

Business Better Episode 31: The New BSA Whistleblower Law: What You Need to Know

Speakers: Peter Hardy, Diana Joskowicz, Meredith Dante

John Wright:

Welcome to Business Better, a podcast designed to help businesses navigate the new normal. I'm your host, John Wright. After serving nearly 15 years as Senior Vice President and General Counsel at Triumph Group Incorporated, the global aerospace components supplier. I'm now a member of the Securities and M&A groups at Ballard Spahr, a national law firm with clients across industries and across the country.

John Wright:

This episode is another in our Energy and Environment Review series in which Ballard's energy and environmental lawyers will address the energy evolution driven by climate change, renewable energy innovation, electrification, and energy efficiency. As consumers, generators, and investors alike strive for a sustainable future. The episode features a discussion of the concept of environmental justice and how it's changing the way federal state, and local governments approach real estate development projects. Leading the discussion is Lea Phillips, an environmental and natural resources attorney in Ballard's Phoenix office, who serves clients in the renewable energy, manufacturing and waste recycling industries. Joining Lea is Alyssa Domzal, an associate in Ballard's Baltimore office who represents owners, developers, and investors in a wide range of commercial real estate transactions. So let's hand it over to Lea to start the discussion.

Lea Phillips:

Hello, and welcome to Business Better. My name is Lea Phillips and I am an environment and natural resource attorney at Ballard Spahr. And I am here today with my colleague Alyssa Domzal, who practices real estate and land use law, for a discussion on environmental justice, and in particular, how environmental justice concepts are swiftly and dramatically changing the way federal, state and local governments are approaching project development, permitting, land use, and zoning. So Alyssa, I invited you here today for this discussion because as an environmental attorney, I have seen environmental justice considerations increase dramatically over the last year. And I was curious to hear your perspective as a land use attorney as to how these concepts are shaping local land use decisions as well. So would you like to take a moment to introduce yourself and give listeners a sense of your practice?

Alyssa Domzal:

Sure. So I do both real estate transactional work and land use and zoning work. I am at the Baltimore office. My transactional practice is nationwide, but in particular, my land use and zoning practice tends to be local to Maryland and especially local to Baltimore City. So I have been sort of seeing some trends both locally and nationally that I think are going to be really good for us to discuss. So our topic today is environmental justice. Lea, what does that mean to you?

Lea Phillips:

So environmental justice is the concept that low income communities and communities of color tend to be disproportionately exposed to pollution and benefit the least from government regulation and investment. So EPA defines environmental justice as the fair treatment and meaningful involvement of all people, regardless of race, color, national origin or income, with respect to the development, implementation and enforcement of environmental laws and policies.

Lea Phillips:

And similar to you, my practice is primarily transactional and regulatory. I work with clients nationwide, although I'm based in Ballard's Phoenix office. And I have seen these concepts pop up, particularly in project permitting and permitting for my client's facilities in the last year in a way that we just haven't seen in past couple of decades.

Lea Phillips:

Well, many listeners may have begun hearing this term for the first time recently from their legal counsel or their facility managers or in regulations in the news. This is not a new concept, in fact, the origin of the environmental justice movement can be traced back to the 1960s. And I would say from the '60s to 2020, arguably one of the biggest victories for the environmental justice movement came in '94 when President Clinton issued an executive order requiring that each federal agency make achieving environmental justice part of its mission by identifying and addressing the disproportionately high and adverse human health or environmental effects of its programs on people of color and low income population.

Lea Phillips:

But at the risk of perhaps over-simplifying things, and I'd be interested to just hear your perspective as well Alyssa, but the risk of oversimplifying things, I think what we saw at both the federal and state level from the environmental law perspective, from this time in the mid '90s through 2020, was what I've seen described as environmental justice through procedural justice, meaning access to information and access to participation in regulatory process.

