In the Zone

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

OCTOBER 2012

Public Official Inaction Exception from Certain Procedural and Time Constraints: *Mullen and Levine v. The Ippolito Corporation*

By Henry Kent-Smith

On September 10, 2012, the Appellate Division approved its opinion in *John Mullen and Howard Levine v. The Ippolito Corporation, et al*.[1] for publication. In the *Mullen* decision, the Appellate Division opens the door for challenges by adjoining property owners to municipal inaction for failure to enforce zoning regulations and require approvals for expansion of a preexisting non-conforming use.

The *Mullen* case involves the Driftwood Motel, a preexisting, non-conforming use located in the Borough of Point Pleasant Beach, NJ that fronts the ocean and is surrounded by residential uses. The motel is currently located in a residential zone. The parties conceded that the Driftwood Motel has operated since at least the 1960s and predates the residential zoning. Therefore, the motel is a preexisting, non-conforming use and protected pursuant to the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-68. However, as a preexisting non-conforming use, the motel could not expand without zoning board variance approval pursuant to N.J.S.A. 40:55D-70(d)(2).

This dispute involved the alleged expansion of the Driftwood Motel over a number of years, which commenced in 1998 – the year that the plaintiffs moved adjacent to the motel. The motel expansion allegedly included enlargement to the outdoor snack area, an increase in the number of rooms, impermissible increase in activities within the dune area and the installation of outdoor restrooms and changing facilities. The plaintiffs' alleged that the expansions significantly increased the intensity of the activity associated with the motel and unduly burdened their use and enjoyment of their residential properties. Despite numerous complaints to various public officials in the Borough of Point Pleasant, the plaintiffs were never provided with satisfactory copies of permits or zoning approvals for these improvements. Borough officials failed to explain the basis by which the Driftwood Motel was able to construct these improvements and expand its operations.

As a result of the continued municipal inaction, plaintiffs ultimately filed an action contesting the expansion of the Driftwood Motel and seeking enforcement of Borough zoning ordinances, as applied to the motel. Plaintiffs' allegations included impermissible motel expansion and the Borough's failure to enforce its dune protection ordinance. However, at no time did the plaintiffs file an appeal to the Borough zoning board pursuant to N.J.S.A. 40:55D-70(a) from any municipal permits and/or approvals associated with the construction activity at the motel.

On the defendants' motion for summary judgment, the trial court dismissed the plaintiffs' action as being both untimely under Rule 4:69-6 (the 45-Day Rule) and for failing to exhaust administrative remedies associated with the right of appeal to the Zoning Board of Adjustment pursuant to N.J.S.A. 40:55D-70(a). On appeal, the Appellate Division ultimately considered the trial court's interlocutory order and reversed the trail court dismissal of the action as untimely and for failing to exhaust administrative remedies.

The *Mullen* court reviewed the pleadings in a manner most favorable to plaintiffs, by assuming the truth all of plaintiffs' allegations. Under this standard, the Appellate Division found that the municipal officials failed to properly enforce Borough Ordinances and failed to require the motel to

[1] 2012 WL 3889102 ___ N.J. Super.____ (App. Div. 2012); Docket No. A-5823-10T3

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secure approvals pursuant to N.J.S.A. 40:55D-70(d)(2) for the expansion of its use associated with the increase in the area of the snack bar, increase in rooms and activities in the dune area. The appellate court remanded the case back to the trial court for further proceedings.

In reaching this holding, the appellate court relied on *Garrou v Teaneck Tryon Co*.[2] The *Garrou* case held that a mandamus action was in fact appropriate when a property owner can show "special damages" as a result of the zoning violation. In *Garrou*, the property owner advised the municipal officials of the alleged zoning violation before any permit was issued by the Township or action take by the property owner.[3] Also, *Garrou* was decided under the Planning Act of 1930, and as such there was no established local administrative remedy available to *Garrou* to challenge or compel municipal action on the building permit application. As such this court's reliance on *Garrou* appears flawed.

The implications of the *Mullen* decision are significant for two reasons. First, the Appellate Division expands application of the exceptions to the time restrictions related to challenges to municipal zoning actions under Rule 4:69-6. This 45-Day Rule requires that actions be brought against public entities challenging an action or inaction by those municipal agencies within 45 days from the date the petitioner was aware of the action.[4] The 45-Day Rule provides a valuable repose to challenges related to governmental action.

