

**TOLL BROTHERS, INC.** :  
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 **v.** : **EHB Docket No. 2007-163-MG**  
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 **COMMONWEALTH OF PENNSYLVANIA,** :  
 **DEPARTMENT OF ENVIRONMENTAL** :  
 **PROTECTION and BUSHKILL TOWNSHIP,** : **Issued: October 1, 2008**  
 **Intervenor** :

**ADJUDICATION**

**By George J. Miller, Judge**

**Synopsis**

The Board dismisses the appeal of a developer which objected to the Department's refusal to order a municipality to provide public sewers to the developer's proposed residential development. The developer failed to demonstrate that the Department's interpretation of the municipality's official sewage plan was unreasonable or that the Department's conclusion that the municipality's refusal to provide public sewer was consistent with its official sewage plan was otherwise erroneous. Accordingly, the Board finds that the Department's determination that the municipality was properly implementing its official sewage plan was appropriate.

**Background**

Before the Board is an appeal from the Department's refusal to grant a private request to the Appellant, Toll Brothers. The Appellant sought to compel Bushkill Township, Northampton County, to provide public sewers for a residential development proposed by the Appellant. In the Township's view, the Official Plan provides that the area of the Township where the parcel is

located is designated to be served by on-lot sewage disposal and not public sewers. The Appellant sought relief from the Department, contending that the Township was failing to implement the Official Plan. The Department found that the Township was properly interpreting its sewage facilities plan and denied the Appellant's request. The Appellant filed an appeal with the Board on June 22, 2007, objecting to the Department's action on the grounds that the Department failed to require the Township to implement its sewage facilities plan. The Appellant made no argument that the plan was inadequate to meet its sewage disposal needs.

A hearing was held before the Honorable George J. Miller on May 14, 2008. The parties have submitted post-hearing memoranda which consist of proposed findings of fact and conclusions of law. The record consists of these memoranda, a transcript of 168 pages and 22 exhibits. After full consideration of these materials we make the following:

### **FINDINGS OF FACT<sup>1</sup>**

1. The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Clean Streams Law,<sup>2</sup> the Sewage Facilities Act<sup>3</sup> and the regulations promulgated thereunder.

2. The Appellant, Toll Brothers, Inc., is a residential real estate developer.

3. Bushkill Township is a legally incorporated second class township located in Northampton County, Pennsylvania.

4. The Appellant is the equitable owner of a parcel of land located in the Township that the Appellant intends to develop as a residential subdivision. The development consists of

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<sup>1</sup> The transcript is noted as "N.T. \_\_\_"; the Appellant's exhibits are defined as "Ex. A- \_\_\_"; the Township's as "Ex. T- \_\_\_"; and the Department's as "Ex. DEP- \_\_\_."

<sup>2</sup> Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law).

<sup>3</sup> Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act).

30 lots and is located in an area of the Township zoned for high density residential use. (Majewski,<sup>4</sup> N.T. 18; Ex. A- 1)

5. The Township's Official Plan was adopted by the Township in June, 1973. It consists of an "Engineering Study and Feasibility Report" submitted by Gilbert Associates Inc. Although it includes a narrative and some maps, it does not include any map with metes and bounds descriptions of which areas of the Township call for public sewers and which call for on-lot sewage disposal. (Ex. A-3)

6. On October 30, 2006, the Appellant submitted a "planning exemption" to the Township, requesting to be served by public sewers and to be exempt from sewage facilities planning. The Appellant did not submit a planning module to the Township. (N.T. 67; Ex. A-2)

7. In November, 2006, the Appellant submitted a preliminary subdivision plan for the property showing 30 lots to be served by public sewage. (Ex. A-1; Majewski, N.T. 17-18)

8. On November 17, 2006, the Township denied the Appellant's planning exemption because there is no provision for public sewers in the area where the property is located. (Ex. A-6)

