In the Zone

Fox Rothschild LLP
ATTORNEYS AT LAW

A newsletter of the Real Estate Department and the Zoning and Land Use Practice Group

March 2014

Pennsylvania Environmental Hearing Board Confirms Tolling Under PA Permit Extension Act

By Robert W. Gundlach, Carrie B. Nase-Poust and Kimberly A. Freimuth

In response to the housing slump of 2010, the Pennsylvania state legislature enacted permit extension legislation that sought to provide relief from expiring building-related permits. Act 46 of 2010, and later Act 87 of 2012 and Act 54 of 2013, commonly known as the "Pennsylvania Development Permit Extension Act," 53 P.S. §§ 11703.1 *et seq*. (the "Act"), suspended the expiration date for various building and land development approvals until July 2, 2016. This permit extension legislation offered a respite for developers and lending institutions, which feared that the investments made to obtain necessary approvals would be lost as the housing market continued to stall and their approvals lapsed.

Specifically, the Act provides for an automatic suspension of certain approvals as follows:

The expiration date of an approval by a government agency that is granted for or in effect during the extension period, whether obtained before or after the beginning of the extension period, shall be automatically suspended during the extension period.

The "extension period" is defined as the "period beginning after December 31, 2008, and ending before July 2, 2016." The term "approval" is very broadly defined in the Act as "any government agency approval, agreement, permit, including a building permit or construction permit, or other authorization or decision (a) allowing a development or construction project to proceed; or (b) relating to or affecting development, granted pursuant to a statute, regulation or ordinance adopted by a municipality…"

In addition, the Act provides that any holder or recipient of an approval may seek written verification from the issuing government agency for any of the following: (1) the existence of a valid approval; and/or (2) the expiration date of the approval under the new legislation. The request must state the approval in question and provide the anticipated expiration date in light of the extension period. Upon receipt of a request, the government agency has 30 days within which to affirm or deny the existence of the approval, its expiration date and any issues associated with its validity. If the agency fails to respond within 30 days, the approval that was the subject of the request, as well as the anticipated expiration date, shall be deemed affirmed. The agency may charge a fee of not more than $100 for a residential approval request and $500 for a commercial approval request. The failure of the holder of an approval to seek verification from a government agency shall not be grounds for termination, revocation or other invalidation of an approval.

The issue of whether the Act serves to "toll" the life of the permit as of the start of the extension period, which would allow the remaining life to be tacked on to the end of the extension period, or whether the Act serves to simply extend all permits until the expiration of the extension period, has been long debated since the Act was originally adopted. In a recent decision in the case of *Limerick Partners I, LP v. PA Dep't of Environ. Protection*, the Pennsylvania Environmental Hearing Board (PAEHB) confirmed that the Act does serve to "toll" the life of environmental permits.

In that case, the Pennsylvania Department of Environmental Protection (PADEP) had issued a water obstruction and encroachment permit to a developer in early 2009, prior to the original enactment of the Act. The permit had a three-year term. Both the developer and PADEP agreed that the permit was an "approval" to which the Act applied, but the parties disputed how to calculate the extension of the permit. PADEP argued that permits were only extended during the extension period and not beyond, arguing that all permits would expire on July 2, 2016, while the developer argued that the permit life was suspended during the extension period and at the expiration of the extension period, the entire three-year life of the permit would begin to run.

The PAEHB disagreed with both parties' analyses, finding there was a middle ground to the two extremes offered by each of the parties. Specifically, the PAEHB relied on the fact that the Act provides for a verification procedure for the expiration date of a permit or approval. Thus, the PAEHB found, there would be no reason for such a verification procedure if all permits and approvals expired on July 2, 2016, as argued by PADEP. Rather, the PAEHB held that the Act served to suspend the expiration date of the permit during the extension period, thereby allowing any remaining permit life to be tacked onto the end of the extension period, thus validating the need for a verification procedure.

In making its decision, the PAEHB relied on two prior Pennsylvania Court of Common Pleas decisions, *In Re: Appeal of Keystone Custom Homes. Inc.*, Lancaster Co. Court of Common Pleas No. CI-10-03933 (October 22, 2010), and *Logan Greens Comm. Assoc., Inc. v. Church Reserve, LLC*, York Co. Court

In This Issue:

of Common Pleas No. 2011-SU-794-93 (July 20, 2012), both of which resulted in similar holdings allowing for remaining permit and approval life to be tacked onto the end of the extension period.

