

ACTION PLAN TO IMPLEMENT RECOMMENDATIONS

INNOVATIVE NEW IDEAS

Create a Municipal Environmental Defense Fund

The Municipal Environmental Defense Fund could be a resource administered by an established municipal assistance organization to provide legal defense for the Delaware River Watershed's municipalities' environmentally protective measures when faced with a legal challenge.

By: Alice Baker, Esq., PennFuture; and Alison Hastings, AICP/PP, DVRPC

Purpose

Environmentally protective zoning and ordinances are frequently set aside to provide more favorable conditions for developers. In the face of development pressures, municipalities have the choice of defending their local laws at great expense and with uncertain outcomes or settling conflicts by allowing developers to move ahead with projects and providing waivers or variances to municipally implemented environmental protections. Too often municipalities take the latter option, sacrificing natural resources and undermining regulations to avoid costly legal fees.

This decision is frequently made in light of a lack of legal resources, both in implementing defensible ordinances and in defending ordinances when challenged. This proposal describes a structure to provide legal defense to Pennsylvania municipalities once a challenge or threat of challenge to a municipal ordinance has been levied. This recommendation focuses on Pennsylvania only, as a fully implemented legal defense fund would vary from state to state based on state land use law.

This recommendation focuses on providing legal guidance when a credible legal challenge is threatened and litigation is actually initiated, with the recognition that upfront education on crafting defensible ordinances is critical and the understanding that other recommendations and organizations plan to establish educational opportunities for municipal managers and solicitors on this topic.

The Pennsylvania State Association of Township Commissioners (PSATC) is an organization that has ongoing relationships with many first-class townships. PSATC has an existing legal defense fund that represents the interests of first-class townships through amicus curiae ("friend of the court") briefs in court cases at the state level.

This recommendation seeks to broaden PSATC's program to provide representation for second-class townships and boroughs, in addition to first-class townships. It further develops the program established by PSATC to assure the representation focuses on defense of *environmentally* protective programs and provides direct legal guidance before a challenge is brought and during initial engagement (rather than simply a friend of the court brief once litigation is in full swing).

Barriers to advancing these additional roles include: (1) implementing a structure to assure the environmental integrity of the law/ordinance, (2) securing adequate baseline funding to start the fund and administer the fund, (3) establishing a reserve fund to handle potential court case, and (4) accessing legal skills.

Anticipated Outcomes

As the Municipal Environmental Defense Fund becomes established, the anticipated result is that fewer waivers and variances will be provided from environmentally protective ordinances. This will be the result of municipalities' increased confidence in their ability to defend challenged measures. To accomplish this long-term goal, an initial increase in litigation over environmentally protective measures may be expected. However, as developers realize municipalities are less willing to disregard ordinances, litigation should decrease.

Anticipated Outcomes

A long-term outcome will be that municipalities issue fewer waivers and variances as municipalities gain confidence in their ability to defend challenged measures, and as supportive case law increases.

A short-term outcome will be an initial increase in litigation while the fund supports court cases.

Proposal

The Municipal Environmental Defense Fund could be housed within an existing organization, such as the Pennsylvania Municipal League (PML). PML is a nonprofit, nonpartisan organization that represents participating Pennsylvania cities, townships, towns, boroughs, and home rule municipalities. Locating such a program within an existing municipal organization that has gained the trust of many municipalities is important. Environmental organizations with legal capacity are often viewed as pursuing a predetermined agenda and not trusted by municipalities.

PML has established both relationships with municipalities and the level of trust necessary to provide legal support in this context. In order to take on direct representation of municipalities, PML would need to increase its capacity through additional funding streams and legal expertise.

Locating the Municipal Environmental Defense Fund at an existing municipal organization is advantageous to getting municipal buy-in. Environmental organizations with legal capacity may have conflicts of interest in accepting membership fees or payments from municipalities; the environmental organizations may want to reserve the right to litigate against a municipality at a future time on separate (or related) issues.

PML already requires municipalities pay an annual membership fee. An additional membership cost could be assessed to access the Municipal Environmental Defense Fund services. The fee could be paid on an annual basis regardless of whether the municipality seeks assistance from the fund, but only those that have paid the annual membership would be eligible to take advantage of the services the fund provides. Additional lines of funding such as grants and donations would be necessary to secure.

To increase municipal and legal expertise, the program could work with local bar associations or law schools, and possibly establish an environmental land use law clinic at a law school.

To ensure that the measures defended by the fund are environmentally sound, a five-member board could review all requests for assistance. The board could be composed of representatives from the environmental nonprofit community, municipalities, and legal professions.

Funding

Although the administrative costs would be relatively stable, the costs associated with an attorney's time spent on a court case could vary greatly and are difficult to estimate. Attorneys representing municipalities through the Municipal Environmental Defense Fund could seek reimbursement of attorney fees and costs as allowed under the Municipal Planning Code Section 617.2(a). Recovered fees and costs could be used by the Municipal Environmental Defense Fund to sustain future activities. The fund would need to employ three to five full-time attorneys to provide initial consultations to the municipalities, provide a description of the legal issues and positions to the board, and, in most instances, provide continuing representation.

After a case is accepted by the fund, the legal representation would be taken on by an in-house attorney, a pro bono attorney, or by retaining a law firm. The Municipal Environmental Defense Fund could regularly seek legal interns from area law schools to generate additional capacity.

Timeframe

Initial implementation of the Pennsylvania fund, securing adequate funding, and promoting its availability could likely take a year. By the second year, the Pennsylvania fund could be fully operational. By the end of the third year, it could be expected that the Pennsylvania fund provides lessons learned, and other organizations or funders can explore creating similar programs in other Delaware River Watershed states.