In the Zone

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Lease Defaults and Landlord Remedies: Monetary Damages

By Michael J. Kornacki

This will be the first in a three-part series discussing landlord remedies for tenant lease defaults. This installment will address the landlord's right to collect monetary damages.

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As a business transaction, a lease is a fairly simple arrangement — the landlord leases space to the tenant in exchange for rent. When the tenant defaults, the rent usually stops. In that scenario, the question for the landlord is equally simple — how does the landlord get paid? This article will explore the provisions a lease should contain in order to ensure that the landlord gets the damages he/she is entitled when the tenant defaults.

The most basic damages are fairly obvious. The landlord is entitled to be paid the amounts that have accrued. This means that base rent, as well as any payments to be made on account of taxes, operating expenses or similar charges that are due and payable but unpaid, may be collected by the landlord.

What the lease should say about rent and other charges for the balance of the term is a more complex question. Absent any provision to the contrary, a landlord would be entitled to collect rent and any additional charges that accrue under the lease as those amounts become due. This can be unwieldy as a remedy, and most landlords would prefer to be able to collect the balance of the rent and other charges owed under the lease for the remainder of the term all at once. As a result, most landlords attempt to negotiate a "rent acceleration" clause in their leases. This permits the landlord to declare that all amounts due under the lease for the balance of the term are due and payable immediately upon the occurrence of a default under the lease.

Tenants often try to eliminate rent acceleration clauses or at least mitigate their effects. Rent acceleration clauses can take a number of forms, giving the tenants "credit" for the fact that the landlord will likely have possession of the premises and for the fact that the landlord will be paid the rent all at once as opposed to over time. For example, rent acceleration clauses often provide that the amount to be accelerated is not the full amount of the rent and other charges coming due under the lease, but rather that full amount less the "fair rental value" of the premises for the balance of the term. While this may be objectively more fair (insofar as the landlord does not gain a windfall by re-letting the premises while still getting the full rental from the defaulting tenant for the balance of the term), determining what the "fair rental value" of the premises is can be difficult. In addition, rent acceleration clauses will often provide that the accelerated rent (whether reduced by the fair rental value of the premises or not) will be reduced to "present value" by discounting the aggregate amount by a percentage (since dollars paid now are worth more than dollars paid in the future).

Leases often provide for alternate remedies. In lieu of accelerating the rent for the balance of the term, leases will often provide that the landlord can elect to keep collecting the rent and other charges as they become due, while giving the landlord possession of the premises and allowing it to re-let the premises to another tenant. These clauses will often provide that the defaulted tenant will then only be liable for the difference between the rent and other amounts it owes under his/her lease, and the rent and other

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charges actually collected by the landlord from any new tenant to whom it rents the property. Essentially, it is as if the landlord is leasing the premises on behalf of the tenant (however, if the landlord were to rent the property for more than the rent that the defaulted tenant was to pay, the tenant would obviously not get the benefit of that additional rent).

In addition to the accrued and unaccrued rent and other charges owed to the landlord under the lease, the landlord can also suffer additional damages as a result of the tenant default. Accordingly, leases should provide that the landlord is entitled to collect from the defaulted tenant the costs incurred by the landlord in obtaining possession of the premises and re-letting the premises to a third party. These can include attorneys' fees, brokerage commissions, tenant improvement costs and similar charges that the landlord would not have incurred but for the tenant's default.

From a business perspective, it is important that the landlord make certain the tenant is credit-worthy. Obtaining a monetary judgment against an entity with no money is of little value. If the tenant itself is not credit-worthy, a landlord should get a guaranty of the lease obligations from an entity or person that has money or assets. A properly written guaranty will make the guarantor directly liable for the obligations of the tenant under the lease (not as a "backstop" in the event the money cannot be collected from the tenant, but as a co-obligor with the tenant). The landlord then has the right to collect its damages from the guarantor as well as from the tenant.

Finally, it should be noted that in some states, such as Pennsylvania, commercial leases can contain "confessions of judgment" for monetary damages. This permits the landlord, upon the occurrence of a default, to go to court and obtain an actual judgment against the tenant for the amount of damages the landlord is permitted to collect under the lease. This gives the landlord a judgment for monetary damages without having to go through a trial. This remedy is only available in certain states and must be properly drafted in order to be enforceable.

It is time well spent making certain that leases and guaranties are properly drafted. Properly written documents give a landlord the ability to collect the full amount of monetary damages to which they are entitled in the event of a tenant default.

