

Changes to Non-Conforming Uses

By Robert W. Gundlach, Jr.

We are often asked by clients as to the ability to convert a property used for one type of non-conforming use to a different type of non-conforming use. The answer to this type of question can be very fact intensive and vary from one municipality to the next depending upon the provisions in the municipality's Zoning Ordinance as to the right to convert non-conforming uses. Many Zoning Ordinances allow a property owner to convert from one non-conforming use to a less intensive non-conforming use by special exception or conditional use, subject to proving the satisfaction of certain requirements. This was the factual situation in the recent Commonwealth Court case of

4154 Roosevelt Street, LLC v. ZHB of the Township of Whitehall.

In *Roosevelt*, the applicant desired to convert a vacant and obsolete industrial building, formerly used as a manufacturing plant in the garment industry, to apartments. After a long and torturous case history, the Commonwealth Court reversed a decision of the Trial Court and determined that the applicant had presented sufficient testimony in the record to substantiate a change as to the use of an existing building from manufacturing to apartments. Specifically, the Court found that the proposed nonconforming use is less detrimental to the neighborhood,

surroundings and public welfare than the previous use of the site and does not substantially increase traffic congestion on the nearby streets.

The case provides a good "road map" as to the type of testimony an applicant should present to the Zoning Hearing Board to convert one non-conforming use to a different non-conforming use.

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Delaware Chancery Court Tackles Fight Over Decades Old Water and Sewer Pipes

By Michael J. Isaacs

In *Kunhs v. Hiler*, (decided March 31, 2014), a dispute over decades-old underground water and sewer lines (laterals) brought neighbors in Rehoboth Beach, Delaware to Chancery Court. The residential properties in question are adjoining parcels that are part of a residential community that was first developed in the 1920s and 30s. Mr. and Mrs. Kuhns (Kuhn) purchased their property in 2008. The Kuhns property abuts and property owned by Bruce Hiler and Elaine Cacheris (Hiler) to the north. The Hiler property was purchased in 2002. Unbeknownst to both Kuhn and Hiler, the water and sewer lines that service the Kuhn property have been in

existence from the 1920s or 30s and run along the eastern boundary of the Hiler property and are located under the setback area (an area that Hiler is not permitted to build upon).

Upon this discovery, the parties did communicate in order to discuss the situation but were unable to come to any resolution. Both properties are located within the City limits of the City of Rehoboth Beach. The City took the position that, because the lines existed for a period of more than 20 years, an implied or prescriptive easement across the Hiler property exists which benefits the Kuhn property. Hiler disagreed with this position and litigation ensued.

Kuhn Arguments

The Kuhns filed an action to Quiet Title in Chancery Court and contended that they are entitled to a permanent utility easement. The Court noted that, in order to establish a prescriptive easement, the Kuhns must show that the use of the disputed area was (a) open and notorious; (b) exclusive; (c) continuous; and (d)

adverse to the rights of others for an uninterrupted 20 year period. The Court ruled that as the water and sewer lines were buried and unnoticed by anyone for more than 70 years, the use was not open and notorious and, therefore, a prescriptive easement could not be established. The Court similarly ruled that, in order to establish an implied easement arising from a quasi-easement, the moving party must show, among other things, that the need for the quasi-easement was apparent at the time that the properties, which had previously been owned by one party, were separated. This separation occurred in the 1920s or 1930s. Again, the Court notes that as the lines were buried and it could not be specifically established when the water and sewer lines were actually installed and there cannot be a finding that the need for the quasi-easement was apparent at the time, that the properties were separated. Accordingly, the Court ruled against the Kuhns by deciding that neither an easement by prescription or implication exists.

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Hiler Arguments

The Hilers requested a permanent mandatory injunction and sought the removal of the laterals from their property. In order to prevail, Hiler was required to show, among other things, irreparable harm in the event the injunction is not granted and that the irreparable harm to be suffered outweighs the harm to the Kuhns if the injunction is granted. The Court, having found that no easement exists, ruled that the invasion of the Hiler property is an irreparable harm. However, the Court further held that this irreparable harm suffered by Hiler does not outweigh the harm which would be inflicted upon the Kuhns if

the injunction were to be granted. The bottom line was no injunction. The Court did note that, even though it was not ordering a permanent injunction, it found, absent a statute or local law, nothing which would prevent the Hilers from themselves removing the laterals.

Hiler also argued that the situation constituted a trespass by the Kuhns. The Court did find that the location of the laterals did technically constitute trespass; however, it only awarded \$3.00 in monetary damages as this trespass had gone unnoticed from the 1920s or 30s until approximately 2009. Accordingly, there was no real loss suffered by Hiler.

