

De Facto Takings in Pennsylvania

By Robert W. Gundlach, Jr.

In the recent case of *Cross v. Solebury Township*, the Bucks County Court of Common Pleas, in Pennsylvania, dismissed an applicant's claim that the enforcement of the Solebury Township Zoning Ordinance resulted in a "defacto" taking of their property. By way of brief background, the applicant owned a parcel of approximately 17 acres of undeveloped, wooded land located along River Road in Solebury Township, Bucks County. The property was located in a residential district, which permitted the use of a property by right for single family homes, but was also located within the Township's flood plain overlay district.

The applicant filed an application for variances from the flood plains restrictions, a wetland buffer requirement and special setback restrictions in order to construct one single family home on the property. The ZHB denied this relief and such denial was then affirmed by the Court of Common Pleas and the Commonwealth Court. While the appeals were pending, given the ZHB's denial of the requested relief in order to construct one single family home on the property, the applicant commenced a defacto taking claim alleging that the Township, by virtue of its enforcement of the zoning regulations at issue, essentially "took" his property and, accordingly, the applicant was entitled to just compensation resulting from the taking.

The Township filed preliminary objections to the application's petition for the appointment of a board review and, after a hearing on the subject, dismissed the taking petition. In analyzing the taking claim, the court noted the following:

There are two different types of condemnations that are classified as regulatory takings. A *de jure* condemnation

is a taking initiated by a regulatory body in full compliance with the regulatory process. A *de facto* condemnation occurs when an entity, clothed with the power of eminent domain, exercises their power and substantially deprives the owner of all beneficial use of their property.

There are two different types of *de facto* takings. The first is a "*Lucas*" taking. This type of taking is rare and occurs when a landowner is deprived of all use of his or her property. The second is a "*Penn Central*" taking. This is the more common type of *de facto* taking. It occurs when a taking falls short of a "*Lucas*" taking but still "goes too far." A "*Penn Central*" taking is one which forces some people to bear public burdens which should be borne by the public as a whole.

A property owner must show three elements in order to establish a *de facto* taking. **First**, the alleged condemnation party must have the authority to condemn. **Second**, there must be proof that there are exceptional circumstances that substantially deprive the property owner of the enjoyment and beneficial use of the property. **Third**, it must be shown that the deprivation is the direct,

necessary and unavoidable result of the exercise of the power to condemn. There is no bright line test to determine whether such a taking has occurred; each case must be decided according to its own facts.

In summary, the court noted that these regulations were valid under the Township's police power and that, if the applicant thought that the regulations "went too far," then the applicant should have challenged the validity of such regulations as part of their application to the ZHB. For further information on this subject, see this author's article dated February, 2003. [In the Zone, February 2003.](#)

In this case, the applicant would have been better served by filing for the requested variances and, in the alternative, challenging the validity of the zoning regulations at issue.

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Supreme Court of Pennsylvania Upholds Grant of Use Variance for Archdiocese of Philadelphia To Convert a Former Elementary School into an Apartment Complex for Low-Income Senior Citizens

By Loren D. Szczesny

In zoning and land use cases, matters involving a request for a use variance are often viewed as being the most difficult cases in which to obtain an approval. However, the Supreme Court of Pennsylvania has recently rendered a decision which may provide a new

opportunity for properties undergoing redevelopment and requesting a use variance.

In the case of *Gloria Marshall v. City of Philadelphia and Zoning Board of Adjustment*, the Archdiocese of Philadelphia proposed to convert a former

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elementary school building into a 63-unit, one-bedroom apartment complex for low income senior citizens. The elementary school was operated by the Archdiocese at the subject property as a legal non-conforming use until the school was closed in 2008 due to declining enrollment and insufficient revenue. In 2009, the Archdiocese received a federal grant of approximately \$11 million from the United States Department of Housing and Urban Development to convert the former school to the proposed senior housing.

In an attempt to proceed with its proposed development, the Archdiocese filed an appeal to the City of Philadelphia Zoning Board of Adjustment for a use variance and for dimensional variances. Before the Zoning Board of Adjustment, the Archdiocese presented testimony establishing that the project constituted an adaptable re-use of the property, that the project had wide community support, and that there was a need for low income senior housing in the area.

At the time of the hearing, there was only one objector, Gloria Marshall. Marshall argued that the Archdiocese failed to show any hardship as required for the grant of a variance and that the Archdiocese was itself creating any hardship by closing down the subject building. Marshall also argued that parking was a problem in the area and that “people” were opposed to Section 8 housing on the block.

Prior to the vote by the Zoning Board of Adjustment, the co-chairperson of the Board, reviewed some of the other uses permitted within the applicable zoning district and concluded that the

other permitted uses would provide more parking and traffic congestion in the neighborhood than the proposed apartment building use. The Zoning Board of Adjustment unanimously voted to approve of the use variance and concluded that the Archdiocese proved the “unique nature” of the property and that the community overwhelmingly supported the project.

Following the decision of the Zoning Board of Adjustment, Marshall filed an appeal to the Court of Common Pleas. Based upon the record before it, the Court of Common Pleas affirmed the decision the Zoning Board of Adjustment. Thereafter, Marshall appealed to the Commonwealth Court arguing that the Archdiocese failed to prove any hardship required for the grant of a variance and failed to prove that parking was sufficient for the development.