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Please click here to see the linked notice that has recently been published by the PA Department of Revenue concerning the common level ratio in Philadelphia.

New Castle County Reinterprets the Realty Transfer Tax Statute

By Michael J. Isaacs

New Castle County, Del. recently announced a change in its interpretation of the realty transfer tax statute. The county has determined that where either the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Company (Freddie Mac) is the seller or buyer, the transaction is ineligible for a governmental exemption from realty transfer tax. This change is effective June 14, 2012.

Until very recently, transactions involving Fannie Mae and Freddie Mac have been exempt from transfer tax in Delaware. This exemption includes the state and each of its counties. 30 Del. C. § 5401 lists the specific transactions that are exempt from the state transfer tax. The state collects one and a half percent of the purchase price or fair market value of the property, whichever is greater. Chapter 14, Article 10 of the New Castle County Code regulates the payment of the New Castle County transfer tax. The county also receives one and a half percent of the purchase price or fair market value of the property.

Traditionally, transactions involving the government have been exempt from transfer tax. This includes deeds to or from the government or any governmental entity. Obviously this is a very broad exemption.

As of now, it is unclear if the state's two other counties will follow suit or if the state will take the same position, but we will keep you posted.

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Is Leased Real Estate Where the Improvements are Owned by Lessee an Object of Taxation To be Valued for Purposes of Taxation Under the General County Assessment Law?

By Herbert K. Sudfeld

In the case of *Tech One Associates v. Board of Property Assessment Appeals and Review of Allegheny County, et al*. No. 32 WAP 2010, argued April 13, 2011 and decided April 25, 2012, the Supreme Court of Pennsylvania ruled on an appeal concerning the validity of a single unified assessment of land and the buildings of a shopping center, movie theater and restaurant located on the land, where the land is owned by one business entity and the buildings and surrounding improvements were constructed by a second business entity under a long term lease.

The Appellant purchased the land in the 1980s. In 1989, Appellant entered into a 50-year lease with lessee who constructed the buildings in the early 1990s.

Lessee pays $665,000 in rent per year plus all real estate taxes. The Board of Assessment assessed total values of land, buildings and improvements at $30,984,000 in 2001 and $32,477,300 for years 2002 through 2005. The Appellant appealed these valuations.

Initially, a Board of Viewers reduced the assessment to a valuation based solely upon the capitalization of rent received under the lease or a leased fee interest in the land and only that interest.

The Allegheny County Court of Common Pleas set aside that report and entered an order assessing market value of the entire parcel comprising both land and buildings.

Appellant appealed to the Commonwealth Court, which affirmed the lower court opinion in a divided *en banc* decision. There, the court addressed the central contention "that the leasehold improvements were not taxable real estate under The General County Assessment Law." The court looked at Section 402(a) of the General County Assessment Law, which obligates assessors to value "all objects of taxation." The court explained that "objects of taxation" are defined by Section 201(a) of the General County Assessment Law as "all real estate which includes buildings, lands…and all other real estate not exempt by law from taxation." The court also upheld the lower court finding that excluding real property from taxation that was built and owned by a lessee pursuant to a long term lease, and not by the owner of the underlying land, would violate the Uniformity Clause of the Pennsylvania Constitution. Thus, the court determined that because the land and buildings are objects of taxation, there is an insufficient basis to tax them differently just because different parties own them. To adopt a different class of buildings (those that are leased) and that are exempt from taxation, would violate Article 8, Section 2 of the Pennsylvania Constitution, said the court.

Judge McGinley dissented on the basis of *In Re: Appeal of Marple Springfield Center, Inc*. 530 Pa. 122, 607 A.2d 708 (1992) *(Marple Springfield I)* stating that "since a property is only worth what an investor-buyer could earn from it, a property encumbered by a long term lease with a fixed rent must be valued based on the income it will yield to a purchaser." In Judge McGinley's view, the economic reality of a long-term lease meant that a prospective buyer would be limited by its terms to receiving as income from the property only the fixed rent, so any valuation of the property must reflect that limitation.

The Supreme Court granted allowance of appeal to determine whether for real estate tax purposes the "economic reality test" announced in *Marple Springfield I* applies to establish the fair market value of an improved property encumbered with a long term lease that grants the lessee ownership of buildings and other improvements on the land. Further, the court considered whether the Uniformity Clause of the Pennsylvania Constitution requires an improved property encumbered with a long-term lease that grants the lessee ownership of buildings and other improvements on the land, to be taxed in the same manner as a similar, but unencumbered property.