Finally, the Kuhns requested that the City of Rehoboth should be required to provide an alternative means of water and sewer service to the Kuhns. The Court ruled that this was an issue that was not properly before it in this litigation. Accordingly, as the Court concluded, all of the parties to this litigation came away unsatisfied.

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Make Sure To Disclose All Relevant Property Conditions to Potential Buyers

By Scott Oberlander

On April 15, 2014, the Eastern District of Pennsylvania issued a decision in *Barker v. Hostetter et al.* that reinforced the need for real estate developers to disclose all relevant property conditions to potential buyers in order to prevent later potential liability for fraud and/or withholding material information.

The plaintiffs in *Barker* were a group of homeowners in the Hopewell Ridge Planned Community (Hopewell Ridge), a 29-lot subdivision in East Nottingham Township, Pennsylvania. Plaintiffs sued (1) Wilmer and Joyce Hostetter, the two original owners/developers of Hopewell Ridge; (2) Keystone Custom Homes, Inc. (Keystone), a corporation that managed the Hopewell Ridge Homeowner's Association (HOA) and constructed improvements in Hopewell Ridge; and (3) Willow Creek, LLC (Willow Creek), a corporation that sold homes in Hopewell Ridge to third parties.

The nine-count Complaint alleged that Defendants "withheld material information from the Plaintiffs and misrepresented facts about the sewage system and water supply at Hopewell Ridge." Specifically, Plaintiffs asserted Defendants (1) failed to disclose that the soil and drinking water at the subdivision had elevated nitrate levels and were being served by experimental sewage facilities that could not properly

function; (2) misrepresented the quality of the septic systems at Hopewell Ridge and improperly used experimental septic systems called EnviroServers on the subdivision; and (3) failed to ensure that Plaintiffs' properties were connected to public water and sewers, despite being required by law to do so. Plaintiffs claimed the material misrepresentations and omissions were intended to induce them into purchasing lots in Hopewell Ridge.

The Hostetter Defendants filed a Motion to Dismiss, and Keystone and Willow Creek filed a Joint Motion to Dismiss. The Court's Opinion first addressed Plaintiff's allegations that Defendants violated the Interstate Land Sales Full Disclosure Act (the ILSA). The ILSA contains numerous registration and disclosure requirements for developers. Defendants argued that they were not "sellers" and did not qualify as "developers" or "agents" under ILSA, and they felt they fell within one of the ILSA exemptions. The Court rejected those arguments, as the Hostetter Defendants were part of the offers to sell lots and thus constituted "developers," and no ILSA exemptions applied. The Court also denied Defendants' Motions to Dismiss the claims for fraud in the inducement and negligent misrepresentation, holding that the Plaintiffs properly set forth facts supporting each element of claims, and

the gist of the action doctrine did not bar claims against the Hostetter Defendants because there was no contract between them and Plaintiffs.

The Court then denied Defendants' Motions to Dismiss the claim under the Pennsylvania Uniform Planned Community Act (UPCA), which contains disclosure and document recording requirements for planned community developments. The Court also denied Defendants' Motions to Dismiss Plaintiffs' claims for Breach of Fiduciary Duty, holding Plaintiffs had sufficiently alleged that (1) the HOA Executive Board, as agents to Defendants, had a fiduciary obligation to ensure that Plaintiffs' properties were connected to public water and sewers, and (2) the Board failed to fulfill that obligation.

Next addressing Plaintiffs' breach of warranty claims, the Court permitted Plaintiffs' breach of express warranty claim against the Hostetter Defendants to proceed, as Plaintiffs alleged the Hostetter Defendants failed to follow through on their guarantee in the Public Offer of Sale that public water would be available as a backup until the EnviroServers were re-designated from experimental status to regular status. The Court dismissed the breach of express warranty claims against the Keystone and Willow Creek Defendants,

however, because Plaintiffs' claims did not set forth the contents of the alleged warranties. The Court also dismissed the breach of implied warranty of habitability and workmanship claim against the Hostetter Defendants because they were not the builders or sellers of the homes, but it denied the Keystone and Willow Creek Defendants' Motion.

Next, the Court denied Defendants' Motions to Dismiss the claim under the Pennsylvania Unfair Trade Practice and Consumer Protection Law, which establishes a private right of action for purchasers of goods affected by "unfair or deceptive acts or practices," including "engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding." The Court ruled that Plaintiffs qualified as "purchasers" under the act and sufficiently pled facts showing damages with respect to the value of their homes resulting from Defendants' fraudulent and deceptive conduct.

Finally, the Court dismissed Plaintiffs' claims for civil conspiracy. While Plaintiffs' claims for fraud and negligent misrepresentation survived the Motions

to Dismiss, with a civil conspiracy the *sole* purpose must be to injure a plaintiff. Plaintiffs had stated themselves that Defendants' purpose was to benefit themselves, not to harm Plaintiffs, so the civil conspiracy claim was dismissed as a matter of law. Out of the nine counts in the Complaint, each defendant still must defend seven counts after the Court's Opinion.

