In the Zone

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Neighbors and Objectors Be Alert: Township Does Not Lose All Jurisdiction Over a Parcel of Land When a Land Use Appeal is Filed

James DeFilippo, Jackson Realty Partners, Cameron Jones and Joseph Gray v. Cranberry Township Board of Supervisors and Carsense, Inc.

By Loren D. Szczesny

In the development of real estate in Pennsylvania, it is common for neighbors and/or residents in close proximity to a project to participate in the public process on the land development application. Parties aggrieved by a decision of a municipality may file an appeal of the decision in the local Court of Common Pleas. Once an appeal is filed with respect to a parcel of land, there is a question as to the effect of that appeal on any other development of that parcel during the pendency of the appeal.

This question was recently presented to the Commonwealth Court in the case of *James DeFilippo, Jackson Realty Partners, Cameron Jones and Joseph Gray v. Cranberry Township Board of Supervisors and Carsense, Inc.* In this case, the Commonwealth Court affirmed the decision of the trial court dismissing the land use appeal of the objectors to a development approval obtained by Carsense, Inc. The case involved a 15 acre parcel of land located in the Planned Industrial/ Commercial Zoning District of Cranberry Township. Carsense, Inc. was proposing to construct an automobile sales and service center, which was permitted as a Conditional Use in the commercial district of the Township. The Carsense, Inc. proposal would require 13 waivers from the Township ordinances relating to landscaping, parking and garage door placement.

On September 29, 2010, the Township Board of Supervisors held a public hearing on the Conditional Use application of Carsense, Inc. James DeFilippo, Jackson Realty Partners, Cameron Jones and Joseph Gray (Objectors) appeared at the public hearing and stated an objection to the Carsense, Inc. proposal. Thereafter, at the Board of Supervisors meeting of November 4, 2010, the Board approved of the Carsense, Inc. proposal and granted all 13 waivers requested by the developer. The Board also granted preliminary and final subdivision approval and final approval of Phase I of the land development plan.

On December 3, 2010, Objectors filed a land use appeal in the Court of Common Pleas challenging the approval of the land development plan. During the pendency of the appeal, in January 2011, Carsense, Inc. filed a new land development plan (Plan II) and a new conditional use application with Cranberry Township. Under Plan II, Carsense, Inc. revised its proposal and, thereby, reduced the need for waivers from 13 waivers to 5 waivers. Although the appeal was pending on the initial plan (Plan I), the Township Board of Supervisors held a public hearing on Plan II on February 24, 2011, and, on April 6, 2011, granted approval of Plan II and conditional use approval for the development. In addition, the Township Board of Supervisors granted preliminary and final subdivision approval and final Phase I land development approval on Plan II.

More than two months later, on June 21, 2011, Objectors attempted to include the Township's approval of Plan II in its initial appeal of Plan I, which was pending in the Court of Common Pleas. Objectors filed a "Supplement to Appeal" arguing that they did not become aware of Plan II or the Township's approval until they noticed construction activity at the site. Objectors argued that the Board of Supervisors lacked authority to act on Plan II because the land use appeal of Plan I divested the Board of Supervisors of any authority to act on any Carsense, Inc. proposal until Objectors initial appeal was decided.

In This Issue:

In response to Objectors "Supplement to Appeal," Carsense, Inc. filed a motion to strike and dismiss as moot the land use appeal of December 3, 2010. Carsense, Inc. argued that Plan I, the plan appealed by Objectors to the Court of Common Pleas, was abandoned and replaced with Plan II. Since Objectors did not appeal the Plan II approval, Carsense, Inc. argued that there was no controversy at issue, and, therefore, the appeal was moot.

After hearing argument from the parties, the trial court granted the motion of Carsense, Inc. and dismissed Objectors' appeal as moot. The Objectors appealed that decision to the Commonwealth Court.