The court determined that the mere fact that the shopping center buildings and other improvements to the land in the instant matter as owned by lessee as leasehold interests does not alter the fact that they are particular types of real estate enumerated in Section 201(a) of the General County Assessment Law and thus are proper subjects of taxation.

The court then considered whether the market value of the real estate including the buildings and improvements was property determined by the lower courts. The court noted that the property assessment procedure is to value the property as a whole. The term actual value as used in Section 402 means "market value." Market value is a "price which a purchaser, willing but not obligated to buy, would pay an owner willing, but not obligated to sell, taking into consideration all uses for which the property is adapted and might in reason be applied." The court reasoned that the property as a whole in this case included the real estate comprising the tax parcel at issue along with the buildings and improvements which Allegheny County was required to ascertain for assessment purposes. Noting that in *Marple Springfield I*, the court did not suggest that in valuing taxable real property as a whole, the value of any portion that is owned as a leasehold interest could be disregarded. The court held that all of the real estate owned, including the leased fee and the leasehold interests, must be valued for tax assessment purposes; and in valuing the leased fee, an expert appraiser must consider the impact of the ownership division and rent restrictions created by the lease on the Appellant's ability to sell the land and in capitalizing the value of the income stream that an owner of the land could expect to receive. The court did not address the second issue on the Uniformity Clause since the court concluded that neither Section 201(a) nor 402 of the General County Assessment Law nor the previous decision in *Marple Springfield I* permits real estate to be classified differently for purposes of taxation based on the matter for which it is owned.

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PaDEP Publishes New E&S Manual

By Robert W. Gundlach, Jr.

On March 31, 2012, the Pennsylvania Department of Environmental Protection (PaDEP) published the final new Erosion and Sediment Pollution Control Program Manual. Final publication had been long anticipated by contractors and design professionals active in earth disturbance activities. Notable design guidance changes within the new manual may alter the approach to land development projects in the Commonwealth and how county conservation districts respond to project submissions.

The purpose of the new guidance manual is designed to inform those engaged in earth disturbance activities and in the preparation of E&S plans how to comply with regulations found in 25 Pa. Code Chapter 102. The manual lists various new Best Management Practices (BMPs) and design standards that are acceptable in Pennsylvania. BMPs, when designed according to these standards, and properly implemented and maintained, are expected to achieve the regulatory standard of minimizing the potential for accelerated erosion and sedimentation, and at the same time to protect, maintain, reclaim and restore water quality and existing and designated uses of surface waters.

Title 25 Pa. Code Chapter 102.4 (b) requires the "implementation and maintenance of E&S BMPs" to minimize the potential for accelerated erosion and sedimentation, including those activities that disturb less than 5,000 square feet (464.5 square meters)." It also requires that "a person proposing earth disturbance activities shall develop and implement a written E&S Plan under this chapter if one or more of the following criteria apply [102.4(b)(2)]:

1. The earth disturbance activity will result in a total earth disturbance of 5,000 square feet (464.5 square meters) or more;
2. The person proposing the earth disturbance activities is required to develop an E&S Plan under this chapter or under other PaDEP regulations; or
3. The earth disturbance activity, because of its proximity to existing drainage features or patterns, has the potential to discharge to a water classified as a High Quality or Exceptional Value water under Chapter 93 (relating to water quality standards)."

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PA Superior Court Upholds Personal Liability Judgment Against Homebuilder

By Kimberly A. Freimuth

In an opinion filed on March 6, 2012, the Pennsylvania Superior Court decided the appeal of *Bennett, et al. v. A. T. Masterpiece Homes, et al.*, No. 1302 MDA 2011. At issue in *Bennett* was whether a homebuilder could be found personally liable for breach of contract, breach of warranty and violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL) resulting from defective construction work.

The Bennetts & the Hoefferles contracted with A.T. Masterpiece Homes for the construction of their respective residences in a York County, Pa. development. During construction of the homes, both couples noticed numerous building deficiencies. One of the named defendants was the managing member of A.T. Masterpiece Homes, who was the couples' primary contact during the construction process. He specifically and directly assured the couples regarding the quality of the work on their homes, often in the form of personal guarantees. Once construction finished, the Bennetts and the Hoefferles discovered their newly constructed homes were in various states of disrepair and structural failure.