The *Mullen* court allowed the lawsuit to proceed, notwithstanding the fact that most of the alleged motel expansion occurred years earlier. The court cited the exception to R. 4:69-6 for matters involving "the important public interest in the performance by public officials of their responsibilities."[5] This argument may be applied generally to almost any action by municipal officials as it relates to the enforcement of a zoning ordinance and as such, potentially limits the application of the 45-Day Rule. Therefore, the repose for both the municipality and the property owner from collateral challenge of permits may not exist, in the circumstance of a preexisting non-conforming use.

Additionally, the Appellate Division failed to require the adjoining property owners to exhaust the Zoning Board appeal process, provided under the, N.J.S.A. 40:55D-70(a), to appeal any action or decision by any municipal official to the Zoning Board of Adjustment within 20 days of the date of the action. The *Mullen* court states that the this administrative remedy does not apply as broadly where there is municipal inaction, insofar as the Zoning Board of Adjustment appeal process requires a decision by the municipal building official from which an appeal can be taken.

The fact remains that construction occurred at the Driftwood Motel, and the neighbors admit that they were aware of the construction. The fact that neighbors witnessed construction activity gives rise to a neighboring property owner's right to seek copies of permits from the municipality. If no permits are produced, or if the neighbors believe further approvals are required, the neighbors have the right to enjoin construction by filing the MLUL appeal under N.J.S.A. 40:55D-70(a). The MLUL provides for an automatic stay of the permit until such time as the issue of zoning relief can be adjudicated by the Zoning Board.[6] The *Mullen* court expresses concern regarding the protection of the property rights of the neighbors. However, the neighbors waited years before asserting their claims, notwithstanding the MLUL's provision of an expedited review process before the zoning board

The zoning board appellate procedure is common place in the New Jersey. The MLUL automatic stay provisions would effectively protect third parties from any harm associated with an improperly issued permit. To sanction a direct appeal to the Superior Court Law Division without recourse to the municipal zoning board, which is the administrative remedy under the MLUL, impairs the clear intent of the MLUL to promptly address issues of local concern related to enforcement of zoning ordinances by the municipal zoning board and not the courts.

The *Mullen* court's failure to require that the adjoining property owners seek immediate recourse through the municipal review process under the MLUL may open the door to litigation involving the proper scope and permissibility of construction permits for preexisting non-conforming uses. Under the *Mullen* court's reasoning, property owners who have secured permits or authorizations from municipal officials may face lawsuits after the completion of construction. The *Mullen* decision opens the door to challenges of determinations regarding permits required for construction and interpretations of zoning ordinances by the zoning and building official, after the property owner has relied on these interpretations by constructing the improvements.

The *Mullen* court limits the extent of its holding by the specific facts related to (a) the expansion of a non-conforming use and (b) the fact that some permits may not have been not

[2] 11 N.J. 294 (1953).
[3] Garrou, supra at 296, 297.
[4] N.J. Court Rule 4:69-6(a)
[5] R. 4:69-6(c).
[6] N.J.S.A. 40:55D-75

issued for certain construction activities. The practical effect of this case may be to expand zoning board review under N.J.S.A. 40:55D-70(d)(2) of *virtually* all building permit applications, regardless of whether it involves an alleged expansion of the non-conforming use. Attorneys, architects, contractors and owners of non-conforming uses must be ever diligent to assure that permits and variance approvals are sought and secured whenever seeking any expansion or modification of a preexisting non-conforming use. If these approvals and permits are not secured, owners may now face the potential of a collateral, third-party challenge after the improvements are constructed.

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PA DEP Publishes Draft Guidelines for Permit Decision Guarantee Program

By M. Joel Bolstein

As a result of Pennsylvania Governor Tom Corbett's Executive Order 2012-11, the state's Department of Environmental Protection (DEP) published in draft guidelines creating a Permit Decision Guarantee (PDG) policy in September. The guideline has the dual goals of elevating the quality of environmental permit submissions as well as increasing the review and turn-around time on applications before the DEP.

