiscal resources, and the quality of life communities enjoy. But land use decisions are a complicated mix of forces—from individual family and business decisions to government regulatory, tax, and spending policies—and legislative solutions are difficult to craft.

### *Fragmentation—Lack of coordination*

Pennsylvania's diversity, fragmented governance structure, and land use laws make land use solutions especially challenging here. Ours is both a very urban state with over 1000 urban municipalities, most in relative decline, and a very rural state with the largest rural

[1] **The Cost of Sprawl in Pennsylvania** (2000), a study conducted by Clarion Associates, a real estate consulting firm, was commissioned by 10,000 Friends of Pennsylvania for a consortium of public and private organizations. The study surveyed national and state research and conducted independent analyses of 21 municipalities in 6 metropolitan regions—Philadelphia, Pittsburgh, Allentown, York, Williamsport, and Meadville. It concluded that the sprawl phenomena-defined in the literature as low density, automobile-dependent, scattered or "leapfrog" development characterized by spatially-segregated uses and fragmented authority in local governments with varying fiscal capacities—are occurring in each of these regions of the state. The categories of costs described and quantified by the study are: increased capital and operating costs of roads, utilities, housing, schools and municipal services; increased transportation and travel costs; loss of farmland and environmentally-sensitive lands; increased concentration of poorer citizens in urban areas and accelerated socio-economic decline in cities, towns, and older suburbs; and increased air and water pollution and stress.

population in the nation. It is also a state with very little real growth—just over 1% population growth in the 20 years between 1970 and 1990—yet one of the highest rates of land consumption per capita in the country.[2] We are not so much growing as spreading our population around the countryside at great cost to taxpayers and to the economic viability of our cities, boroughs, and older developed areas, where half of our 12 million people live.

Pennsylvania has 2,568 local municipalities—56 cities, 964 boroughs, 1,548 townships, and one incorporated town. In addition, there are state agencies permitting and funding particular facilities and infrastructure, 67 counties, 501 school districts, and thousands of authorities and special districts—some 5,000 entities with pieces of responsibility for land use decisions. In southeastern Pennsylvania alone, there are 237 municipalities in five counties. Allegheny County has 130 municipalities within one county.

While reduction in the number of governing bodies and entities is undoubtedly desirable, the number of functional units is not the major problem. It is the lack of coordinating requirements or enabling mechanisms for achieving coordination and consistency among state agency actions, county and local government actions, and the actions of special purpose authorities and districts. The coordinating function is one that sound land use planning on a regional basis can serve, provided there are legally-effective means for carrying out such plans.

## LAND USE RULES

As in most states, Pennsylvania municipalities have only the authority delegated to them by the legislature, and the legislature has delegated land use authority to the state's many municipalities through the MPC. Adopted in 1968, the MPC was a progressive reform to consolidate and make uniform the requirements for planning, subdivision, zoning and other land use regulation, which previously had been disbursed through differing provisions in the various municipal codes.

To understand the significance of the new provisions enabling multi-municipal planning and implementation, it is important to understand where we've come from. Pennsylvania's approach to land use is enabling and permissive rather than mandatory, and continues to be so under the newly-amended MPC. Unlike Oregon, Florida, Maryland and other states where planning is mandatory and implementing actions are subject to review for consistency, planning and zoning here are optional, but, if undertaken, must comply with the MPC. Counties are required to do comprehensive plans, but these are advisory only and have been much ignored. Consistency between plans and ordinances has not been required – in fact the MPC specifically says (and still says regrettably) "no action of a governing body shall be invalid or subject to appeal on the ground that it is inconsistent with a comprehensive plan." Section 303(c).

Pennsylvania's land use law, a combination of the MPC and court decisions interpreting it in the face of our fragmented governmental structure and constitutional constraints, have contributed to sprawl by requiring each municipality to plan and zone for all uses — all categories of residential, industrial, commercial, institutional uses, as well as the necessary transportation, water and sewer infrastructure, and, ultimately, schools to accommodate projected growth. Thus, if a rural township sees growth coming and wants to plan and zone for it, it has to zone the entire township and, at least on paper, convert a rural place into a suburban or urban place. The fact that the MPC applies to so many municipalities in isolation means that the build-out scenario, if all municipalities chose to plan and zone (over a third do not), would cover the state with buildings. However, if they do not plan and zone, anyone can put anything anywhere – with whatever state permits might be required.