At the lower court, the jury found A.T. Masterpiece and the managing member individually liable for breach of contract, breach of warranty and violations of the UTPCPL. Further, the jury concluded that the managing member's representations and guarantees regarding the homes exposed him to personal liability. The case then moved to the damages phase, where the jury found the managing member liable to the Hoefferles for $26,000 and to the Bennetts for $85,000. The court doubled the damages, pursuant to the UTPCPL and assessed counsel fees of $3,250. As a result, the total judgment against the managing member was $173,250 for the Bennetts and $55,250 for the Hoefferles.

The managing member argued he should be shielded from personal liability because he was at all times acting only as an agent on behalf of a limited liability corporation, A.T. Masterpiece, and that any statements attributed to him (such as "I will take care of it" or "I guarantee it") were simply figures of speech and did not amount to an express assumption of personal liability.

Nevertheless, the court found that a person acting as an agent may assume personal liability on a corporate contract where he executes a contract in his own name or voluntarily undertakes a personal responsibility. Although the couples officially contracted with A.T. Masterpiece, the managing member voluntarily assumed personal liability on the building contract when he guaranteed the final quality of the home. His statements were intended to calm fears about the building deficiencies and reasonably led the couples to believe he would personally ensure the completed home was built properly.

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Legislative Update in Pennsylvania

By David H. Comer

You may recall that I previously wrote about House Bill No. 1702, which proposed to reenact and amend what is commonly referred to as the Borough Code as the code was in substantially the same form since 1966. I wanted to update the status of House Bill No. 1702, as it was approved by Gov. Corbett on May 17, 2012, as Act 43. The revised Borough Code will take effect in 60 days from the date it was approved.

By way of background, according to an executive summary on the proposed revisions to the Borough Code, the Pennsylvania General Assembly Local Government Commission (Local Government Commission) wrote that the proposed legislation "seeks to modernize and recodify the Borough Code," which it added is "an effort that has not been attempted in the last 45 years." The Local Government Commission provided that since 2003, the Borough Code Revision Committee that was established by the Pennsylvania State Association of Boroughs has reviewed the Borough Code in order to, among other things, remove obsolete provisions, consolidate common subjects and incorporate pertinent and updated language.

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Attempt to Restore the Opt-out Provision in Lead Paint Rules

By Carrie B. Nase

On June 7, 2012, Reps. John Sullivan (R-OK) and Tim Murphy (R-PA) introduced H.R. 5911, the Lead Exposure Reduction Amendments Act of 2012. The Sullivan/Murphy bill would provide a much-needed legislative fix to EPA's Lead Renovation, Repair and Painting Rule (LRRP).

Among the notable provisions, it forces EPA to restore the "Opt-Out Provision," which would allow homeowners without small children or pregnant women residing in the home to decide whether to require LRRP, and it would lower compliance cost with the rule by $336 million. The legislation would also suspend the rule if EPA cannot approve one or more commercially available test kits that meet the regulation's requirements. Oklahoma Senator Jim Inhofe previously introduced companion legislation in the U.S. Senate (S 2148). The bill is supported by a strong coalition of home builders, contractors and remodelers who are struggling to comply with the rule.

EPA's April 22, 2010, final Opt-Out Rule eliminated the "opt-out" provision in the final Renovation, Repair and Painting Rule (issued in 2008) that had exempted a renovation firm from the training and work practice requirements of the rule where the firm obtained a certification from the owner of a residence he or she occupies that no child under age six or pregnant women resides in the home and the home is not a child-occupied facility.

If successful enacted into law, the legislation would clearly alter the mandate to follow the LRRP for some homeowners. Remodelers and other contractors could provide some of their customers with the option to "opt-out." However, the action of "opting-out" of the EPA rule does not automatically eliminate the health or legal risk posed by lead paint contamination. Contractors whose clients choose to avoid the compliance costs associated with following the LRRP should protect themselves by seeking waivers from the homeowner for potential civil liability associated with the "opt-out."

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Township's Condemnation of Property to Allow for Expansion of Charter School Invalidated by Commonwealth Court

Bear Creek Township v. Joan H. Riebel, Harold J. Harris, Brian W. Harris and Metropolitan Development Group, Inc.

By Loren D. Szczesny

Under the provisions of the Second Class Township Code, 53 P.S. Section 65101, et seq., a township is given the authority to condemn land for a recreational purpose. The statute provides examples of some types of improvements that can be considered "recreational"; however, the list of examples does not include a public or private school.