The *Barker* case illustrates the need for real estate developers to proactively inform all potential buyers of any conditions on their properties that could possibly affect decisions to purchase them. The most optimal course of action would have been for Defendants to have spent enough money to fix the alleged nitrate level and septic system problems before selling the properties. An unwanted but imperative extra cost before sales occurred would have almost definitely saved Defendants money in the long-run, as they now are faced with expensive litigation and potential significant liability at trial.

If fixing the conditions ahead of sales was not feasible, Defendants still should have disclosed all relevant property conditions to the potential buyers.

While it may have been more difficult for Defendants to sell the lots at the prices they wanted had they disclosed all relevant information, Defendants would have avoided what now looks like will be extremely time-consuming and costly litigation as a result of failing to disclose the information.

Barker should serve as a lesson for all real estate developers in Pennsylvania that despite the up-front cost of improving conditions or increased difficulty selling properties if improvement is not economically and/or physically feasible, the benefits to developers of avoiding future costly litigation far outweigh the consequences of paying additional costs before selling properties or having a harder time selling properties after disclosure.

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New Jersey Affordable Housing Saga Continues: COAH's New Regulations

By Henry L. Kent-Smith

On April 30, 2014, the Council on Affordable Housing (COAH) approved proposed Third Round Regulations and authorized the publication of the new regulations in the New Jersey Register in accord with the State Supreme Court's March scheduling Order. The new regulations will be published on June 2, 2014, and the public comment period will expire on or about August 4, 2014. COAH has scheduled a public hearing on Wednesday, July 2, 2014, to receive public comment on the proposed rules.

By way of a brief background, the rules adopted by COAH represent the third attempt by the Council to adopt a constitutional methodology and compliance standards to meet the New Jersey's constitutionally mandated Mount Laurel affordable housing obligation. The prior two attempts each were found to be unconstitutional.

In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing. 215 NJ 578 (2013); *In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J. Super. 1 (App. Div. 2007).

As a result, municipal affordable housing obligations have not been definitively calculated since the expiration of the prior round on June 30, 2000. More than 14 years have elapsed without any constitutional guidelines to determine municipal affordable housing obligations and how those obligations will be satisfied.

The new Third Round rules, however, violate the Supreme Court's prior ruling and are potentially unconstitutional. The Supreme Court's directive was that COAH calculate and allocate affordable housing obligations for the third round following the prior round (1987-1999)

methodology. Instead, COAH has proposed a methodology for calculating the affordable housing obligations that neither follows the prior round methodology, nor adheres to the Supreme Court's prior decisions in this field.

The proposed regulations have generated agreement among municipal, developer, environmental and affordable housing advocates who have all voiced concerns regarding the validity of the methodology used to calculate affordable housing obligations and the effectiveness of the available compliance mechanisms to meet this obligation.

Some of the highlights relative to the proposed rules are the alleged reliance on private market production of affordable units as the primary mechanism to assure production of affordable housing. The proposed rules provide for a mandatory 10 percent affordable housing set aside,

with no minimum density standards. This presumptive 10 percent set aside for all inclusionary developments requires an economic feasibility analysis to support any density bonus for affordable housing set asides greater than 10 percent, or justification for all other requested compensatory benefits. The economic feasibility and compensatory benefit study requires an assessment of capital markets, an assessment of whether “the rate of return is sufficient to attract developers” and the assessment of the development and how it will affect the “character of the community.” However, there are no guidelines as to what is “feasible,” or what is a sufficient rate of return, and these factors have universally been rejected by courts as requirements for establishing inclusionary zoning.

Municipalities are faced with a very difficult problem. The proposed rules eliminate all bonus credits. Coupled with the revocation of regional contribution agreements, the end result is that

affordable housing requirements will be required to be developed within the municipality, and on a unit per credit basis. COAH's rule proposal eliminates rental bonus credits, and substantially increases rehabilitation requirements.

These rules establish a new methodology to calculate third round obligations. This methodology does not follow the 1987-1999 methodology. The methodology reduced affordable housing requirements by a 24,925 unit filtering deduction from overhaul need, the use of certificates of occupancy issued from 2011 to 2013 (the depth of the reception) to project housing activity and development moving forward, and most notably, undertaking a statewide vacant land analysis to reduce the affordable housing obligation based on the alleged lack of available developable land.

Finally, the calculation of development potential for remaining vacant land is calculated based upon the average net density of the municipality. Therefore,

the more exclusionary a municipality, the more it is rewarded by a reduced number of available units through the “realistic development potential” of the remaining land. The regulations contain other flaws as well.