The *Logan Greens* case, however, involved the conversion of convertible real estate within a planned community. A few weeks after the PAEHB issued its decision, the Pennsylvania Commonwealth Court decided the *Logan Greens* case in an unreported decision (2013 WL 5302578), holding that the Act does not apply to flexible communities. Although the Pennsylvania Commonwealth Court determined in that case that the Act specifically suspends the expiration date of a "government agency approval", the Court held that the Act did not apply since the right to add additional real estate, convert convertible real estate and withdraw withdrawable real estate are permitted under the Pennsylvania Uniform Planned Community Act (PUPCA) and the Pennsylvania Uniform Condominium Act (PUCA) without the need to obtain governmental approval.

Even though the Commonwealth Court held that the Act does not apply to flexible communities, the time limit to add additional real estate, convert convertible real estate and withdraw withdrawable real estate has been extended under the PUPCA and PUCA. Both statutes have recently been amended to extend the time limit not to exceed the later of:

- Ten years after the recording of the declaration; or
- In the case of a preliminary plat calling for the installation of improvements in sections, 120 days after municipal approval or denial of each particular section's final plat that was filed prior to the deadline approved or modified by the municipal governing body pursuant to Section 508(4)(v) of the [Pennsylvania Municipalities Planning Code], or, in the event of an appeal from the municipal approval or denial of such final plat, 120 days after a final judgment on appeal.

As such, the legislature has handled the necessary extensions under the PUPCA and the PUCA. However, both the Commonwealth Court's and the PAEHB's recent decisions have provided clear interpretations of the Act to support the argument that any remaining permit or approval life is to be tacked onto the end of the extension period. This is certainly a welcome decision for developers, builders and land owners.

Authors

Robert W. Gundlach, Jr.
215.918.3636
rgundlach@foxrothschild.com

Carrie B. Nase-Poust
215.299.2030
cnase-poust@foxrothschild.com

Kimberly A. Freimuth
215.918.3627
kfreimuth@foxrothschild.com

Proposed Legislation in Delaware

By Michael J. Isaacs

Summary Proceedings for Possession

Legislation has been proposed to extend jurisdiction of the Justice of the Peace Court (JP Court) in summary proceeding for possession. Currently, landlords, who seek possession in the JP Court, and seek judgment in excess of $15,000, must file a separate action in the Court of Common Pleas or Superior Court to obtain a dollar damage judgment.

The Family Financial Protection Act (HB 230)

An Act to amend Title 6 of the Delaware Code relating to consumer protection, the Family Financial Protection Act (FFPA) has been proposed to, among other things, address credit card collection activities and protect consumer debtors. The proposed Bill defines "Consumer debt," to include . . . "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."

The Bill addresses Consumer Form contracts and specifies provisions which may not be included in such contracts including Confession of Judgment clauses.

Critics of the legislation feel that the Bill tries to do too many things and casts too wide a net. The Bill, as currently drafted, may include areas of the law in Delaware that may not have been intended to be covered, including foreclosure practice.

Statute of Limitation Involving Surveys (HB 115)

House Bill 115 provides that any action seeking damages as a result of an error or omission in a survey of land or survey product must be brought within six years of the date of the survey or within three years after discovery of the error, whichever occurs first. Also, actions for damages, based upon gross negligence are not subject to this section. This Bill has not yet come to a vote.

All three Bills are being reviewed by various sections of the Delaware Bar.

Author

Michael J. Isaacs
302.622.4213
misaacs@foxrothschild.com

When Is Contributing to a Remediation Unconstitutional?

By Philip L. Hinerman

It is not uncommon for many agencies to request that applicants for environmental permits accept conditions to those permits such as payment of money for site remediation. When the agency goes too far, the actions may be unconstitutional.

This issue was addressed in the United States Supreme Court in *Koontz v. St. John's River Water Management District.* In *Koontz*, an applicant for a permit to develop on wetlands declined to pay money for outside remediation as demanded by the regulatory agency. He challenged the constitutionality of the agency's demands under the 5th Amendment constitutional right to just compensation.

In a 5 to 4 decision by Justice Samuel Alito, the Supreme Court ruled that there are restrictions on what a government can demand in its approval of land use, regardless of whether it is a request for a permit or the condemnation of property. When an agency demands payments as a condition to the granting of a permit, the agency must show that there is a nexus in what it has requested and what the permit grants. This nexus must be roughly proportional to what the permit requests. The government agency demands cannot outstrip the effects of the proposed land use.