In the recent case *Bear Creek Township v. Joan H. Riebel, Harold J. Harris, Brian W. Harris and Metropolitan Development Group, Inc.*, the question arose over whether a municipality can condemn private land for the benefit of a school that would include public recreational areas. The case involved a joint planning effort between Bear Creek Township and the Bear Creek Community Charter School and presented an interesting factual scenario.

Joan H. Riebel, Harold J. Harris and Brian W. Harris (Landowners) owned a 48.86 acre tract of land that was located adjacent to the Bear Creek Community Charter School (Charter School). The Charter School was experiencing some success and it desired to expand its current facilities. After an unsuccessful attempt to acquire the land directly from the Landowners, the Charter School, through the Bear Creek Foundation, approached Bear Creek Township (Township) to discuss the possibility of a plan under which the Township would condemn the property, convey the property to the Charter School to allow for the expansion of the school and develop recreational facilities for Township residents. Public hearings were conducted on the plan, and the intention of the parties to condemn the property for the purpose of building/expanding the Charter School was clearly expressed.

On September 29, 2009, the Township and the Bear Creek Foundation entered into two agreements relating to the property. The first agreement acknowledged that the Township would condemn the 48.86 acre tract and convey the land, in fee simple, to the Bear Creek Foundation. The Foundation agreed to be responsible for all costs associated with the project, including the development of recreational facilities adjacent to the Charter School. The second agreement was entitled "Public Use and Access Agreement," and it provided the Township residents with access to the recreational facilities, as well as the library and the community room at the Charter School.

On October 5, 2009, the Township filed a Declaration of Taking for the subject property. In response, the Landowners filed Preliminary Objections. Although four objections were raised, the central issue raised by the Landowners was whether the condemnation for the purpose of building a charter school was authorized under the provisions of the Second Class Township Code. Following hearings before the trial court, the court entered an order allowing the Township to amend its Declaration of Taking to specify the statutory references, but overruled all other objections. The Landowners appealed to the Commonwealth Court.

In reviewing the information presented, the Commonwealth Court determined that the dominant reason for the condemnation was to permit the expansion of the Charter School. The court found that the Declaration of Taking and its exhibits contained specific references to the construction of the school. The references to the recreational fields described the fields as being accessory to the school facility even though they would be open to the public. In addition, the court found that the Bear Creek Foundation was the party to initiate the project, not the Township. The testimony of the Township Supervisors indicated that the Township did not identify any need for more recreational facilities until the Foundation approached the Township, and the Township would not have undertaken the project but for the Foundation's offer to be responsible for all costs. Therefore, the court determined that the condemnation was not done to address a Township need for recreational facilities.

In examining the Second Class Township Code, the court noted that a Township's power of eminent domain is limited and must be expressly stated. The code does not authorize the taking of private property for the construction of a school. An attempt to validate the taking by referencing the recreational aspects of the property does not overcome the absence of authorization in the code. Accordingly, the Commonwealth Court reversed the decision of the trial court.

This case may only be a preview of the issues to be raised in condemnation proceedings in the future. As municipal and school district budgets become tighter, it is likely that other joint planning efforts will be explored in an attempt to condemn property while complying with the code. As indicated by this case, the key to the validity of any such proceeding will be the true purpose and intent of the condemnation.

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New FHA Collections Rule Limits Borrower Eligibility

By Robert W. Gundlach, Jr.

In a February 28, 2012 Mortgagee Letter, the U.S. Department of Housing and Urban Development (HUD) announced guidance changes affecting lending eligibility requirements for borrowers with disputed accounts or accounts in collection. The new requirements ban Federal Housing Administration (FHA)-insured loans to borrowers who have $1,000 or more in collections.

The old guidance required that if the borrower's credit report revealed disputes of any credit accounts or public records, the mortgage application must be referred to an underwriter for review.

Under the new guidance, mortgage applications will no longer be referred to an underwriter due to disputed account as long: (1) the total outstanding balance of all disputed credit accounts or collections are less than $1,000; and (2) disputed credit accounts or collections are aged two years from date of last activity.

However, if the borrower has individual or multiple disputed credit accounts or collections with singular or cumulative balances equal to or greater than $1,000, the accounts must first be resolved by establishing payment arrangements with a minimum of three months of verified payments, or paying off the account in full prior to, or at, the time of closing.