Court decisions sustain "curative amendment" challenges (unique to Pennsylvania) to local ordinances if they find that a zoning ordinance does not adequately provide for a proposed use, and give site-specific relief to the landowner regardless of local zoning. Intended to assure that municipalities do not use zoning to exclude people and uses, particularly affordable housing, curative amendment challenges have resulted in court "fair share" rulings requiring densities for all types of housing, rather than all income levels (which is what "fair share" has meant in other states), and all categories of commercial and industrial uses (e.g., malls and quarries).

While the MPC provides sound direction for integrating all uses and various densities in a plan and zoning ordinance, it has been oriented toward development rather than conservation of rural lands and uses, and natural and

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[2] For example, according to the USDA's corrected figures (December 2000) for the 1997 National Resources Inventory, Pennsylvania is ranked 5th in the nation for change in acreage of total non-federal land developed from 1992 to 1997—only Texas, Georgia, Florida, and California rank higher.

heritage resources. Planning for these resources is newly required in Section 301, though such plans cannot exceed the requirements of certain listed laws.

## A VOLUNTARY, FLEXIBLE PROCESS FOR PLANNING TOGETHER

The new multi-municipal provisions of Article XI avoid mandates and respect Pennsylvania's tradition of local government by providing voluntary tools that can be legally effective if cooperating municipalities plan carefully, with respect for property rights, and if they carry out those plans with generally consistent ordinances and actions.

The law provides flexibility for counties and local municipalities to shape planning areas based on inherent regional logic and political willingness. Areas that are already working together through councils of government (COGs) or joint planning commissions are natural candidates for further cooperation. They may want to use the provisions of Article XI to take their plans further and implement them through agreements and ordinances. Though municipalities so can get together without the county, the county can play a major facilitating role, if the participating municipalities so choose, by bringing appropriate regions together, providing technical assistance, and getting implementation agreements signed by all the parties.

Planning areas might be:

- a natural configuration of political jurisdictions—e.g., a city or borough and surrounding townships or a school district that already shares tax base for schools in the region
- a natural resource-based area such as a watershed
- a corridor area or areas surrounding a proposed highway expansion, interchange or network
- an area motivated to get together to preserve viable farmland and/or aquifer recharge capacity by focusing growth in and around boroughs and villages
- an area comprised of municipalities that have more commercial and industrial development and municipalities that are more residential, where services and revenues can be shared to the benefit of both
- an entire county where municipalities agree that the county plan will be the plan adopted and implemented by them
- sub-regions of a county based on county and municipal plans as modified, agreed to and adopted by municipalities in regions of the county.

### *Cities and Boroughs*

The new provisions offer cities and boroughs the opportunity to plan with neighboring municipalities for development in and around their municipalities, making use of and improving their existing infrastructure. Many of these municipalities have been left out as new development moves out to suburban and ex-urban locations. Many are in relative economic decline with less affluent populations and shrinking tax bases; yet they have assets that, with appropriate public and private investment, could make them attractive to homebuyers and businesses.

Cities and boroughs could be ideal locations for infill traditional neighborhood development (TNDs), newly authorized in Article VII-A. Such development could be located in or near a city or town, so as to take advantage of existing infrastructure. A transfer of development rights program in a planning area that combines rural and urban municipalities would enable farmers to sell development rights to developers for use in a city, borough or more suburban township within the plan, thereby relieving pressure on rural lands, and helping to sustain developed areas. The use of tax and revenue sharing, if desired, could mean that the burdens and benefits of commercial and industrial development are shared and contribute to the economic health of all the participating municipalities. The specific plan provisions would enable the participants to develop one set of applicable standards for an area or areas of the plan targeted for economic development.

## ONGOING ISSUES

Although "Growing Smarter" has provided some strong new tools that can advance land use planning and implementation in Pennsylvania, some problematic provisions remain or were added to the MPC as a result of compromise or the insistence of particular interests. Most of these occurred in Act 68, which applies to all municipalities, and some will affect what municipalities taking advantage of the multi-municipal options can do.