At the center of the PDG policy is the creation of a guaranteed timetable on environmental permit application decisions. The policy impacts a variety of state-issued permits as well as permits issued via delegated agencies, such as a county conservation district or health department. Each permit classification has a different "guaranteed" turn-around time ranging from several weeks to several months. Indeed, the DEP is attempting to adopt a new mindset of "how long have we had the application" versus "how much time do we have left to take action on a permit" with an eye to reaching a decision as quickly as possible. Failure of DEP reviewers to achieve those PDG deadlines would prompt a meeting with the DEP Secretary to determine why the deadline was missed.

Citing the results of an internal audit, DEP has claimed 40 percent of the environmental permit submissions received are deficient, which requires DEP staff to spend additional time helping applicants bring those submissions into compliance. Under the draft PDG policy, several significant changes would be made to the application process that will surely impact the regulated community.

Applicants will be encouraged to schedule pre-application meetings with the DEP to the greatest extent possible. Such meetings will include not only the applicant and the applicant's consultants, but also representatives from all appropriate regulatory programs to ensure clear design and permitting expectations.

Upon submission, the permit application will be reviewed for administrative completeness within 10 business days. While minor changes can be made by telephone, any meaningful errors or omissions will cause the application to be deemed incomplete and the application will be denied. Likewise, if the applicant amends the application and resubmits it, the DEP will treat the package as a new application.

Following a successful completeness review, submissions will be reviewed for technical adequacy. However, DEP staff reviewers are expressly prohibited from relying on personal preference or a regional interpretation of regulation/statute that is inconsistent with DEP's statewide interpretation. Only one technical deficiency letter will be sent during the review process. If the applicant receives one technical deficiency letter, the PDG timetable is voided. Applications that continue to possess technical deficiencies after two technical reviews may be denied. If denied, the application will need to be re-submitted and will be treated as a new application.

If qualified as a "technically complex project," some plan approvals may receive additional deficiency reviews as appropriate.

In those instances where applications are technically deficient, and for which the deficiencies have not been resolved within the established PDG response timeframe, the package will be subjected to an elevated review process. The elevated review entails engaging the Regional Director and/or the Bureau Director to evaluate a final review strategy. The elevated review process may include more face-to-face meetings with the applicant as well as granting the applicant an additional 10 days to implement a resolution.

Finally, the PDG will implement a permit review hierarchy to inform which applications are prioritized for review ahead others. Instead of a "first-in, first out" method of reviewing submissions, the DEP will place a premium on reaching a decision for certain types of environmental permits.

The hierarchy consists of: (1) applications necessary for the protection of public health, safety or environment from imminent threats; (2) applications necessary for economic development projects that create/save jobs, leverage private investment or provide significant economic benefits; (3) applications within the PDG that meet either (1) or (2) above; (4) applications not covered within the PDG but necessary for economic development; and (5) applications that do not meet any of the above criteria will be completed on a "first-in, first-out" basis.

The hierarchy further delineates permit prioritization based upon the application type: new applications, amendments/modifications/transfers and renewals.

Executive Order 2012-11 rescinds the Department's "Money Back Guarantee Permit Review Process" and replaces it with the new Permit Decision Guarantee policy.

The Department anticipates draft PDG policy by year's end. Those applications submitted prior to final adoption of the policy will still be reviewed under the existing standards.

Additional information on the draft PDG policy (including FAQs, recorded webinars and PowerPoint presentations) is available on the Department's website.

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PENNDOT Issues New HOP Indemnification Policy

By Robert Gundlach

As part of the Pennsylvania Department of Transportation's June 2012 Strike-Off Letter addressing Access Approval Procedures, PENDDOT has revised its policies relating to indemnification requirements for Highway Occupancy Permits.

Oftentimes a developer must mitigate traffic impacts resulting from a project by installing an auxiliary land in front of a neighbor's property. Such auxiliary lanes may include acceleration or deceleration lanes, left turn lanes and center left turn lanes. Because landowners abutting public highways have a constitutional right of access to the public road system, PENNDOT has established a process to balancing those rights with permitted work.