Coy Koontz, an owner of land in the Florida wetlands, wished to develop a portion of the wetlands that he owned. He offered the St. John's River Water Management District a substantial conservation easement in his application. The District rejected that offer and stated that, in exchange for the permit, the District must either receive a larger conservation easement or Koontz must pay for the remediation of nearby land owned by the District.

The Florida Supreme Court ruled in favor of the District and stated that a request for money payments in exchange for a permit was not the taking of a particular property interest. The United States Supreme Court reversed the Florida court.

The Court, in Justice Alito's opinion, discussed the "Unconstitutional Conditions Doctrine" which prohibits the government from coercing people into giving up constitutional rights. The Court extended prior precedent regarding the taking of property to the extraction of cash payments. The Court determined that, in requiring payment for the District's remediation project, the District had, in effect, unconstitutionally "taken" property without "just compensation." The Court found that the "government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." Here, the District was pursuing a governmental end that did not have a central nexus to the impacts for which a permit was sought.

Although this is a close decision, it does raise the specter of additional litigation where, as a permit condition, some monetary payment has to be made. This could place courts in the position where lines must be drawn over whether or not a payment request has an "essential nexus" to the permit application.

Author

Philip L. Hinerman
215.299.2066
phinerman@foxrothschild.com

Fixing Rent Under a Lease Option

By Melvyn J. Tarnopol

A recent case, *Cablevision of Oakland, LLC v. CK Bergen Holdings, LLC*, Superior Court (Appellate Division) (2014 WL 923226), shows that an arbitration provision in a lease to establish rent for an option term, can be enforced, notwithstanding obstacles imposed by one of the parties.

CK Bergen Holdings, LLC, as landlord, and Cablevision of Oakland, LLC, as tenant, were parties into a lease that provided for rent during an extension term to be based on the then fair market value of the premises. The lease provided that each of the landlord and tenant would appoint an appraiser who, if they could not agree as to fair market rent, would appoint a third appraiser to determine fair market rent.

The tenant's appraiser opined that the fair market rent was $12.00 per square foot, while the landlord's appraiser opined that the fair market rent was $25.00 per square foot. Not only could the two appraisers not agree on the rent, but they also could not agree on the appointment of a third appraiser. Since the lease also provided that if the two appraisers could not agree on a third appraiser, a court could appoint the third appraiser, which is what happened.

In due course, the third appraiser opined that the fair market rent was $11.00 per square foot. Since the lease provided that the third appraiser's decision would be final, that would have seemed to end the matter. However, the landlord, obviously frustrated by not getting a rent anywhere close to what it had demanded, filed an appeal, challenging the validity of the third appraiser's determination of fair market rent.

The landlord's arguments on appeal, attacking the methodology of the third appraiser, were less than persuasive.

The lease provided that the area to be used by the appraisers for establishing their comparables, was to be within a 20 mile radius of the premises, and then listed nine towns within that radius, that could be included for purposes of the appraisals. The landlord argued that the reference to the nine towns meant that there needed to be in the third appraisal a comparable from each of the nine towns. However, since the landlord's

appraiser's report included only two of the nine towns, this argument bore little weight. Additionally, the reference in the lease provided that the comparables were to be within an area "including but not limited to" the nine towns. The Court was not persuaded that this reference would require a comparable from each of the nine towns. Although the Court termed this argument by the landlord as "creative," the Court was not persuaded.

The second argument that the landlord used was that the third appraiser should have taken into account the brokerage costs that would be incurred by the landlord in computing fair market rent. However, since the landlord's appraiser, in its appraisal, stated that no brokerage commissions were payable, the Court held that the third appraiser was entitled to rely on this, especially since the landlord's counsel did not provide any information relating to any brokerage commission to the third appraiser.

The Court stated that a review of a business valuation appraiser is afforded the same finality as an arbitrator's decision. Thus, it is reviewed only for fraud, corruption, or similar wrongdoing. Since the lease provided that the third appraiser's decision would be final, there was no grounds to overturn that decision.

So, finally, the tenant prevailed despite the landlord's efforts to establish a higher rental. This case confirms that appraisal provisions in leases remain enforceable, although they may not protect a party from the cost and time of litigation to enforce them.