In reviewing the information presented, the Commonwealth Court noted that the Objectors failed to keep themselves apprised of the land development submissions on the subject parcel and the Township actions, which are matters of public record. The Objectors had an opportunity to participate in the public process and the review of Plan II, but they did not participate. The court held that a land use appeal does not stay the effectiveness of a municipality's order, nor does it bar a property owner from considering and proposing a different land development plan or zoning application. A municipality does not lose all jurisdiction over a parcel of land when a land use appeal is filed. Carsense, Inc. obtained two approvals, and it chose to develop the plan (Plan II) that was not challenged or appealed. Therefore, the Commonwealth Court found the appeal relating to Plan I was moot, and it upheld the decision of the trial court dismissing that appeal.

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E-Verify Required for Public Construction Workers

By Carrie B. Nase

On July 5, 2012, Pennsylvania Governor Tom Corbett signed into law the "Public Works Employment Verification Act" meant to eliminate the use of undocumented workers on public construction projects. SB 637 requires contractors and subcontractors to verify employment eligibility of employees who are working on publicly funded projects.

"Public work" is defined under Section 2 of the Pennsylvania Prevailing Wage Act (P.L. 987, No. 442) as meaning "construction, reconstruction, demolition, alteration and/or repair work other than maintenance work, done under contract and paid for in whole or in part out of the funds of a public body where the estimated cost of the total project is in excess of $25,000, but shall not include work performed under a rehabilitation or manpower training program."

Public works contractors and subcontractors must enroll and use the federal E-Verify System to verify employment eligibility of each new employee, effective January 1, 2013. As a precondition of being awarded a contract for a public work, or with respect to a contract that was awarded prior to January 1, 2013, but has not yet been executed, the contractor must provide the public body with a verification form, designated by the Department of General Services, acknowledging its responsibilities and confirming compliance with Act.

Public work contractors, subcontractors and staffing agencies are required to participate. However, "material suppliers" are not included in the definition of subcontractor.

Contractors who violate SB637's provisions could be subject to various penalties and in some cases fines. A first offense would result in a warning letter; for a second violation, a public works contractor shall be debarred from public work for 30 days; and, for a third (and subsequent) violation, the contractor shall be debarred for not less than 180 days and not more than one year. If it can be demonstrated that an employer willfully violated the law, they would be barred from public projects for three years. Violators may also be subject to civil penalties.

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Too Little, Too Late

By John Grossman

The New Jersey Appellate Division has disallowed a claim, raised by a foreclosure defendant for the first time on appeal, that the plaintiff lacked standing because it did not possess the note showing the repayment obligation when it filed its complaint. In *PHH Mortgage Corp. v. Krowicki, et al.*, decided by the Superior Court of New Jersey, Appellate Division, on August 27, 2012, the court, on equitable grounds, affirmed the decision of the lower court denying defendant's contentions that the foreclosure judgment and sale should be set aside. While the court was sympathetic to the interests of the innocent purchaser of the property, it also chided the defendant for waiting too long, in this case several years, before seeking to set aside the judgment and sale and for raising, for the first time on appeal, the plaintiff's lack of standing.

The New Jersey Supreme Court adopted significant amendments to the court rules governing foreclosures in 2011. Among those amendments include certifications concerning the existence of the original note. In this case, the initial loan documents were executed in 1991; modifications to those documents were executed in 1998 at the time of a loan extension. The defendant defaulted in August 2006, resulting in the entry of default judgment in June 2007. During the set aside proceedings, the defendant contended that the 1998 loan was a new loan, with which the court disagreed. On appeal, the Appellate Division found the defendant's standing argument, i.e. failure in possession of the 1998 note, to be without merit, not only on equitable grounds, but also on the basis that the judgment and sale were entered and accomplished in 2007 and 2010, respectively, well before the court rule amendments were adopted.

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HUD-1 Settlement Statement Proposed To Be Replaced with New "Closing Disclosure"

By Kimberly A. Freimuth

In July 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act was passed, which created a new and independent regulatory agency known as the Consumer Finance Protection Bureau (CFPB). The CFPB was tasked with promulgating regulations to integrate the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA). In addition, the CFPB was charged with proposing rules and model disclosures combining TILA and RESPA into a single, integrated disclosure. The CFPB was given until July 21, 2012 to publish its proposed rule.