If alternate traffic engineering solutions are not viable, the Department will often require the applicant secure indemnity from the affected property owners for the Commonwealth. Property owners are typically asked to sign release letters; and, in the event property owners refuse, the developer can choose to indemnify the Department.

PENNDOT's Strike-Off Letter creates a new, streamlined Approval Procedure Worksheet and Letter for use by the HOP applicant with the intent of decreasing costs and time delays for the applicant.

Revisions also include the removal of the "personal guarantee" as a prerequisite to obtaining indemnification as well as a simplification of insurance requirements as they relate to access, drainage and design waivers.

According to the Pennsylvania Builders Association, "these changes are significant for several reasons. First, the potential claimants are limited to the property owners identified [in] … the Indemnification Agreement. This was not the case under the prior arrangements. Second, it allows the builder to fairly and accurately identify the parameters of its potential exposure and make a business decision to proceed with a project or not. Under the prior indemnification it was fairly difficult to calculate the potential financial exposure."

The changes are effective immediately.

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Transition of Control in a Condominium

By Melvyn Tarnopol

Gurriere v. Brookdale Condominium Associates, Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C-143-00 (2012) involves the interpretation of the portion of the Condominium Act that governs the transition of control over a condominium from the sponsor to the other unit owners.

In *Brookdale*, the sponsor sold approximately 20 percent of the units in a condominium in 1989 and then stopped selling units. Since N.J.S.A. 46:8B-12.1 provides that the Sponsor retains control of the condominium association until conveyance of 75 percent or more of the units in a condominium, the sponsor retained control of the condominium for more than 20 years since no additional sponsor units were sold after 1989. Instead, the sponsor leased its units, treating the condominium as an apartment house.

The non-sponsor condominium unit owners claimed that the sponsor had mismanaged the property, not performing maintenance until emergencies occurred, and alleged this was because the sponsor did not want to pay 80 percent of maintenance costs.

N.J.S.A. 46:8B-12.1.a. provides that notwithstanding the 75 percent requirement, if units have been conveyed to purchasers and none of the other units are being offered for sale by the sponsor "in the ordinary course of business," the unit owners other than the sponsor shall be entitled to elect all of the members of the board of the association.

Thus, the issue in this case was whether the sponsor had been trying to sell units in the ordinary course of business for the more than 20 years that it had not been selling units. The court concluded that the sponsor "intentionally took action that prevented the sale of additional units in the ordinary course of business." Therefore, the court held that the non-sponsor unit owners were entitled to elect all of the members of the governing board.

The court reached its conclusion that the sponsor had not been trying to sell units in the ordinary course of business by examining the blanket mortgage encumbering all of the sponsor's condominium units.

The court concluded that the blanket mortgage that encumbered the sponsor's units was not capable of being paid upon sale of individual units, but instead, because of the way it was structured, effectively required the entire mortgage to be paid off in order to release the lien on the sponsor's units. This is contrary to N.J.S.A. 46:8B-23, which provides that a blanket mortgage may not be given unless any unit owner can obtain a release of his unit from the lien of the mortgage. The blanket mortgage must allow individual units to be discharged upon payment to the mortgagee of "a sum equal to the proportionate share attributable to his unit of the then outstanding balance of unpaid principal and accrued interest and any other charges then due and unpaid" N.J.S.A. 46:8B-23.

The blanket mortgage in question did not provide a release mechanism. This prevented the sale of the units in the ordinary course of business. In 2008, the sponsor replaced the offending mortgage with a new mortgage. The court noted that this change would not be sufficient to cure the earlier deficiency in the prior mortgage. However, the court went on to point out that the substitute mortgage was also defective, since it did not provide for release of individual units upon payment of a "proportionate share" since the release payment provided for in the replacement mortgage was the same fixed amount for the release of each unit. Additionally, if that fixed amount were multiplied by the number of sponsor units, that amount exceeded the amount of the mortgage by a significant margin, thus further violating the requirement that each unit bear its own proportionate share.

Thus, since it was impossible to pay off the mortgage, the court concluded that it was also impossible to sell units "in the ordinary course of business," and thus control of the association had to be turned over to the unit owners other than the sponsor.

There are a couple of interesting issues raised by this decision.