Paying down of balances on the accounts to reduce the balance below $1,000 is not deemed an acceptable resolution.

FHA continues to require judgments to be paid off before the mortgage loan is eligible for FHA insurance.

If the collection accounts can be traced back to so-called "life events," such as medical issues or divorces, the borrower may qualify for an exemption from the rule.

Analysts have estimated that once the rule goes into effect it will adversely impact between 30 to 40 percent of first-time homebuyers. Homebuilders whose portfolio is geared toward young, first-time homebuyers will likely experience constraints in qualifying purchasers for FHA-insured loans.

The new guidelines were set to go into effect on April 1, 2012, but have been postponed until July 1, 2012.

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If You Want To Appeal Your NJ Tax Bill, Don't Ignore Chapter 91 Requests

Yeshivat v. Borough v. Paramus — the Tax Court's Latest Lesson to Taxpayers

By Jeffrey M. Hall

Chapter 91 is a New Jersey law that when wielded properly by tax assessors can stealthily kill meritorious commercial tax appeals. In a time when opportunities for real property tax appeals of excessive assessments are plentiful, owners and tenants should pay close attention to Chapter 91 requests issued by municipal assessors. Named after a state statute, Chapter 91 has claimed many a worthy appeal filed with the Tax Court and County Boards of Taxation over the years. It is recommended that any taxpayer contemplating tax relief monitor mail carefully.

Last month, the Tax Court delivered another blow to taxpayers of income-producing properties in deciding *Yeshivat v. Borough of Paramus*. In the factual matrix of that matter, Yeshivat had filed a tax appeal challenging the 2011 assessment. While that appeal was pending, Paramus made an application to dismiss the appeal for Yeshivat's failure to respond to the tax assessor's request for a completed income and expense statement. The assessor had correctly requested information for a time period preceding 2011 as the property was an income producing property at that time of the request. The property was sold to Yeshivat and as a result the property became non-income producing. Yeshivat argued that as owner of a non-income producing property it had no obligation to provide the information and that, further, it knew nothing of the request. As it turned out, the assessor's Chapter 91 notice went to the prior owner. For these reasons, Yeshivat argued that it should not be subject to the ultimate sanction mandated by Chapter 91, namely the dismissal of the appeal.

The court rejected Yeshivat's arguments and concluded that, in light of the strong policy of compliance underlying Chapter 91, a proper Chapter 91 request "runs with land" notwithstanding the absence of notice. Thus, Yeshivat was bound regardless of whether it had notice of the request as the prior owner's failure to respond was a fatal defect. Further, the court found that the assessor did not have the duty to track deeds and resend Chapter 91 requests to a new owner after a property changed hands.

The lessons of this case are three-fold. First, it should be standard practice during the due diligence period of a purchase of any commercial, income producing property in New Jersey for the purchaser to request from the seller all information and notices given by the municipality and its officials to the property owner, including Chapter 91 requests. Second, due diligence should also require direct contact with the municipality to verify when Chapter 91 requests were served and to give notice to the assessor of the purchaser's address (this can supplemented with service of an Open Public Record Act request on the municipality during the due diligence period). Third, a taxpayer must act proactively as this and a myriad of other cases point out and reaffirm that it is the obligation of the taxpayer to monitor and respond promptly to Chapter 91 requests.

In the next issue, we will discuss the procedural requirements of Chapter 91 requests that are being used with more frequency by assessors to kill meritorious claims and to thwart future appeals.

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Recent NJ Legislative Activity on Real Estate Tax Credits

By Jeffrey M. Hall and Daniel V. Madrid

The legislative process in New Jersey becomes very interesting in the month of June when all legislative and executive eyes focus on the budget proposal and deals may be struck on other pieces of legislation to build support for the budget. This month should prove to be no exception. While we will not discuss the budget process as it affects New Jersey tax credits, the negotiations over the budget could have a direct impact on some key programs. This article will focus on updates to bills related to programs that we have previously discussed in earlier volumes of *In The Zone*.

We previously reported on legislation that would raise the maximum allowable tax credits under the Urban Transit Hub Tax Credit Act and under the Grow New Jersey Assistance Act. These bills, A2242 and S1562, seek to increase the UTHTC Credits from 1.5 billion dollars to 2.5 billion dollars and tax credits under the Grow New Jersey Assistance Act from 200 million dollars to 400 million dollars. The Assembly bill, A2442, has not received any attention since its introduction in February of this year. On the other hand, the Senate version, S1562, sailed through two committees and was reported favorably by the second committee in early March of this year. Until the end of last month, that bill sat, but on May 31, it was passed unanimously by the Senate 35 to 0. Earlier this month, the Senate bill was received by the Assembly and referred to the Assembly Commerce and Economic Development Committee.