9. By letter dated January 4, 2007, the Appellant submitted a private request to the Department which essentially asserted that the Township was not properly implementing its Official Plan and requested, among other things, that the Township be ordered to implement its Plan by allowing public sewer service to the Appellant's property. (Ex. A-7)

10. The request included a letter from the Nazareth Borough Municipal Authority that there was sufficient capacity in the Authority's sewage treatment plant to accommodate the Appellant's proposed subdivision and the property was not in an area of the Township which

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<sup>4</sup> James Majewski is a divisional Senior Vice President for the Appellant. (N.T. 16-17).

was covered by an existing franchise agreement. Therefore an additional agreement would have to be executed. (Ex. A-5)

11. After reviewing the request and soliciting comments from relevant agencies, including the Lehigh Valley Planning Commission and the Township, the Department determined that the property was not located within the Official Plan's designated sewer service area and that the Township's denial to provide sewer service to the property was consistent with the Plan. Accordingly, the Department denied the Appellant's private request. (DEP Ex. 11)

12. Larry Turoscy, P.E. testified on behalf of the Appellant. A licensed engineer, he served as the project engineer on the project. (N.T. 30)

13. He largely relied upon the sewage collection map included in the Township's Official Plan and believed that the map demonstrated that the Appellant's parcel was included in the area for public sewer rather than on-lot sewage disposal. (N.T. 42-43)

14. Mr. Turoscy testified that it was his assumption that the property was in an area to be included in a proposed collector sewer line contemplated by the Official Plan. (N.T. 42)

15. However, this line is not directly adjacent to the Appellant's property, but is adjacent to homes on Schoeneck Avenue which existed at the time the Plan was developed. He acknowledged that the collector line would have to be extended to accommodate the Appellant's property. (N.T. 40-42)

16. He also testified that a pump station would be required in order to connect the property to the existing sewer system. (Turoscy, N.T. 49-50)

17. Although he conceded that the narrative portion of the Official Plan described a proposed public sewer system only for "developed" areas of the Township, he did not know what "developed" meant. (N.T. 37, 43)

18. Both Mr. Majewski and Mr. Turoscy admitted that the Township supervisors have consistently interpreted the Official Plan to provide for on-lot sewers for the area of the Township where the Appellant's property is located and not public sewers. (Majewski, N.T. 27-28; Turoscy, N.T. 41)

19. Darryl Fritz is a Sewage Planning Supervisor for the Department. He has worked for the Department since 1980. (N.T. 58-61)

20. He reviewed the Appellant's private request to order the Township to implement its Official Plan. He considered the relevant regulations, especially Section 71.14,<sup>5</sup> comments from the Township, the Appellant and the Lehigh County Planning Commission. He also reviewed the Official Plan and the Township's file with the Department. (N.T.73-74; 94-95 )

21. The Township's plan has no map with metes and bounds which clearly identifies which areas of the Township are designated for public sewer and which are designated for on-lot sewage disposal. Although most modern plans are more precise and include such a map, it was not unusual for earlier plans to not include such a map, but rely instead on narrative descriptions. (N.T. 109, 113, 127-28)

22. Accordingly, in order to determine whether the Appellant's property was in an area of the Township designated for public sewers, he had to read what the plan was describing, how the plan was put together and discern the intent of the plan and how that reflected in the conclusions and recommendations of the plan. (N.T. 113)

23. Mr. Fritz concluded that the property was not within an area designated for public

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<sup>5</sup> 25 Pa. Code § 71.14.

sewers.