First, the Master Deed provided that the sponsor "may, with unanimous written approval of all unit owners, encumber …some or all of the units therein with a single or blanket permanent mortgage." Although this provision otherwise tracks the language in N.J.S.A. 46:8B-23, the statutory language does not require "unanimous written approval" of the unit owners, but instead requires that each unit owner whose unit is encumbered by the mortgage shall be a grantor under the mortgage. The court seized on this difference to hold that even if the blanket mortgage had otherwise provided for the release of units, the imposition of the blanket mortgage violated the Master Deed since it was not approved by all of the unit owners and, without such approval, constituted a violation of the Master Deed by the sponsor.

However, it should be noted that this violation of the Master Deed did not provide specifically for a change of control of the condominium association as the remedy for its

violation, although an equity court would have the power to fashion that remedy. In any event, the provision in the Master Deed was oddly drafted. Presumably, the intent was to provide that unit owners who were affected by the blanket mortgage would have to unanimously approve the imposition of the blanket mortgage. However, the overbroad way in which the provision was drafted gave the court the opportunity to find a default under the Master Deed.

Second, the court's interpretation of the "proportionate share" required for release of the lien of a blanket mortgage for a particular unit, was particularly stringent. For example, there are often mortgage release provisions that provide, essentially, for front-ended release prices, thus permitting the lender to be paid off sooner than if each unit's release amount were exactly proportional to the outstanding balance of the mortgage. For example, many blanket mortgages require that all of the net proceeds of sale be applied to the mortgage regardless of the unit's proportionate amount of the outstanding debt. Although this is a commercially-common practice, the analysis in this case draws it into question. However, it would require odd circumstances for the question to be raised, because the maker of a blanket mortgage would generally not object to such a release provision, since it would have negotiated that provision. It came up in *Brookdale* only because a third party was trying to show that it was impossible to obtain unit releases from the blanket mortgage.

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Decision Regarding SALDO Waivers Could Streamline Plan Approval Process

By Clair Wischusen

In *Ray v. Board of Supervisors of East Pikeland Township*[1] the Chester County Court of Common Pleas issued a decision that could prove useful to developers looking to obtain a decision on SALDO waivers prior to the preparation and submission of land development plans. In *Ray*, the court held that an appeal from the initial grant of subdivision waivers was premature where the Township had not yet issued a decision on the applicant's preliminary plans.

This case arose from the Phoenixville Area School District's efforts to expand the East Pikeland Elementary School. In conjunction therewith, the District requested the Township waive the inclusion of certain information in the preliminary plan that would otherwise be required under the Township Subdivision and Land Development Ordinance. Prior to issuing a decision on the preliminary plan, the Township granted the requests for waivers that was memorialized in a letter from the Board of Supervisors. Neighboring property appealed, contending that the grant of waivers was arbitrary and capricious, and violated the law in various ways.

The District intervened and filed a Motion to Quash the appeal on the basis the appeal was interlocutory and therefore, premature. In granting the Motion to Quash, the court found that waivers are only part of an applicant's preliminary land development plans and any allowance of waivers necessarily precedes the applicant's submission of a preliminary plan. Regardless of whether the waivers are granted, the Township may still render a decision approving or denying the development plan which could render an appeal of waivers moot.

Accordingly, the court held that the grant of waivers could not be appealed unless and until the board enters a decision to approve or deny a preliminary development plan. The court's decision turned upon its determination that the grant of waivers did not constitute a "decision" under Section 107(b) of the MPC, which defines that term as a "final adjudication of the board" and provides that all "decisions" can be appealed to the court of common pleas. The court found that were it otherwise, interested parties would potentially be required to appeal seriatim whenever during the approval process a waiver or modification was granted.

This case could prove useful in that it provides authority for the proposition that a landowner can apply for and receive waivers prior to preparation and submission of land development plans. This could potentially streamline the plan approval process and minimize plan revision and review. It could also allow a land owner to get a decision on a particularly important waiver request prior to undertaking the time and expense to prepare full land development plans.