Author

Melvyn J. Tarnopol
609.572.2212
mtarnopol@foxrothschild.com

New Jersey Supreme Court Vacates COAH Order

By Henry L. Kent-Smith and Thomas Daniel McCloskey

One week following the Appellate Division's Order mandating that the Council on Affordable Housing (COAH) undertake immediate action to implement the state Supreme Court's prior directive that COAH adopt new regulations within five months from September 26, 2013 (see Alert, March 10, 2014), the Supreme Court overruled the Appellate Division.

The Supreme Court has now required that COAH adopt proposed regulations for publication no later than May 1, 2014. The court has directed that COAH's proposed regulations be published in the New Jersey Register on June 2, 2014. The comment period on those regulations will last 60 days, to August 1, 2014. During the period of public comment, a party may request that COAH conduct a public hearing on the proposed regulations during the comment period. Regardless of the hearing, COAH is to formally adopt its new Third Round Rules on or before October 22, 2014, for publication in the New Jersey Register on November 17, 2014. The adopted Third Round Rules transmitted to the Office of Administrative Law (OAL) shall be accompanied by a report prepared by COAH that recites, addresses and summarizes how COAH responded to all comments made during the comment period in accordance with the Administrative Procedure Act.

In the event that COAH fails to meet the November 17, 2014, deadline, "then this Court will entertain applications for relief in the form of a motion in aid of litigant's rights, including but not limited to a request to lift the protection provided to municipalities through N.J.S.A. 52:27D-313 and, if such a request is granted, actions may be commenced on a case-by-case basis before the Law Division or in the form of 'builders remedy' challenges." The Supreme Court directed that it would retain jurisdiction for the sole purpose of entertaining any and all future applications to enforce the scheduling order entered by the Ccurt on March 14.

The Supreme Court has now provided COAH with a new eight-month time frame within which to adopt conforming regulations, notwithstanding the court's unambiguous September 26, 2013, Order directing COAH to adopt new regulations within five months from the date of that Order (i.e., February 26, 2014). This extension of time was based on a last-minute request made by the Attorney General's Office on behalf of COAH for an extension, based on the DCA Commissioner's statement that COAH is examining the census data and working on new numbers, when the prior round regulations and formula already exist. See N.J.A.C.5:91 and 5:92.

It appears the Supreme Court has abandoned fundamental concepts of stare decisis and prior precedents established in Mount Laurel I, Mount Laurel II and Hills Development. By this decision, the Supreme Court has diminished hope that New Jersey citizens will see the creation of affordable housing in New Jersey in any foreseeable future. Instead, the court's Order sanctions the ongoing municipal practice of exclusionary zoning, which consumes ever-diminishing land assets and limited infrastructure, limiting affordable housing opportunity in New Jersey.

One last issue: COAH has never been fully reconstituted to its full complement of required stakeholder members since the Appellate Division invalidated the governor's prior attempt to abolish COAH by the governor's 2011 Reorganization Plan. (see In The Zone, March, 2012) Therefore, a stripped-down COAH Board, without representatives of the protected class and builders, will be adopting the new Third Round regulations.

Authors

Henry L. Kent-Smith
609.896.4584
hkent-smith@foxrothschild.com

Thomas Daniel McCloskey
609.896.4578
tmccloskey@foxrothschild.com

New Legislative Session Spurs More Economic Growth Legislation in the Garden State

By Jeffrey M. Hall

As last reported in the December, 2013 issue of *In The Zone*, legislators attempted to guide through the legislative process Bill Nos. A4501 and S3030 which were coined the "New Jersey Economic Opportunity Act II of 2013." Act II was intended to build on the New Jersey Economic Opportunity Act of 2013 (NJEOA) signed into law last September. Full legislative support could not be generated during the Legislature's lame-duck session and that effort died with the expiration of the legislative term. In the new legislative term, the past efforts have been renewed in bills known as Economic Opportunity Act of 2014, Part I and Economic Opportunity Act of 2014, Part III (S928 and S1551, respectively). For the most part, these bills represent legislative tweaking of the NJEOA, and thus have modest but important goals.

As of this writing, the Economic Opportunity Act of 2014, Part II, has not been dropped, but it is anticipated to be introduced at some point in the not too distant future.