24. Read in context, the Plan was clear about sewerage “developed” areas within the Village of Cherry Hill, but the “remaining” areas of the Township were not intended for public sewers. If there were new land development, they would have to follow through with a further feasibility study to revise existing plans. (N.T.87-88)

25. In Mr. Fritz’s view, “developed” meant existing houses. (N.T. 88-89)

26. Which conclusion was bolstered by the discussion in the Plan concerning federal and state funding programs which would only apply to existing development, and not future development. (N.T. 84-86)

27. The drainage map shows that any sewage plan for the southern portion of the Township should ideally flow by gravity through the developed area. The Appellant’s proposal would require construction of a gravity collector sewer. (N.T. 83-84)

28. Additionally, the plan proposes a collection line along Schoeneck Avenue to serve existing development. (Fritz, N.T. 116-17)

29. In Mr. Fritz’ view, although the property is admittedly in the vicinity of Schoeneck Avenue, the property was not intended to be served by the proposed collection line because it was not developed at the time the study was drafted. (N.T. 117-18)

### **OPINION**

In this appeal from the Department’s denial of the Appellant’s private request, it is the Appellant who bears the burden of proof.<sup>6</sup> Accordingly, the Appellant must show by a preponderance of the evidence that the Department improperly denied its request to order the Township to implement its sewage plan by providing public sewers for the Appellant’s property

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<sup>6</sup> 25 Pa. Code § 1021.122(c).

and entering into a franchise agreement with a neighboring municipality.

Our review is *de novo*.<sup>7</sup> Therefore we may consider not only the evidence reviewed by the Department in making its decision, but also evidence which was presented to the Board at the hearing.<sup>8</sup>

As we analyze the facts of this case, it is important to keep in mind the limits of the challenge raised by the Appellant in making a private request to the Department to order the Township to provide public sewer to the Appellant's property. The *only* argument made by the Appellant is that the Township was not implementing its Official Plan within the meaning of Section 750.5(b) of the Sewage Facilities Act.<sup>9</sup> The Appellant did *not* contend that the plan was inadequate to meet the sewage disposal needs of the proposed development. The Appellant did not argue or present evidence that on-lot sewage disposal was not a feasible method of sewage disposal for the property. Accordingly, the sole question that the Board must answer is whether the Department properly interpreted the Township's Official Plan when it determined that the Appellant's property was not located in an area designated for public sewers, and the Township was therefore properly implementing its Official Plan in refusing the Appellant's request to provide public sewers.

We find that the Department's interpretation of the Township's Official Plan was reasonable. Although something less than "concise," the Plan does describe the area of the Township which is intended for public sewers and which is not. A significant portion of the Plan is devoted to a discussion of the funding programs which were available to the municipality in

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<sup>7</sup> *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93 (Pa. Cmwlth. 2004); *Browning-Ferris Industries, Inc. v. DEP*, 819 A.2d 148 (Pa. Cmwlth. 2003); *Leatherwood, Inc. v. DEP*, 819 A.2d 604 (Pa. Cmwlth. 2003).

<sup>8</sup> *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth.1998).

<sup>9</sup> 35 P.S. § 750.5(b)

1973 under the Federal Water Pollution Control Act, and it is clear that the sewerage options were discussed from the that frame of reference.<sup>10</sup> Because those funding programs only applied to projects which would serve properties which were “developed” at the time the Plan was written, it is most likely that the Township did not intend to provide sewers to new developments. Under this scenario, in the vicinity of the Appellant’s property, only the developed areas of the “Village of Cherry Hill” and an area along Schoeneck Avenue where there were existing houses, are included in the area designated for public sewers.

The Appellant argues that the term “developed” is not defined by the Township’s Plan. This is true. The Department took the term to mean homes which were in existence at the time the Plan was drafted because the Township would not have been able to secure funding for future development under the federal sewer grant program which was in effect at the time. The Appellant has not offered any definition which would include its property within any understanding of “developed.” The Appellant offered no evidence that there were any structures or other improvements to the property in 1973, when the Plan was drafted. We fail to comprehend any commonly understood definition of “developed” which would have described this parcel as it existed in 1973.

Next, the Appellant points to other references within the Plan which suggest that the property is meant to be included within the area designated for sewers. Specifically, there are sections of the Plan which refer to the “vicinity of Schoeneck Avenue” and the “southeast section of the Township,” which, in the Appellant’s view, might be read to include the property. Although these references, read in isolation, may provide a basis for an alternative interpretation of the Plan, this evidence is not sufficient to prove that the Department’s interpretation was

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<sup>10</sup> See Ex. A-3 at Sections IX.D. and XII.

unreasonable or contrary to any regulation.