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[1] 60 Ches. Co. Rep. 337 (C.C.P.Chester 2012)

Tax Credit Report: *Historic Boardwalk Hall, LLC v. Commissioner of Internal Revenue*

By Jeffrey Hall and Daniel V. Madrid

In a case of potentially far reaching implications, the Third Circuit Court of Appeals in *Historic Boardwalk Hall, LLC v. Commissioner of Internal Revenue*[1] reversed the U.S. tax court's decision and issued a decision considered to be a seminal ruling on use of the Federal Historic Rehabilitation tax credit (Historic Tax Credit). As codified under Section 47 of the Internal Revenue Code, the Historic Tax Credit allows a taxpayer to claim a 20 percent tax credit calculated on certain qualified expenses used towards the rehabilitation of certified historic structures. Since Historic Tax Credits may not be sold, transactions are often structured to allow investors to take an equity interest in the entity rehabilitating a historic structure so that the investor can claim the tax credit. In *Historic Boardwalk Hall*, the central issue was whether an investor in the Boardwalk Hall project could take advantage of the historic tax credit based upon its ownership interest in the project's sponsor and the related contractual arrangements associated with such interest.

The case involved the rehabilitation of Atlantic City's Boardwalk Hall – a building constructed in the late 1920s that certified as a National Historic Landmark in 1987. Site of the Miss America Pageant for many years, Boardwalk Hall had fallen into a state of disrepair. In 1992, the New Jersey Legislature authorized the New Jersey Sports and Exposition Authority (NJSEA) to use its legislatively proscribed powers to construct the Atlantic City Convention Center and renovate the deteriorated Boardwalk Hall exhibition facility. NJSEA formed Historic Boardwalk Hall, LLC (HBH), a single member limited liability company, to carry out these objectives.

The renovation of Boardwalk Hall commenced in late 1998. The renovation project was capitalized through several grants and bond issuances such that the project was considered to be fully funded by the end of 1999. However, in August 1998, NJSEA learned of an opportunity to raise additional capital for the project through the sale of federal Historic Tax Credits to a private investor. NJSEA solicited offers to potential investors through a confidential offering memorandum and Pitney Bowes (PB) was ultimately selected as the investor.

Through a wholly-owned subsidiary, PB purchased an interest in HBH as the investor member and entered into an operating agreement to memorialize its contractual obligations to HBH. The transaction required PB to make an initial capital contribution of $650,000 and three additional capital contributions totaling $17,545,797 contingent upon the verification of certain rehabilitation costs incurred to generate Historic Tax Credits. The transaction was structured to allow PB to receive a 99.9 interest in the profits and losses of the entity as well as the right to an allocation of 99.9 percent of the Historic Tax Credits generated by the project. Between 2000 and 2002, Boardwalk Hall LLC incurred nearly $104 million in qualified rehabilitation expenditures.

In 2002, the Internal Revenue Service (IRS) conducted an audit of HBH and determined that PB could not be allocated the Historic Tax Credits for two reasons. First, the IRS stated that HBH should not be recognized as a partnership for federal income tax purposes because it was a sham transaction structured to allow PB to improperly obtain the benefits of the credits. Second, based on the totality of the circumstances surrounding the transaction, PB was not a bona fide partner in HBH as it had no meaningful stake in the company. In reversing the IRS's decision, the United States Tax Court rejected the IRS's findings and instead determined that the transactions had "economic substance" and a "legitimate business purpose – to allow [PB] to invest in the [rehabilitation of Historic Boardwalk Hall."

The Third Circuit Court of Appeals reversed the tax court's ruling and held that PB was not a bona fide partner in HBH. The court's analysis focused on whether HBH satisfied the test of being a bona fide partnership, defined as "parties in good faith and acting with a business purpose intend[ing] to join together in the present conduct of the enterprise." The court emphasized that the transaction should be reviewed for substance over form and should turn on the totality of the circumstances. In its analysis, the court found that PB did not have a meaningful stake in the success or failure of the enterprise based on the following factors:

- PB had no meaningful risk in joining HBH as HBH provided PB with various guaranties including the protection against recapture or disallowance of the tax credits, cost overruns and operating deficits;
- PB had no meaningful upside potential as the project was highly leveraged and there was no residual

[1] --- F.3d ----, 2012 WL 3641769 (C.A.3 2012)

cash flow available for distribution even under HBH's "rosy" financial projections; and

- Although HBH met partnership formalities, there was no "meaningful intent [for PB] to share in the profits and losses of the investment."