It is anticipated that A2442 will receive favorable attention by the Assembly Committee. The UTHTC program has been highly successful and the tax credits it has generated have been a significant component of capitals stacks in numerous projects in several of the eligible municipalities. However, the program has been a victim of its success as the eligible credits have been gobbled up and presumably worthy projects may be at risk for lack of credits.

We expect favorable action by the Assembly. If that happens then, a bill will arrive at the governor's desk accompanied by vigorous lobbying behind the scenes to urge the governor to sign the bill. While there are other pending bills that seek to either tweak or radically change this tax credit program, they seem to be garnering little attention at this time. One significant oversight is the disparity in distribution of urban transit hub tax credits to the eligible municipalities. Whether that New Jersey legislature will address the historic disparity remains an open question. For more information on these tax credit laws, please see our previous article.

A1450 and S141, the New Jersey Historic Property Reinvestment Act, has not progressed in either house, a curious result. Last year, the identical legislation made it to the governor's desk only to be vetoed. As the bill presently stands it seeks to aid many without consideration of economic need. Perhaps with a more surgical approach -- for example, permitting tax credits in urban cities in need of redevelopment -- it will draw favorable action. For more information on this proposal, please consult our previous article.

In view of our readership, two pieces of legislation proposing tax incentives to "distressed shopping centers" deserve a quick note. These bills are proposing tax incentives to encourage revitalization of partially or completely vacant shopping centers. A204 and S1002 propose a tax credit of $15,000 up to 50 percent of the corporate business tax liability while the other, A434, proposes an array of tax incentives including tax credits, rebates, reimbursements, exemption and skill training to tenants of eligible shopping centers. In the case of all of this legislation, there are prerequisites to eligibility. We will follow their progress and, if warranted, report more thoroughly on them in the next issue of *In The Zone*.

Please feel free to contact us if you have questions or comments about this article or for more information about this program or other Federal or State tax credit programs.

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We're Not There, Yet

By Gregory J. Kleiber

Any careful reader of the daily business news will have noticed that, at long last, the residential market is showing signs of a strong recovery. That's on Monday. By Tuesday, average home prices have again dipped across the major markets. By Wednesday building permits are up. Thursday brings news that the banks are planning to flood the market with foreclosed houses just as soon as prices firm up a bit. On Friday, prices are firming! Or not, as Saturday brings yet more bad news. On Sunday, we just avoid the business press altogether.

Can this be the new normal? It has, at least, been the norm long enough to seem very familiar. Given the traditional role of residential construction as a major driver of previous recoveries, it is hard to exaggerate the importance of guessing right about where the market will ultimately head. After nearly half a decade of recession, it is natural to assume that there is tremendous pent-up demand for homes, and that releasing that demand could drive a powerful upward spiral of increased sales, development, employment and pricing — benefiting just about everyone. However, the trigger for this rebirth has remained elusive.

Complicating the analysis further is the real possibility that we are living through a long-term change in social expectations regarding housing. It is notoriously difficult to distinguish a long-term change from the ups and downs common to any economy, especially in unsettled times like these. Moreover, an extended recession in itself will, over time, re-shape expectations. We naturally tend to assume that the suburban, single-family home (whether attached or detached) will always remain an essential part of the "American Dream," because that model has prevailed for so many years. If this recession is essentially the same as the last few only bigger — a quantitative, rather than a qualitative change — then the eventual recovery of the traditional home building industry should be inevitable. It may be, however, that larger forces in the economy — the aging of the Baby Boomers, structural changes in employment opportunities, evolving preferences for urban living arrangements, etc. — are eroding the lure of the suburban home, especially for first-time home buyers living in urban areas after graduation.

From my office window in downtown Philadelphia, I can see two cranes: a tower crane for a large new apartment tower on Chestnut Street and a smaller portable crane adding stories to the former AAA office building next door, which is being converted to apartments as well. If the young people who will be moving into those units, and who have filled so many other buildings in Philadelphia, decide to stay in Philadelphia long-term, the new normal, when it arrives, may look quite different than the market that endured for so many years.

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Complete Redesign of PA Redevelopment Assistance Capital Grant Program

By Kimberly A. Freimuth

The Pennsylvania Governor's Budget Office recently announced that the Redevelopment Assistance Capital Program (RACP) will be completely redesigned.

According to the Governor's Budget Office, the goals of the redesign are to:

- To define the application process with published guidelines and procedures.
- To implement merit-based evaluation and selection.
- To promote transparency.
- To maintain rigorous monitoring, measurement and reporting.

Semi-annual funding rounds will be held for the program and funding is approximated at $125 million each year, with funding awards made in April and October of each year. Projects that are not "shovel-ready" within 365 days will be deferred to a later round. Business plans for the first funding round of the new program must be submitted by June 29, 2012.

Project selection will be through a scoring matrix based upon the following criteria:

- jobs created or retained;
- community impact;
- strategic cluster for development;
- financial impact / long-term sustainability; and
- construction shovel readiness.

Further information on the redesign can be found on the Governor's Office of the Budget website, including copies of the new Application Handbook.

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Wetland Plant List Updated

By Robert W. Gundlach, Jr.

On May 18, 2012, the U.S. Army Corps of Engineers, Pittsburgh District, announced the availability of the updated National Wetland Plant List (NWPL). The NWPL plays a critical role in wetland determinations under the Clean Water Act and Food Security Act. Wetlands are evaluated using three parameters — soils, hydrology and vegetation. Using sampling protocols outlined in the Regional Supplements to the 1987 Wetland Delineation Manual, the indicator status is then used to determine whether the vegetation parameter is met.

The 2012 NWPL should be used in any wetland delineations performed after June 1, 2012. The 2012 NWPL may be used in delineations/determinations conducted prior to that date, and for the purpose of clarity and accurate interpretation, should be referenced in delineation reports or regional supplement determination forms.

The NWPL is a list of plants with their updated nomenclature and their assigned indicator statuses. An indicator status reflects the likelihood that a particular plant occurs in a wetland or upland. This update represents the most complex and thorough evaluation of wetland plant species ratings since the inception of the 1988 list.

Specific changes include:

- Providing the status ratings of more than 8,200 plants
- A dedicated website that includes photos, previous status ratings and other botanical information
- Updated nomenclature for more than 2,400 plants
- Eco-regions matching those of the Regional Supplements to the 1987 Wetland Delineation Manual
- Descriptions of status ratings were updated to describe the qualitative probability of a plant's occurrence in a wetland/upland.
- +/- modifiers were removed for FAC species

The 2012 NWPL as well as related background information can be found online.

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PaDEP Permitting Legislation Advances in House

By Robert W. Gundlach, Jr.

On May 23, 2012, the Pennsylvania Department of Environmental Protection (PADEP)Permit Review and Issuance Act was voted out of the House Energy & Environmental Resources Committee with bi-partisan support. HB1659, introduced by Rep. Jeffrey Pyle (R-Armstrong), awaits consideration by the full House of Representatives.

Pyle's legislation, as amended, seeks to accomplish a number of goals relative to enhancing the timeliness and effectiveness of Pennsylvania Department of Environmental Protection's (PaDEP) permitting process. It would pertain to those permits, approvals and decisions related to new, renewed and modified permits issued by PaDEP. Included in that list are those federal permits where the PaDEP has obtained delegated status over the program, such as NPDES permits.

The bill would mandate pre-application meetings to determine the scope and requirements of submission.

Upon the applicant's formal permit application submission, PaDEP would be required to supply a review schedule that indicates when a final decision will be determined. PaDEP shall use the following timetable:

- Completeness and technical reviews occur within 30 days
- Reviews of an applicant's response to identified technical deficiencies occur within 90 days
- Final review and determination following a resubmitted application within 60 days

Failure by PaDEP to respond to a submission (or re-submission) within the stated review schedule results in an application approval. Alternate review schedules can be crafted through the mutual agreement of both the applicant and PaDEP.

HB1659 would also expressly grant the Environmental Hearing Board jurisdiction to hear appeals from persons aggrieved by PaDEP's final decision.

If enacted, the legislation would further direct PaDEP to establish a plan that would use qualified, non-departmental employees to undertake permit application reviews where appropriate. The plan would also encourage full usage of general permits in lieu of individual permits and demonstrate that plans sealed by professional engineers may not require the same level of scrutiny as those submissions without.

Finally, HB1659 would enable PaDEP to establish an electronic permit submission, review and approval system.

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