### *Consistency*

In states that have adopted the most effective land use programs—Florida, Oregon, Maryland, Washington, Tennessee, for example (all growing states with significant appreciation in property values it might be noted)—what makes them work is a process for determining

whether local zoning and other land use regulation is consistent with the county, regional and/or local plan. Though the new MPC amendments include many provisions encouraging and even requiring consistency between local plans and ordinances and county and local plans, Section 303(c) remains in the law and undermines its effectiveness.

In Pennsylvania, early case law prior to the MPC started down the road of requiring consistency between plans and ordinances, *Eves* v. *Zoning Board of Adjustments*, 401 Pa. 211, 164 A.2d 7 (1970), but retreated from that position in the face of numerous challenges by landowners on the ground that ordinances were not in accordance with comprehensive plans. The changing case law led to pressure to codify the legal insignificance of plans in Section 303(c). Both the Pennsylvania Association of Township Supervisors and the Pennsylvania Builders Association are opposed to any change in that section. The townships don't want plans to be used against them by developers or citizens, even though giving plans some legal effect would enhance the power of municipalities to control their futures.

Developers and resource industries don't want plans to have any legal effect because they want to be able to change zoning requirements in response to their proposed uses for property they own or acquire. They want predictability and they want to be able to rely on whatever the zoning regulations are as of right without any possible challenge base on inconsistency with a plan. Interestingly, when their own interests are at stake, the builders insist on consistency, as for instance in the transportation infrastructure provisions of Article V, where ordinances and actions "shall be" consistent with transportation plans.

Plans are not laws; they are advisory documents that provide a rationale for the zoning ordinances and other regulation. However, if there is no process for determining whether action is consistent with plans, amending plans if necessary to fit a community's changing needs and desires, and keeping plans and ordinances tied together, plans become meaningless and ignored—which has been the case in Pennsylvania. Not only is the civic and governmental effort that went into planning largely wasted, but there is no up-to-date, justifying rationale for ordinances. Zoning becomes a somewhat arbitrary exercise in carving up the landscape—often in response to the pressure of individual landowners without consideration of public and other private interests.

In the case of multi-municipal plans and implementing ordinances, general consistency will be required by the courts in reviewing challenges to an ordinance because of Section 1104(1), requiring implementation agreements to establish a process for conforming ordinances to the plan within two years. Further, the judicial review provisions in Sections 1006-A (b) and (b.1) require ordinances to be "consistent" in the case of a joint zoning ordinance and "generally consistent" in the case of a multi-municipal plan with separate implementing ordinances in order for the court to consider the availability of uses in the region of a plan.

*State Agency Review*

The importance of consistency is raised very clearly by the state agency review provisions. The combination of Section 619.2(a) and Section 603(j) have been interpreted by the Governor's Policy Office to limit the requirement that state agencies "shall consider and may rely upon" local land use plans and ordinances in reviewing applications for funding or permitting of infrastructure or facilities to situations where there is a county plan and a municipal plan and ordinance and all are consistent with each other. Given the present reality of Pennsylvania's local land use laws, this narrows the scope of state agency consideration considerably. It is most unfortunate since local land use should be a consideration in any such review. DEP's new land use policy recognizes that and does ask for information regarding land use from applicants and municipalities, with municipalities self-certifying as to the consistency of plans and ordinance. However, DEP's consideration will be limited if consistency is not established or is challenged.

Remedying this situation by adopting a clear process for determining consistency at the county and local level, while allowing landowners to rely upon existing regulations until changes are made to conform ordinances to plans is a possible approach. This can be done in implementation agreements under the multi-municipal provisions; however, there is little comfort for municipalities that do not choose to enter into such arrangements. For 10,000 Friends, the failure to come to grips with deleting or amending Section 303(c) was the greatest disappointment in the 2000 amendment process. However, we continue to work toward a solution that can be accepted by the major players.