Lea Phillips:

So with a few notable exceptions that we can talk about through, for example, the National Environmental Policy Act, where regulators were charged with taking into account, the cumulative impacts of a polluting project. What I saw primarily, particularly at the state level were laws and regulations that required public participation and notice to be given to the surrounding community when a polluting project would be permitted. So for example, when you're going to get your hazardous waste permit, your solid waste permit, you would need to notify communities in the surrounding area, you maybe had a public meeting. And that was by much the extent of the environmental justice component of your permit. You didn't have a situation where you were being asked to evaluate how your project was going to cumulatively impact a neighborhood. And you weren't being asked by large to look at the demographics of your neighborhood and your neighbors to see if this was a community that was already disproportionately impacted by pollution.

Lea Phillips:

But what I think was really interesting in 2020 was during this moment in history where the country was grappling with systemic racism, we also saw the Trump administration rolled back a number of federal environmental policies, including policies that were aimed at promoting environmental justice. Like the policy that I just referred to where federal projects that were pursuing a permit under NEPA, federal regulators, permitting those projects had been directed to take into account cumulative impacts of the project, from an environmental perspective. That policy was rolled back by the Trump administration. So this really galvanized the environmental justice movement, and President Biden made environmental justice part of his campaign platform and states really began to take action to fill the void.

Alyssa Domzal:

So Lea, now that we are about three months into the Biden administration, what trends are you seeing?

Lea Phillips:

So we see the Biden administration take a number of steps towards environmental justice. Obviously, as I mentioned, it was part of president Biden's campaign platform. And in his first few months as president, he's made good on the promise to take certain actions. And we've seen that through his order to every federal agency to review the state of equity in the agency and come up with a plan to remedy any "unequal barriers," to opportunity in policies and programs. Biden's instructed the justice

department to increase enforcement against polluters, which is something that I think we're going to see. I think we're going to see an increase in enforcement actions play into environmental justice, in those considerations, basically environmental justice driving increased enforcement.

Lea Phillips:

And just a few days ago, as we record this in the first week of April, EPA administrator Regan, publicly announced that he is directing EPA to take a number of steps to better serve historically marginalized communities. And so these include first that enforcement piece, but I think we're going to see the directive from administrator Regan specifically asked for strengthened enforcement of violations of environmental statutes and civil rights laws in communities overburdened by pollution. So that's something I think that's particularly interesting as we're seeing that first increase in enforcement, but a focus on communities that may already be facing those disproportionate impacts.

Lea Phillips:

But the directive also asked for affirmative steps to incorporate environmental justice considerations and into, including assessing impacts to pollution burden, and underserved and tribal communities in the regulatory development process. So again, you're seeing specifically directives made to consider environmental justice and take affirmative action to better serve communities that may be disproportionately impacted by pollution.

Alyssa Domzal:

So beyond what's happening at the federal level, you mentioned that states are filling the void that resulted from some of the Trump administration rollbacks, what are the trends you're seeing at the state level?

Lea Phillips:

Yeah, it's interesting, particularly when you're talking about environmental justice, you're not going to have an environmental justice conversation without talking about New Jersey. New Jersey recently passed groundbreaking legislation last August, that requires companies that want to build or improve certain facilities, polluting facilities to include an environmental justice analysis in permit applications.

Lea Phillips:

And the law directs those permits to be denied or amended to include additional conditions or what have you, if unnecessary environmental justice impacts are identified. And so under that law, you have a certain overburdened community, which is defined by the legislation. And if your project is in that overburdened community, you will need to evaluate the environment and public health impacts, put together, basically this environmental impact statement, have a public hearing and the regulators are then harsh with either denying or asking you for additional permit conditions and then imposing additional permit conditions on a facility, if the facility is unduly impacting an already overburdened community.

Lea Phillips:

What I think is so interesting is this legislation had been sitting for years. It was originally proposed years ago. And in this sort of galvanized environmental justice movement was passed at last summer. And the regulations are still pending. So we don't know specifically how this is going to play out, what types of permit conditions we're going to see. But I think it's incredibly interesting to see states like New Jersey take this type of specific targeted action to promote environmental justice and to try to lessen the burden on communities that may already have a disproportionate impact for pollution. And you think other states follow suit, New York has a similar legislation that's been proposed and just last month passed in the Senate. Very, very similar. You also have proposals in Connecticut, Minnesota, New York, that have similar vein, where you're seeing a very specific focus on overburdened communities and project permitting.