Upon its review of the record before it, the Commonwealth Court reversed the decision of the Court of Common Pleas. The Commonwealth Court concluded that the Archdiocese failed to address how the physical characteristics of the subject property prevented the owner from using the property for any one of the other permitted uses in the zoning district. The Court held that the Zoning Board of Adjustment improperly found that a unique hardship existed for the grant of a variance, and the Court held that the grant of a variance was not based upon substantial evidence.

Thereafter, the Archdiocese filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, and the Petition was granted. The issue before the Supreme Court was whether

the Commonwealth Court misapplied the applicable standard of review.

In reviewing the record before it and the relevant case law, the Supreme Court stated that an applicant for a use variance is **not** required to show that a property is valueless without a variance or that a property cannot be used for any permitted purpose. The Court indicated that multiple factors must be taken into account when assessing whether the unnecessary hardship has been established. In the present case, the unnecessary hardship was grounded upon the assertion that the property was non-conforming and could be converted to a conforming use only at prohibitive expense. The Supreme Court held that the Zoning Board of Adjustment acted well within its discretion when concluding that the Archdiocese had established an unnecessary hardship and in granting the use variance to convert the property to low-income senior housing. The Supreme Court concluded that the Commonwealth Court did not rely upon the proper standard for hardship and concluded that the Commonwealth Court erred in substituting its judgment for that of the Zoning Board of Adjustment. The order of the Commonwealth Court was reversed and the order of the Court of Common Pleas affirming the grant of the variance by the Zoning Board of Adjustment was reinstated.

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The Process of Constructing Billboards

By Robert W. Gundlach, Jr.

In the case of *Chester County Outdoor, LLC v. Board of Supervisors of Penn Township*, the Commonwealth Court, in an unreported decision, dismissed a lawsuit filed by the applicant seeking site specific relief to construct billboards in the Township.

By way of brief background, the applicant filed a challenge to the substantive

validity of the Township's Zoning Ordinance with the ZHB alleging that Section 1800.G of the Zoning Ordinance unlawfully excluded billboards. The Township intervened in the challenge and agreed with the applicant's position; thereafter, the ZHB issued a decision and order sustaining the applicant's validity challenge. For reasons not

explained in the opinion, during the proceedings before the ZHB, the applicant withdrew its request for site specific relief and its accompanying plans for billboards. Nevertheless, in its decision, the ZHB held that the applicant would not be entitled to the site specific relief depicted in its application because the plans would not comply

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with various unchallenged sections of the Zoning Ordinance. This ZHB decision was upheld by both the Court of Common Pleas and Commonwealth Court. Thereafter, the applicant filed the instant declaratory judgment action seeking site specific relief. For a host of reasons referenced in the decision, the Commonwealth Court upheld the opinion of the lower court and dismissed the

applicant's attempt to "circumvent" the underlying ZHB process and commence a separate declaratory judgment action for site specific relief.

In summary, this case is a lesson for applicants to first submit a sketch plan application in an attempt to have the Township identify all non-compliant provisions so that the applicant has

the best possible information as to the provisions that need to be challenged. A thorough review by the applicant's engineer and legal counsel is also recommended as well.

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Why You Need Legal Counsel

By Robert W. Gundlach, Jr.

In the case of *Selig v. The Zoning Hearing Board of North Whitehall Township*, the Pennsylvania Commonwealth Court, in an unreported decision, upheld prior case law ruling that a corporation cannot proceed "pro se" or with a non-attorney representing them. In the *Selig* case, Selig attempted to handle a land use appeal in court, without legal counsel, as the sole shareholder and officer of an underlying corporate applicant. The Commonwealth Court confirmed that a corporation cannot take legal action in court except through legal counsel

and that such rule of law holds true even if the corporation only has one shareholder. By implication, this same rule requiring attorneys to represent corporations in court should also apply to limited partnerships and limited liability companies. Similarly, many of the governing bodies and zoning hearing boards in Pennsylvania properly apply this same rule in their administrative proceedings; thus requiring any entities to be represented by licensed legal counsel. In fact, there is a separate body of law that prohibits non-lawyer agents of the

applicant (such as engineers, architects, realtors, etc.) from representing such applicants in administrative proceedings as constituting the unlawful practice of law. In summary, any corporations, limited partnerships and limited liability companies should have legal counsel representing them in all land use proceedings before the municipality and in court.

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Transactions

On behalf of the New Jersey Builders Association, Henry Kent-Smith prepared comments on the recently proposed Third Round Procedural Rules (proposed NJAC 5:98 -1 et seq.) published by the Council on Affordable Housing (COAH)

on June 2, 2014. The Third Round Rules represent COAH's third attempt to promulgate constitutional rules to govern municipal compliance with New Jersey's Mt Laurel affordable housing obligation.

Rob Gundlach represented Metropolitan Development Group to obtain preliminary/final subdivision plan approval for a 53 unit small lot single-family home subdivision in Warrington Township, Bucks County, PA., known as Warrington Springs.

The project involved the use of transferrable development right (TDRs) and approval was obtained to develop the project in three phases.

Rob Gundlach and Kim Freimuth represented Compass Realty Associates to obtain variances for signage for a new Walgreen's drug store. This project involved a pad site in an

existing shopping center in Sinking Springs Borough, Berks County, PA.

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