In essence, the court found that if a tax credit investor has no real possibility of upside and is insulated from construction, operational and task risk, the investor may not be qualified for the tax credits as such risk mitigation is inconsistent with the investor's status as a partner.

Based on this decision, the tax credit industry is forced to carefully evaluate the use of partnership structures to qualify for Historic Tax Credits as the mechanisms that were built into the structure described in the case are common place. Practitioners have been actively restructuring transactions with the principles of this case in mind. Guidance from the IRS has been requested in light of the unsettling impact of this decision.

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Florida Supreme Court Extends Homestead Exemption to Non-Residents

By Peter Blacklock

A unanimous Florida Supreme Court has rebuffed an appeal by the Property Appraiser of the state's largest county to deny an *ad valorem* property tax exemption to foreign property owners. On October 4, 2012, in *Garcia v. Andonie*, the Supreme Court upheld the Third District Court of Appeal's affirmation of a 2006 circuit court decision granting homestead benefits to David and Ana Andonie, an Hondoran couple residing in a $1 million Key Biscayne under a temporary visa. In reaching its decision, the court rejected the Miami-Dade Property Appraiser's argument that since the Andonies are not permanent residents of the State of Florida, they fail to fulfill the entitlement standards for the exemption under Florida law.

The Andonies' initial homestead application for the 2006 tax year included a sworn statement that their condominium was being maintained as the permanent residence of their three minor children (each of whom was born in Florida and is a citizen of the United States). The Property Appraiser rejected the application in reliance of section 196.031(1), Florida Statutes (2006), which reads in relevant part:

> Every person who, on January 1, has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent residence, or the permanent residence of another or others legally or naturally dependent upon such person, is entitled to an exemption from all taxation… as defined in s. 6, Art. VII of the State Constitution.

Article VII, Section 6(a) of the Florida Constitution, states in pertinent part:

> Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, *or another legally or naturally dependent upon the owner*, shall be exempt from taxation thereon . . . upon establishment of right thereto in the manner prescribed by law.

The court premised its decision upon Article VII, Section 6(a), going so far as to opine that the inconsistent "and who resides thereon" element of its statutory counterpart (language which was also included in the Constitution until it was amended in 1968) "is invalid and unenforceable as a legal element of entitlement for the *ad valorem* tax exemption as provided for under the plain language of article VII, section 6."

Florida has a rich history of residential property ownership by citizens of other states, and more recently, other nations. While it's certainly too early to conclusively evaluate the ramifications of the Andonie decision, the case may have a significant impact upon non-resident homeowners in our state.

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PENNDOT Publishes Draft Regulations Amending Highway Occupancy Permitting

By Robert Gundlach

On August 25, 2012, the Pennsylvania Department of Transportation published proposed regulatory amendments to 67 Pa. Code, Chapter 441 – the rules that govern Access and Occupancy of Highways by Driveways and Local Roads. The proposed regulations include changes to two areas. First, they attempt to clarify who can apply for a Highway Occupancy Permit and who can submit the permit applications to the Department. Second, the amendments would update out-of-date sections of the regulation.

The significant proposed changes that will amend who can apply for an Highway Occupancy Permits would expand the definition of "owner" to allow additional people with an interest in the property to apply. Additionally, eligible applicants were broadened by adding the term "agent" which would enable project consultants to apply for a permit on behalf of the property owner.

Out-of-date language in Chapter 441 is also amended by the proposed rulemaking to reflect the existence of PENNDOT's new electronic permitting system for Highway Occupancy Permits. Additionally, the fee schedule associated with permits would be removed from within the regulatory language and replaced with a provision that allows the Department to publish fee schedules in the Pennsylvania bulletin as needed.

Furthermore, the proposed regulations would update sight distance requirements and driveway design criteria by replacing the regulatory standards with references to standards described in the Department's Highway Design Manual and Highway Occupancy Permit Design Manual, respectively.

The proposed rulemaking is currently subject to the regulatory review process managed by Pennsylvania's Independent Regulatory Review Commission (IRRC). If successful, adoption would likely not occur until 2014.

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