Alyssa Domzal:

That's all super interesting. It's really interesting to think about sort of every level of government what's happening and how the conversation has evolved. I think when we talked about sort of the early days of discussions on environmental justice, 20 years ago, or even 30 years ago. And I think we saw much more that it was just something that was acknowledged, but not really something where there were action items were things that were codified and things that someone doing a project actually has to address. I think we're definitely moving into a new phase of environmental justice at every level of government.

Lea Phillips:

I think that's absolutely right. And it's interesting to see it move from sort of that information phase of we're going to notify a community to actually looking at the cumulative impacts and potentially imposing permit conditions on a facility that are above and beyond what you would have seen previous to address those impacts, which has been really interesting.

Lea Phillips:

What have you been seeing on the local level when it comes to local zoning? Because I know you and I worked together with some frequency because there's some overlap in zoning of facilities and the environmental permitting piece, but I'm curious to know what you're seeing, even outside of the industrial context at the local level?

Alyssa Domzal:

I think we're seeing a number of different strategies at the local level in zoning codes or in other local codes. One strategy, which is sort of obvious when you say it out loud is just banning certain uses. In Baltimore city in 2018, after much advocacy from local groups, the city council enacted a ban on the creation and expansion of crude oil terminals, which has been a huge source of disproportionate impact on low-income communities here in the city. And I think this goes to what you were saying about establishing special zones, Minneapolis, for example, established green zones, where to identify specifically communities that have experienced this disproportionate impact, to look at census tract data on priority issues, air quality, brownfields housing, to create a map of burdened areas, which then as you were saying, will have certain requirements that have to be met for a permit to be issued for certain uses in those areas.

Alyssa Domzal:

And another trend is how we're addressing existing uses. Every zoning code has a non-conforming use provision, a use that was permitted at the time. And then over time that the code has changed, the use would no longer be allowed to be established as of that date. And certain zoning codes are specifically targeting those industrial non-conforming uses and putting standards for emissions or phase out or really any sort of additional use standards that accompany that use being allowed to continue. So I think those are sort of generally the strategies that we're seeing at the sort of the local zoning level.

Lea Phillips:

When we talk about zoning, it's something that historically contributed to systemic inequality. And so how have zoning laws evolved into the environmental justice conversations that we're having today?

Alyssa Domzal:

So early in the 1900s, a lot of cities passed racially restrictive zoning laws. Baltimore actually was the first racial segregation residential ordinance in 1910. And although that eventually was deemed unconstitutional, there was evolution to separate zoning uses through redlining and through a number of other mechanisms to separate high-income residential communities that have a lot of resources from lower-income communities where a lot of these undesirable uses ended up being cited because land values were lower, because there was less social infrastructure for the communities living there to oppose, any number of reasons.

Alyssa Domzal:

And so really throughout the 20th century, we saw the racially restrictive zoning laws evolve into a disproportionate impact for environmental uses. And in fact, today Baltimore has the highest rate of deaths caused by air pollution as a result of both industrial uses, as well as closest to urban highways and other sources of air pollution. So it's interesting to see the way this is being addressed now, Minneapolis, for example, in 2019, passed upzoning throughout the city to bar single-family exclusive zones, and to essentially make three units per lot the standard and all residential zones. I think that's still pretty rare, but I think what we are seeing is more and more zoning reforms that include thoughtfully mixing uses throughout the city and not just sort of creating these islands of single-family, residential only that have high resources and high incomes and are very isolated from other uses.

Alyssa Domzal:

And I think one way that isn't sort of as drastic as the Minneapolis example, but here in Baltimore in 2017, the city council enacted and the new zoning code and industrial mixed use zone. And the idea for that was that there are all these vacant industrial buildings throughout the city that are in or neighboring residential communities, and we want to see these buildings put to good use, but they need to be done in a thoughtful way and that there need to be particular standards and only particular uses and sort of... I thought that was a really interesting way that we're starting to see residential and industrial uses harmonized more in zoning codes.