Part I seeks to plug some existing gaps in the existing law. Under the Urban Transit Hub Tax Credit Act, certain municipalities could choose whether there should be affordable housing set asides. Under NJEOA, that exception was not continued. Section 1 of S928 plugs the gap and authorizes the exception to the 20 percent affordable housing set aside requirement under the ERGG Program. Sections 2 and 3 of the Bill further amend the ERGG Program to authorize an additional $250,000,000 of tax credits. It is the intention of the legislation that these credits will be used exclusively for the redevelopment or rehabilitation of support, special needs, very low income, low income or moderate income housing. However, 100 percent of the housing units must be reserved for affordable housing. Further, $50,000,000 of the credits are to be used for projects that will have 25-100 housing units. Finally, the New Jersey Housing and Mortgage Finance Agency is directed to manage the program in consultation with the New Jersey Economic Development Authority. There is also a technical correction extending the deadline to July 28, 2018 from 2015 and displaced residents in certain areas impacted and distressed by Hurricane Sandy, are given a limited right of first refusal to qualified residential housing.

Part III makes an effort to make the market for tax credit transfer certificates more liquid. It proposes to reduce the minimum amount of the certificates that can be transferred from $100,000 to $25,000. The Bill also proposes several changes to the "Grow New Jersey Assistance Act" ostensibly to better reflect the marketplace. It:

1. Alters the meaning of full time employment in a supermarket or similar retail industry to conform to custom or practice in the industry;
2. Includes a construction project as a qualified business facility as defined by the NJEOA;
3. Modifies the "net positive benefit test" to require a business to demonstrate that the capital investment will benefit the State **and** the host municipality;
4. Proposes changes to encourage non-profit corporations to undertake projects by permitting a non-profit to apply for a "unified project" in which several businesses that would not otherwise qualify can participate;
5. Proposes to allocate tax credits to shareholders of New Jersey S corporations, and their "qualified sub-chapter S subsidiaries", if the project is in a "Garden State Zone;"
6. Mitigates the law's harshness where businesses that must shed jobs by allowing a pro rata reduction of credits rather than forfeiture;
7. Permits supplementary tax credits if the business exceeds the targets for creating and retaining jobs; and
8. Makes, finally, a number of technical changes, one of which is to extend the deadline for the qualified residential project developer's receipt of a temporary certificate of occupancy to July 28, 2018 from 2015.

One of the primary sponsors of this legislation is Raymond Lesniak. As of this writing, it remains an open question whether he can garner support for passage of these amendments to the NJEOA.

Author

Jeffrey M. Hall
609.895.6755
jhall@foxrothschild.com

What Landlords, Franchisees and Franchisors Should Know About Franchising

By John R. Gotaskie, Jr.

Successful franchisors spend considerable time and resources helping their franchisees select what they anticipate will be successful locations based on a variety of factors such as demographics, road access, parking and household income in the local area.

In a recent podcast, John Gotaskie highlights the protective mechanisms that successful franchisors often put into place to protect their investment of time and resources related to their franchise's sites.

To listen to the podcast, please click here.

Author

John R. Gotaskie, Jr.
412.394.5528
jgotaskie@foxrothschild.com

Transactions

Brian J. Levin represented the landlord at 1818 Market St., Philadelphia, PA, in connection with the approximately 100,000 square foot Beneficial Bank lease, to which Beneficial relocated its corporate headquarters to 1818 Market.

Brain J. Levin also represented the receiver (as landlord) in connection with a 40,000 square foot expansion for the 801 Market Street building's largest tenant, located in Philadelphia, PA. In addition to negotiating the lease amendment, he also filed and obtained a Court Order authorizing the client to sign lease documents on behalf of the former landlord.

Jeffrey M. Herskowitz and Elizabeth J. Hampton successfully resolved a real estate tax appeal for a subsidized apartment complex in St. Joseph County, Indiana. They were successful in reducing the assessment from $15,292,090 to $6,082,090. This reduction in the assessment of $9,210,010 equated to a tax savings for the client in the amount of $244,900.

Carrie B. Nase-Poust represented BET Investments in the Municipality of Norristown, PA, in obtaining final land development approval to expand anexisting apartment complex known as Curren Terrace. Curren Terrace is located on New Hope Street in the Municipality of Norristown. BET Investments is proposing to construct two additional buildings, containing a total of 36 residential units and a clubhouse, as well as an outdoor pool, parking and stormwater improvements.

Carrie B. Nase-Poust represented Hallman Retirement Neighbors in Lower Pottsgrove Township, PA, in obtaining preliminary/final subdivision approval to subdivide a property into three lots.

Fox Rothschild LLP
ATTORNEYS AT LAW