The Appellant also argues that, to the extent that the Plan is ambiguous, the Plan is like a zoning ordinance, and must be construed in favor the Appellant.<sup>11</sup> The Appellant offers no legal precedent to support this proposition. The court cases which apply this principle to zoning ordinances are predicated on land use law, and the principle that “the widest use of land is the rule and not the exception, unless the use is specifically restrained in a valid and reasonable exercise of the police power.”<sup>12</sup> By contrast, official plans are created by the authority of the Sewage Facilities Act as such an exercise of the Commonwealth’s police power in order to protect health and environment.<sup>13</sup> The Department interprets Official Plans based upon the provisions of that Act and the Department’s regulations which are promulgated under the authority of the Act. Our review of the Department, in turn, is governed by the Environmental Hearing Board Act.<sup>14</sup> To the extent a regulation may be unclear, we rely upon the Department’s interpretation of the regulation, unless it is unreasonable or contrary to the language of the authorizing statute.<sup>15</sup> As we read the sewage facilities regulations, they do not necessarily authorize the Department to construe an “ambiguous” plan in favor of the landowner. Indeed, as a whole, the Sewage Facilities Act might be read to favor municipal interpretation, because it is local municipalities that create official plans which embody local development choices. Further, in this case, the Department did not view the Township’s Plan as ambiguous. Rather, it concluded that the Township was properly interpreting its plan to exclude the Appellant’s

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<sup>11</sup> *See Tobin v. Radnor Township Bd. of Commissioners*, 597 A.2d 1258 (Pa. Cmwlth. 1991).

<sup>12</sup> *Mt. Laurel Racing Ass’n v. Zoning Hearing Bd.*, 458 A.2d 1043, 1045 (Pa. Cmwlth. 1983).

<sup>13</sup> 35 P.S. § 750.3.

<sup>14</sup> Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7514.

<sup>15</sup> *Department of Environmental Protection v. North American Refractories*, 791 A.2d 461 (Pa. Cmwlth. 2001).

property from the area designated for public sewers based upon the language of the Plan itself, the review of the comments from other local agencies and the Township's consistent historical treatment and interpretation of the Plan. The Department considered each of the factors required by Section 71.14(d) of the regulations.<sup>16</sup> As explained above, we cannot say that the Department's conclusion is unreasonable or contrary to any regulatory provision, nor has the Appellant offered a sufficient basis to impose upon the Township an interpretation of the Plan which is contrary to the weight of the testimony offered at the hearing.

We therefore make the following:

#### **CONCLUSIONS OF LAW**

1. The Board's scope of review is *de novo*.
2. The Department properly concluded that the Township's denial of the Appellant's request to provide public sewer for its proposed residential development was consistent with the provisions of the Township's Official Plan. 35 P.S. § 750.5.
3. The Department properly concluded that the Township was implementing its Official Plan and denied the Appellant's request to order the Township to provide public sewers for its property. 35 P.S. § 750.5(b).
4. The Department's review of the Appellant's private request was consistent with 25 Pa. Code § 71.14.

We enter the following order:

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<sup>16</sup> 25 Pa. Code § 71.14(d).



**COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD**

**TOLL BROTHERS, INC.**

**v.**

**COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and BUSHKILL TOWNSHIP,  
Intervenor**

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**EHB Docket No. 2007-163-MG**

**ORDER**

AND NOW, this 1<sup>st</sup> day of October 2008, the appeal of Toll Brother's in the above-captioned matter is hereby DISMISSED.

**ENVIRONMENTAL HEARING BOARD**

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**THOMAS W. RENWAND**  
**Acting Chairman and Chief Judge**

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**GEORGE J. MILLER**  
**Judge**

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**MICHELLE A. COLEMAN**  
**Judge**

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**BERNARD A. LABUSKES, JR.**  
**Judge**

**DATED: October 1, 2008**

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