Lea Phillips:

And so is the idea that, when you're talking about sort of eliminating the single-family use zoning and your example of making three unit per lot, zoning structure is the idea that you are instead of having isolated communities that are privileged and sort of separate from any industrial zoning to that sort of spread industrial uses around a little bit more so that no one community is so disproportionately impacted.

Alyssa Domzal:

I think that's part of it, for sure. I think that it's also about economic resources, and because those, as I'm sure you're realizing in your practice are very much tied together, who has the access to the higher quality resources in the city often impacts who is disproportionately impacted by industrial land use. And so I think that's part of it. And then part of it, I think is really related to highway construction and the single-family residential really drives sprawl, which drives highway construction, which tends as we've seen over time to have a really disproportionate impact on low-income communities.

Lea Phillips:

Well, and you brought up highways. I think that's so important because as I mentioned earlier, when we're thinking about environmental justice, we're so often thinking about those industrial facilities, we're thinking about your classics, we're thinking about solid waste, hazardous waste, your power generating facilities, power plants. So outside of the industrial development issues, are there any broader land use and environmental justice trends that you're seeing that go beyond what we typically think about when we're thinking about environmental justice with those industrial manufacturing type of facilities that we typically think about when we're thinking about pollution?

Alyssa Domzal:

Yeah. I think that's a really interesting question. And I think one thing that we're really seeing in the Biden administration is a focus on urban highway removal. In the proposed \$2 trillion infrastructure plan there is, that they're currently recording \$20 billion set aside to reconnect cities that were cut off by older highway projects. And timing-wise this makes a lot of sense because a lot of these were in the 1950s and '60s. And so now after 50, 60 years, the highways have reached more or less the end of their useful lifespan.

Alyssa Domzal:

And so it's a really great opportunity to envision what is next for these highways, which have historically divided communities and created economic inequality and had a negative impact on environmental health. One interesting example that President Biden actually called out specifically was in New Orleans, in the Tremé community, an urban highway that activists have been railing against for years. And now finally, they're seeing the president calling out this example specifically and saying, "This highway is an example of racist Land Use Policy. And I think people were floored. I think we have not historically seen at the federal level, those kinds of discussions about our highway policy, having a disproportionate impact on low-income and minority communities.

Alyssa Domzal:

And it's gone further as we were sort of talking about and just sort of saying, "Oh, highways have a negative impact on low-income communities." Earlier this year in March, the department of transportation issued a halt on a project in Houston that citing several concerns about the Title VI of the Civil Rights Act, which bars discrimination under programs receiving federal funding. So they actually issued a halt on a project, which again is something that we haven't seen much really. And so it's a really interesting time. I think it's a hot button issue and the Biden administration, I think people are very curious to see what that will actually look like and that \$20 billion, what the vision for that really is.

Lea Phillips:

No, absolutely. This is such an interesting time. And I think seeing how the Biden administration goes forward, how each state goes forward with these policies will really change project development and project permitting in the years to come, certainly in the next couple of years, as these regulations are promulgated and you see more and more examples of the federal government in particular, but also states taking a close look at the impacts of each of their projects on the communities that surround them. So I think it's something we're going to see more and more. And I know it's something that in my practice I've already seen more and more in just the last few months when we're looking at project permitting and project development in particular. So thank you so much Alyssa, for being here today and joining me for this conversation, it's been really interesting and I think it'll be fascinating to follow some of these developments in the next couple of years.

Alyssa Domzal:

Absolutely. Thanks so much.

John Wright:

Thanks again to Lea Phillips and Alyssa Domzal. Make sure to visit our website, www.ballardspahr.com, where you can find the latest news and guidance from our attorneys. Subscribe to the show in Apple Podcasts, Google Play, Spotify, or your favorite podcast platform. If you have any questions or suggestions for the show, please email podcast@ballardspahr.com. Stay tuned for a new episode coming soon. Thank you for listening.