On July 9, 2012, the CFPB issued its 1099 page Proposed Rule. The Proposed Rule includes a replacement for the HUD-1 Settlement Statement (which was just recently revamped in 2010). The traditional HUD-1 Settlement Statement would now be replaced with a new five-page document titled "Closing Disclosure," which now includes both RESPA and TILA requirements. As part of the Proposed Rule, the CFPB has offered two potential options for the preparation of the Closing Disclosure: (1) preparation by the lender; or (2) shared preparation by both the lender and the title company.

In addition, the Proposed Rule requires that the Closing Disclosure be given to the consumer three business days prior to closing. Exemptions to the three-day rule include last minute negotiations between parties, changes that amount to less than $100 and technical errors. There are certainly additional exemptions that may be appropriate, such as seller side changes or if the cash required to close decreases rather than increases.

The CFPB is currently seeking public comment on the Proposed Rule. Comments are due no later than November 6, 2012.

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Federal Legislation Seeks to Reverse EPA Guidance Document

By M. Joel Bolstein

On April 27, bipartisan leaders of the House Transportation and Infrastructure Committee and the House Agriculture Committee introduced H.R. 4965, which would prohibit the Environmental Protection Agency (EPA) and the Army Corp of Engineers (Corps) from finalizing or implementing guidance provided in the document entitled "EPA and Army Corps of Engineers Guidance Regarding Identification of Water Protected by the Clean Water Act." Enacting this legislation also would prohibit those federal agencies from using similar guidance as the basis for any decision regarding the scope of the Clean Water Act's jurisdiction or in any rulemaking activities.

In May 2011, the EPA and the Corps issued draft guidance on "Identifying Waters Protected by the Clean Water Act." This guidance document, which was sent in final form to OMB on February 21, 2012, significantly changes and expands what features are considered protected under the Clean Water Act. It makes substantial additions, such as a first time inclusion of ditches, ground water, potholes, gutters and other water features that may flow, if at all, only after a heavy rainfall.

These new regulations would make it harder for Americans to build in their backyards, grow crops, manage livestock, expand small businesses and carry out other activities on private lands.

Further, the guidance uses an overly broad interpretation of the U.S. Supreme Court's decision in the *Rapanos* case that addressed the issue of jurisdiction over "waters of the U.S." under the Clean Water Act. The guidance contends that virtually all wet areas that connect in any way to navigable waters are jurisdictional, an assertion that was rejected in the *Rapanos* decision.

H.R. 4965 is similar to S. 2245, the Preserve the Waters of the U.S. Act.

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Legislative Update in Pennsylvania

By David Comer

Act No. 97 of 2012, which was approved by Governor Corbett on July 5, 2012 and takes effect 60 days thereafter, amends the Pennsylvania Municipalities Planning Code (MPC) by, among other things, adding requirements that municipalities notify school districts of approved plans for residential developments within impacted school districts.

Act No. 97 adds Section 508.1 to the MPC, which reads as follows: "Notice to School District. Each month a municipality shall notify in writing the superintendent of a school district in which a plan for a residential development was finally approved by the municipality during the preceding month. The notice shall include, but not be limited to, the location of the development, the number and types of units to be included in the development and the expected construction schedule of the development."

Additionally, Act No. 97 adds Section 711(f) to the MPC, which is similar to Section 508.1, although Section 711(f) addresses planned residential developments specifically.

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Appeals Court Grants Developer's Requests for Public Records

By John Grossman

A New Jersey developer succeeded in his efforts to compel Jersey City to produce records related to his companies' ownership and proposed development of land known as the former Pennsylvania Railroad Stem Embankment. In awarding the plaintiff access to numerous categories of public records sought to be protected by Jersey City, whose position was upheld by the Government Records Counsel, which,

in some instances, unilaterally reclassified the protective designation proffered by the city, the Appellate Division engaged in a detailed analysis of sections of the Open Public Records Act, known as "OPRA," N.J.S.A. 47:1A-1 to – 13 and, in particular, those provisions concerning Jersey City's position that certain requests were overbroad or were otherwise protected on the basis of the attorney-client privilege or the advisory, consultative, or deliberative exception to disclosure.

For a more detailed discussion of this case, *Hyman v. City of Jersey City, et al.*, decided by the Superior Court of New Jersey, