

A Look at Your Pennsylvania Real Estate Tax Assessment

By Herbert K. Sudfeld, Jr.

If you are the owner of a commercial, industrial, retail or office property or you simply want to review your own home's market value and tax assessment, now is the time to do so.

Today's economy has caused many commercial and industrial property owners to experience declining rents, increased vacancy and the need to become "creative" in leasing to both the new tenant and the renewal tenant. These factors have aided an already declining real estate market in devaluing property for real estate tax purposes. These same factors are applicable to both the multi-family and single-family residential marketplace.

Unfortunately, county boards of assessments, while attuned to a depressed market, cannot be expected to 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, local, 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 I do if I think my real estate taxes are too high?

First, you need to determine whether to file an appeal from the county board of assessment's determination of assessment for your property. Taxpayers frequently believe that the filing of an appeal before the Board of Assessment is of such an informal nature that professional help is not required. Not only should you have an experienced real estate assessment attorney, but you should also have a qualified appraiser for your property.

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 give your professionals the ability to make a determination as to whether a particular tax assessment is out of line.

The capitalization of income approach is the easiest and quickest test, whereas comparable sales require more information to be developed both by in house and outside real estate professionals. 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 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 arms 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, at Fox Rothschild, 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 real estate appraiser. In Pennsylvania, appeals for the Philadelphia suburban counties need to be filed on or before either August 1 or September 1 depending upon the county in which you own property. The deadline in Bucks, Chester, Delaware and Lancaster counties is August 1, 2012. The deadline for filing an appeal in Montgomery County is September 1, 2012 and for Philadelphia County is October 4, 2012.

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Florida Court Enforces Loan Document Arbitration Provision

By Peter Blacklock

On April 25, 2012, Florida's Third District Court of Appeal filed an opinion reversing a trial court's decision denying a defendant's motion to compel arbitration. In *MV Insurance Consultants, LLC et al. v. NAFH National Bank* (Fla. 3d DCA 2012), MV Insurance Consultants, LLC, Dadeland Financial Associates, Inc., Maribel Viego Argomaniz, and Alberto Argomaniz (collectively, the "Borrower") argued that the trial court erred in not enforcing an arbitration provision in one of its loan documents with NAFH National Bank, the successor in interest to Metrobank of Dade County (the "Lender").

On October 22, 2007, the Borrower executed a series of loan documents relative to issuance of a commercial loan from the Lender. These documents included a promissory note, a security agreement, a guaranty, and an instrument entitled "Collateral Assignment of Termination Payments and Economic Interests Agreement" (the "Collateral Assignment"). The latter instrument contained the following provision:

ARBITRATION: Any controversy or dispute arising out of or relating to this Agreement or to any portion thereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association . . . and judgment upon the award of the Arbitration shall be binding upon parties hereto and may be entered into any court having jurisdiction thereof, all rights to appear and review being hereby waived by all parties.

When the Borrower defaulted on the promissory note, the Lender sought to foreclose under the security agreement. The Borrower sought to enforce the arbitration provision in the collateral assignment and entered a

motion to compel arbitration, which was denied by the trial court. The Borrower subsequently appealed to the Third District Court, which reviewed the matter *de novo*.

Citing *Boston Bank of Commerce v. Morejon*, 786 So.2d 1245 (Fla. 3d DCA 2001), the court noted that, "[i]t is well-established that Florida law and public policy strongly favors arbitration, and courts are encouraged to resolve all doubts in favor of arbitration." The court further noted that the parties' intent is the paramount consideration in determining whether or not a particular dispute is subject to arbitration (citing *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 636 (Fla. 1999); *Pacemaker Corp. v. Aaron T. Euster*, 357 So.2d 208, 211 (Fla. 3d DCA 1978)).

The Lender argued that: (i) excepting the collateral assignment, none of the other loan documents contained arbitration provisions; and (ii) the collateral assignment was (as its name implies, a "collateral agreement" which should not be construed as part of the presumably more significant loan documents. The Lender cited an array of Florida case law (*LBC Design & Constr. v. Serruya*, 57 So.3d 994 (Fla. 3d DCA 2011); *Gen. Impact Glass & Windows Corp. v. Rollac Shutter of Tex., Inc.*, 8 So.3d 1165 (Fla. 3d DCA 2009); *Temple Emanu-El of Greater Fort Lauderdale v. Tremarco Indus., Inc.* 705 So.2d 983 (Fla. 4th DCA 1988) to support that it is possible.

The court discredited the Lender's assertion, countering that the aforementioned cases were distinguished by the fact that the "collateral" nature of the subject instrument in each case was premised not upon the significance of the document, but rather the fact that it was not executed by both parties or

attached to a [more substantive] agreement. The court also observed that:

Documents executed by the same parties, on or near the same time, and concerning the same transaction or subject matter are generally construed together as a single contract. Where a writing expressly refers to and sufficiently describes another document, the other document, or so much of it as is referred to, is to be interpreted as part of the writing (citing *Quix Snaxx, Inc. v. Sorensen*, 710 So.2d 152, 153 (Fla. 3d DCA 1998).

In finding in favor of the Appellant, the court opined that references to other loan documents in the collateral assignment, coupled with the contemporaneous execution thereof, was sufficient to conclude that the parties evidenced an intent to apply mandatory arbitration to disputes arising under any of the loan documents.

Interestingly, since the U.S. Supreme Court upheld a mandatory arbitration clause in *AT&T Mobility v. Concepcion*, 2011 WL 159156 (U.S. 2011), there is a growing trend amongst lenders to restructure their loan documents to include arbitration provisions. Notwithstanding the ruling in *AT&T Mobility*, should lenders seek to impose mandatory arbitration, the take-away from *MV Insurance Consultants* is that lenders and their counsel need to ensure that arbitration provisions are applied universally and uniformly in all loan instruments.

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Pennsylvania Court Reminds Developers of Variance Process Risks

By William F. Martin

In April, 2012, the Pennsylvania Commonwealth Court issued its decision in *Society Hill Civic Association et al. v. Philadelphia Zoning Board of Adjustment (ZBA), City of Philadelphia, John and Mary Turchi*. In its decision, the court reminds developers of the risks associated with the variance process not just within Pennsylvania, but specifically within the City of Philadelphia.

The decision related to the applicant's development project that involved the building known as the Dilworth House, which was built in 1957 for Mayor Richardson Dilworth. The applicants sought permits to build a 16 story residential tower with 12 full story dwelling units behind the Dilworth House. The plan involved renovation of the existing Dilworth House, with the ground floor becoming part of the lobby of the newly constructed building, and the upper floors of the existing building housing offices and perhaps additional condominium uses.

This project has been opposed by the local civic association and local neighbors for a number of years. The project was the subject of litigation relating to a grant by the City of Philadelphia's Historic Commission of a permit allowing the proposed renovation and development (See *Turchi v. Philadelphia Board of Licenses and Inspections Review*, 20 A. 3rd 586 (Pa. Commw. 2011)). Separately, the appellants appealed the decision by the ZBA to grant a variance and special use permit for the project to the Court of Common Pleas of Philadelphia County, which affirmed the decision of the ZBA.

Unfortunately for the developers, the Commonwealth Court reversed a portion of the trial court's decision regarding issuance of the variance, vacated certain portions of the decision and remanded for further

hearing. While this decision may leave the future of the development project in grave doubt, of more significance to the development community are the implications of the decision to developers requiring variances for their own projects.

The applicants' permit application to the city's Licenses and Inspections Department was refused because the design lacked an off-street loading area. Additionally, the application was referred to the ZBA because the proposed above-grade parking required a special use permit. As to the lack of a loading area, the applicant placed into evidence the testimony of a city planning expert who indicated that the narrow street behind the property would not allow for effective use of a loading area, and thus a hardship existed justifying the variance. Significantly, on cross-examination, the expert explained that the loading area requirement was generated by a design of the proposed building exceeding 50,000 square feet and that had the building been less than 50,000 square feet, the zoning code would not have required off-street loading, and the variance would not have been necessary.

In its analysis, the court referenced the standards set forth for grant of a dimensional variance in *Hertzberg v. Zoning Hearing Board of Adjustments of the City of Pittsburgh*. While the *Hertzberg* decision has often been cited for providing for a more relaxed standard for grant of dimensional variances, the court's interpretation in this case narrows the application of *Hertzberg*. The court stated "where no hardship is shown, or where the asserted hardship amounts to a landowner's desire to increase profitability or maximize development potential, the unnecessary hardship criterion required to obtain a variance is not satisfied even under the relaxed

standard set forth in *Hertzberg*." Further, in the court's opinion, it stated "it is apparent that the need for the variance stems from the Applicant's desire to construct a building that exceeds 50,000 square feet. Additionally, the subject property to be used in compliance with the zoning code as it presently exists as a single family residence . . . Applicant's desire to expand the use of the subject property in order to maximize profitability is not a sufficient hardship to justify the grant of a variance, even under the relaxed *Hertzberg* standards."

Thus, developers are faced with a very recent decision of Commonwealth Court that significantly narrows the circumstances when a dimensional variance is appropriately granted. This decision will likely be aggressively utilized by neighboring property owners and objecting civic associations seeking to slow or alter development, when variances are required.

The decision contains an additional area of concern specific to developers in Philadelphia. The application was filed subject to a "Unity of Use Agreement" between the applicants' property and the adjacent Athenaeum of Philadelphia. The plan called for construction of a connection in the second level of the Athenaeum to a storage level within the new project, to provide conditioned and easily accessible storage space for use by the Athenaeum. The applicants avoided several zoning code requirements (such as the FAR requirement) by having the two properties analyzed under the "unity of use" approach sometimes followed in Philadelphia.

The objectors argued that as the "unity of use" concept is based only upon a legal opinion from the Law Department of the City of Philadelphia, and that the concept is not valid, and if the concept were to be deemed valid, that it was

misapplied in this case. The court, in its opinion, is very critical of the analysis utilized by the Law Department in its 1991 opinion, providing for “unity of use” applications and points out that the concept has never been codified in the Philadelphia Zoning Code. Finally, the court expresses concern that the record does not include any actual unity of use agreement which would have included the recordable restrictive covenants, easements and other

agreements generally contemplated in this type of arrangement.

This decision, in the end, only remands to the ZBA for findings concerning the specific aspects of the agreement between the applicants and the Athenaeum. However, developers in the City of Philadelphia will need to be cautious that this decision sets forth a road map for future objectors who are fighting projects when the approval has relied upon a unity of use agreement. The opinion suggests that

only in the narrow circumstance involving vacant lots, owned by the same owner with each lot proposed for the same use, will a Pennsylvania appellate court uphold the grant of a variance which is dependent upon unity of use.

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Will the New Zoning Code Really Streamline the Development Process?

By Carrie B. Nase

This ongoing article series will explore Philadelphia's new zoning code.

On August 22, 2012, the new Zoning Code for the City of Philadelphia will go into effect. It has been said that the new Zoning Code is developer friendly in that it streamlines the development process. However, having had an opportunity to review the new procedures set forth in the new Zoning Code, I question whether it will in fact streamline the process. Instead, it appears as though the new Zoning Code will add another layer, or two, of necessary review in obtaining zoning approvals. Such additional review could further delay the approval process.

Currently, a developer can obtain a by-right Zoning/Use Registration Permit (Zoning Permit) in as little as five days; whereas, under the new Zoning Code, it could take up to 120 days. Not only will it take longer to obtain a by-right Zoning Permit, but a developer may also be required to receive public comment on a by-right project. The new Zoning Code now requires certain projects to be reviewed by the Civic Design Review Committee (CDRC). If a by-right project is subject to the Civic Design Review, the developer must also review the project with the

Registered Community Organization (RCO).

After an applicant submits an Application for Zoning/Use Registration Permit with the Department of Licenses and Inspections (L&I), L&I will complete its review and notify the applicant, within 30 days, whether the project is subject to review by the CDRC (L&I Notice). If it is, the applicant is required to notify the RCO that the project is subject to review by the CDRC within seven days after it receives the L&I Notice. The applicant is then required to meet with the RCO to review the project and submit documentation to the CDRC, within 45 days after the L&I Notice, documenting the meeting with the RCO. The CDRC is not required to review a project until it receives the meeting documentation from the RCO and applicant, or 45 days after the L&I Notice, whichever is earlier. After the applicant reviews the project with the RCO, it then reviews the project with the CDRC. The CDRC's meetings are open to the public. Agendas will be published online in advance of each meeting. Within 45 days after its initial meeting (the CDRC can review a project at up to two meetings), the CDRC is required to submit its

recommendations for the proposed project to the Planning Commission. The Planning Commission then posts the recommendations of the CDRC on its website. After the CDRC issues its recommendations, the applicant can obtain its Zoning Permit from L&I.

What an applicant might find most frustrating is that, although the above review procedure with the RCO and CDRC is mandatory, the recommendations of the CDRC are only advisory. Therefore, after meeting with the RCO and CDRC, the applicant could decide to disregard the comments it received from both committees and obtain its Zoning Permit as it initially proposed — but not until after waiting at least 90 days.

Next month, more information will be provided regarding when a project is subject to review by the CDRC and the CDRC review process. Should you have any questions regarding zoning related matters in Philadelphia, please feel free to contact Fox Rothschild.

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New Jersey Tax Credit Legislation Update

By Jeffrey M. Hall and Daniel V. Madrid

In the past, we have written and presented on various tax credit programs. One of the most successful has been the program created pursuant to the Urban Transit Hub Tax Credit Act, signed into law as N.J.S.A. 34:1B-207 et seq. Its success has led to the subsequent passage of the Grow New Jersey Assistance Act earlier this year. That Act has been codified under N.J.S.A. 34:1B-242 et seq. Their success has significantly reduced the availability of credits, which, arguably, deprives worthy projects of much needed capital.

To remedy this shortage, lawmakers have introduced A2442 and S1562 in the current legislative session. These bills propose to expand the allowable tax credits under the Urban Transit Hub Tax Credit Program from \$1.5 billion to \$2.5 billion and also to expand the allowable tax credits under the Grow New Jersey Assistance Program from \$200 million to \$400 million.

Despite the success of the Urban Transit Hub Tax Credit program, the extent of the legislation's fiscal impact is unclear, which may deter its passage. The Office of Legislative Services (OLS) has calculated a potential loss of revenue to the state equaling \$1 billion through fiscal year 2027 on both that program and Grow New Jersey's tax credits. There is also the potential for lost opportunity costs as the state's funding is directed from one economic activity to another. These losses are potentially offset by the realization of capital projects in eligible areas that

will benefit both the state and local governments.

Notwithstanding the uncertainty of projected fiscal impacts, the senate bill (S1562) extending the amount of allowable tax credits has been reported favorably by two committees – the Senate Economic Growth Committee and, more recently, the Senate Budget and Appropriations Committee. A2442 has been referred to the Assembly Commerce and Economic Development Committee. For further information regarding the Grow New Jersey Assistance Act, please refer to "[New Jersey's Latest Tool for Economic Growth](#)," a January 2012 Fox Rothschild Alert.

In the February 2012 issue of *In the Zone*, we reported on pending legislation, A1450 and S141, commonly referred to as the Historic Property Reinvestment Act. This Act seeks to establish a New Jersey historic tax credit, which can potentially be twinned with the Federal Historic Tax Credit administered by the National Parks Service. The state proposal targets both homeowners and businesses. While it caps a homeowner's historic tax credit at \$25,000, there is no cap for businesses. Further, the incentives differ, providing more flexibility with the tax credit program for businesses. Last year, nearly identical legislation, A1851, made its way through both legislative houses only to be vetoed by Gov. Christie.

These bills are moving at a disappointing pace since their

introduction earlier this year. As of this writing, only one legislative committee – the Senate State Government, Wagering, Tourism & Historic Preservation Committee – has conducted hearings on S141 and filed a favorable report with amendments to that legislation. The amendments are technical in nature and do not substantially change the bill as S141 was pre-filed for introduction in the 2012-2013 session pending technical review. In March, the committee performed its review and amended S141 to extend the deadlines by one fiscal year.

For further information, please refer to our article entitled "[The New Jersey Historic Tax Credit – Is Now The Right Time?](#)" published in the February 2012 edition of *In the Zone*, or contact us for information on our webinar on the Urban Transit Hub Tax Credit program presented in December 2011.

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Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 1414 proposes to amend Section 906 of the Pennsylvania Municipalities Planning Code (MPC) by adding language regarding the ability of the chairman of a zoning hearing board to designate alternate members of the board. The proposed legislation would add a new Section 906(b)(3) of the MPC that would provide the following: "If, by

reason of disqualification of a member due to conflict of interest, the chairman of the board shall designate as many alternate members of the board to sit on the board as may be needed to replace the disqualified members."

As for the status of House Bill No. 1414, it was referred to the local

government committee, where it remains.

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What Constitutes a Purely Public Charity for Purposes of Real Property Tax Exemption?

A look at *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Board of Assessment Appeals*

By Herbert K. Sudfeld, Jr.

The Appellant in this matter appealed a Commonwealth Court ruling, asking the Supreme Court of Pennsylvania to find that it was an "institution of a purely public charity" under Article VIII, Section 2(a)(v) of the Pennsylvania Constitution, entitling it to exemption from real estate taxes. The Supreme Court allowed the appeal in order to determine if it must defer to the General Assembly's statutory definition of that term as enacted in the "Institutions of Purely Public Charity Act", 10 P.S. §§ 371-385 (Act 55) or continue to follow the standards as outlined by the Supreme Court in *Hospital Utilization Project v. Commonwealth*, 487 A.2d 1306, 1317 (Pa. 1985) ("HUP") more commonly referred to as the "HUP Test."

In the instant case, the Appellant is a not-for-profit religious entity related to the Bobov Orthodox Jewish Community in Brooklyn, NY, organized pursuant to 26 U.S.C. §501(c)(3). The Appellant operates a summer camp in Pike County that consists primarily of lectures and

classes on the Orthodox Jewish faith and provides food and recreational activities for its students. The camp's funding comes from donations and rental income from a building owned by the Appellant in Brooklyn as well as tuition from the students. The Appellants sought a property tax exemption as a purely public charity. The Supreme Court has, in the past, applied the HUP Test by holding that an institution is an institution of purely public charity when it: (a) advances a charitable purpose; (b) donates or renders gratuitously a substantial portion of its services; (c) benefits a substantial and indefinite class of persons who are legitimate subjects of charity; (d) relieves the government of some of its burden and (e) operates entirely free from private profit motive (HUP at 1317).

The Appellant claims that it did not need to satisfy the HUP Test since the General Assembly had enacted the Institutions of Purely Public Charity Act (Act) as cited above. The Act defines the element of "burden

relieving" more expansively than the HUP Test. The Act provides in pertinent part:

- (f) GOVERNMENT SERVICE – The institution must relieve the Government of some of its burden. This criterion is satisfied if the institution meets any one of the following:
- (1) Provides a service to the public that the government would otherwise be obliged to fund or to provide directly or indirectly or to assure that a similar institution exists to provide the service.
 - (2) Provide services in furtherance of its charitable purpose which are either the responsibility of the government by law which historically have been assumed or offered or funded by the government.
 - (3) Receives on a regular basis payments for services rendered under a Government Program if the payments are less than the

full cost incurred by the institution, as determined by general accepted accounting principals.

- (4) Provides a service to the public which directly or indirectly reduces dependence on government programs or relieves or lessens the burden born by government for the advancement of social, moral, educational or physical objectives.
- (5) Advances or promotes religion and is owned and operated by a corporation or other entity as a religious ministry and otherwise satisfies the criterion set forth in Section 5.

Institutions of Purely Public Charity
Act 10 P.S. §375(f)(1) – (5).

The Appellant further argued that Article VIII §2(a)(v) authorizes the General Assembly to define what qualifies as a purely public charity. The Pike County Board of Assessment Appeals, as well as the intervening school district and township, argued that the Supreme Court had continually applied the HUP Test even after enactment of Act 55, and that the Separation of Powers Doctrine would prohibit the General Assembly from

intruding upon the Judiciary's function of interpreting and defining the Constitution.

In deciding the case, the Supreme Court held that:

While the General Assembly necessarily must attempt to interpret the Constitution in carrying out its duties, the Judiciary is not bound to the "legislative judgment concerning the property interpretation of constitutional terms.

The court further held that:

The ultimate power and authority to interpret the Pennsylvania Constitution rests with the judiciary, and in particular with this court.

The court in its decision provides a history of Article VIII, §2 and the purposes for its inclusion in the Constitution, noting that it was not designed to grant, but limit, legislative authority to create tax exemptions.

Noting the above, the court held that to receive an exemption without violating the Constitution, a party must meet the definition of "purely public charity" as measured by the test in HUP. If it does so, it may qualify for exemption if it meets the statute's requirements. Act 55, however, cannot excuse the Constitutional

minimum – "if you do not qualify under the HUP test, you never get to the statute." An entity seeking a statutory exemption for taxation must first establish that it is a purely public charity under Article VIII, §2 of the Pennsylvania Constitution before the question of whether that entity meets the qualifications of a statutory exemption can be reached. Seeing no reason to alter that standard, the Supreme Court held that the Appellant did not satisfy the HUP test and Act 55 does not supplant the HUP test for purposes of such determination.

Justice Saylor wrote a well-written dissent joined by Justice Melvin and Chief Justice Castile, noting that Act 55 is "an integrated legal test blending the Judiciary's well-crafted HUP test with the wide-ranging policymaking experience of the Legislature." Justice Saylor would defer to the General Assembly's reasonable policy determination that an organization satisfying the criteria set forth in Act 55 is a purely public charity.

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