The proposed rules will be published in the New Jersey Register on June 2, 2014. The public comment period commences on June 2 and will expire on or about August 2, 2014. Property owners, developers and affordable housing advocates have this opportunity to weigh in on the proposed regulations and begin to establish a record whereby these regulations can be either modified, or successfully challenged.

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Time To Review Your Pennsylvania Real Estate Assessments

By Robert W. Gundlach, Jr.

If you are the owner of a commercial, industrial, retail, office or other property in Pennsylvania, then now is the time to review your properties' tax assessment against its current market value. This same review is also applicable to your residential properties as well. Today's economy has caused many property owners to experience declining rents, increased vacancy and the need to become “creative” in leasing space. These factors have aided an already declining real estate market in devaluing property for real estate tax purposes.

Unfortunately, county boards of assessments cannot reassess property every year based on the local economy. As a result, the real property taxes assessed against your property by the county board of assessment for county, municipality and school district taxes may be out of proportion to the actual value of your property or the value attributable to your property by capitalizing the income you receive from the property.

What Should You Do If You Think Your Real Estate Taxes Are Too High?

First, you need to determine whether to file an appeal from the county board

of assessment for your property. To do so, you need an experienced real estate assessment attorney and a qualified appraiser.

On commercial and industrial properties, as well as rental residential properties, two calculations often make the determination as to whether or not to appeal. Capitalization of income and comparable sales gives us the ability to make a preliminary determination as to whether a particular tax assessment is out of line.

The capitalization of income approach is the easiest and quickest test to determine the value of your property; whereas comparable sales require more information. Up to date information on costs, square footage, occupancy, types and number of leases, use, location, mortgage amounts and interest rates, rental income and expenses is necessary to complete the capitalization approach. Recent comparable sales within the last year before filing of an appeal should be noted and analyzed. Financing implications must also be taken into account to determine whether the sale is an arm's length sale or was the result

of a mortgage foreclosure or workout agreement. For residential properties, the most reliable determination is of course comparable sales of similar homes within a reasonable distance from the subject property.

With the above in mind, now is the time of year to review your real estate tax assessment on any and all property owned. If the market value utilized by the board of assessment is inconsistent with the market value of your property, or if you have experienced rental income problems over the last few years, then an appeal from your assessment this year may be in order. We can help you make that determination in short order. If an appeal of your assessment appears warranted, we may suggest further analysis by a qualified appraiser. In Pennsylvania, appeals in Bucks, Chester, Delaware, and Montgomery counties need to be filed on or before August 1, 2014. The deadline for filing an appeal in Philadelphia County is October 6, 2014.

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Upcoming Event

Robert W. Gundlach, Jr., M. Joel Bolstein and Kimberly A. Freimuth will be speaking at the 2014 Land Use Institute conference from June 19-20. The conference, sponsored by the Philadelphia Bar Association will be simulcast to audiences in Lebanon, Mechanicsburgh, Montrose, Pittsburgh, West Chester and York counties. The seminar will focus on the challenges in land use planning and will cover:

- Can applicants still win substantive or procedural challenges in light of recent case law?
- State preemption of zoning and other local ordinances
- When it comes to municipal fees, how much is too much?
- *Robinson Township vs. Commonwealth* (Act 13)
- Act 2 approval process
- Obtaining waivers and other relief
- Update on the PennDOT permit process.

To register for the event, or for more information, please visit the [Philadelphia Bar Institute website](#).

Transactions

Robert W. Gundlach, Jr. and Lauren Taylor obtained conditional use approval for a new manufacturing facility,

consisting of approximately 155,000 square feet, in Lower Chichester Township, Delaware County, to manufacture

Marissa A. Crespo and Daniel V. Madrid recently obtained a use variance approval from the City of Trenton Zoning Board of Adjustment in connection with an abandoned three unit apartment dwelling. The use variance granted permits for

a three unit dwelling on one lot, where the City of Trenton Zoning Ordinance and Central West Redevelopment Plan restrict the zoning district to single family attached and detached dwellings.

Robert W. Gundlach, Jr. and Jessica L. Rice, a paralegal with Fox, obtained conditional use approval for Metropolitan Development Group for a new 53 single family home

community in Warrington Township, Bucks County, involving the use of transferable development rights.

The Wilmington office, led by J. Breck Smith, represented the owner of three research and development buildings aggregating approximately 110,000 square feet located

in a suburban New Castle County technology park in a \$10,000,000 mortgage refinancing transaction with a regional lender.

Robert W. Gundlach, Jr. and Nissan Shah obtained site plan approval for Federal Realty Investment Trust to expand

an existing shopping center in Lawrence Township, Mercer County, New Jersey, known as the Mercer Mall.

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