*Water and Sewer Facility Expansions*

What began as a strong provision in Senator Gerlach's Senate bill that required water and sewer facility expansions to be consistent with

local comprehensive plans and ordinances was significantly weakened by the final passage of both bills. Water and sewer facilities, along with roads, are the major precursors of sprawl development when they open up new lands for development that were not planned for growth.

The new amendments require only that municipal authorities and water companies notify municipalities of their intent to expand service and that nothing shall be interpreted to limit the right to expand service "as otherwise provided by law." Section 608.1(c). "Expansion of service" is defined to mean expanding the number of individual service connections, not locating transmission lines or other facilities, which are known to lead ultimately to development and individual connections.

Sections 608.1(d) and 1105(d) invoke the protection of the Public Utility Commission: "Except as provided in section 619.2, nothing in this article shall be construed as limiting the authority of . . . the PUC . . . over the implementation, location, construction and maintenance of public utility facilities and the rendering of public utility services to the public." It appears from this provision that comprehensive plans and ordinances will be controlling when all the stars are in place and consistent under section 619.2 as described above. However, the actual effect of these sections and the relationship to PUC regulation needs to be understood and illuminated in some depth.

*Protection for Forestry and Agriculture*

These are important rural uses that all Pennsylvanians want to see protected as part of our rural heritage and economic base. However, they are land use that are often in conflict with other uses and should be able to be regulated to minimize those conflicts. The environmental aspects of their operations should be regulated by state law that is uniformly applicable to all operations. The requirement in section 603(f) that forestry, "including timber harvesting," be a permitted use by right in every zoning district in the Commonwealth is impractical and excessive. Municipalities can regulate the land use aspects of forestry to some degree, however, particularly as there is no state law governing sustainable forestry practices. The degree of permissible regulation is an issue that needs to be explored in greater depth, and will be discussed in some detail on the forthcoming legal section of 10,000 Friends' web site, www.10000friends.org.

In the case of agriculture, the state's Nutrient Management Law applies to large concentrated animal operations, and by its terms preempts local regulation. However, it does not apply to smaller farms that do not qualify as concentrated animal operations, yet the effect of MPC Sections 301(6)(ix) and 603(b) seems to be to exempt all farms from planning and zoning regardless of size. The support of the Farm Bureau for agricultural zoning as a way of keeping agriculture viable was very important to the passage of land use legislation. However, the effects of some of these provisions need to be reexamined with a view to what they do or do not permit.

*Coal and extractive industries*

Special protections for these industries allowing "reasonable coal mining in every municipality," Section 1006(b.1), and "reasonable development of minerals in every municipality," Section 603(i), are overreaching, particularly as applied to multi-municipal planning areas where all other uses can be distributed over the region of the plan.

Granted that minerals have to be mined where they exist; however, not if they are in direct conflict with residential and commercial urban and suburban development. A regional approach to development and conservation aims to conserve rural areas where rural uses, including extractive industries, are permitted and encouraged and urban uses are not. In the case of quarrying, which can occur wherever there is significant limestone aggregate, Section 603(i) is a weakening of prior law on joint planning and zoning, which enabled municipalities in the Newtown, Bucks County region to put intense suburban development in two townships and quarrying in the township that remained largely rural. Perhaps this issue can be resolved by interpreting "reasonable" to mean not in conflict with intense urban and suburban uses. If not, the law should be changed.

## CONCLUSION

Despite the ongoing issues identified, the new amendments offer a more progressive approach to development and conservation for Pennsylvania that we can build upon and improve. There will undoubtedly be litigation over the application of the new provisions because land use is a litigious area and conflicts are resolved by the courts.

The objection is often heard that the validity of ordinances raises constitutional questions that only the court can address. Although courts determine what is or is not constitutional, they must consider and be guided by what the legislature has authorized. The somewhat murky Pennsylvania court doctrines on

substantive due process in the land use arena seem in part a response to the fragmentation of our governance structure and the previous lack of any authority for legally-effective regional approaches.

It is hoped that the Growing Smarter amendments will promote more sustainable land use by encouraging public investments, municipal actions, and court decisions that support revitalizing rather than abandoning our cities and towns, conserving rural lands and natural, heritage, and fiscal resources, and improving the quality of life in all of Pennsylvania's diverse communities.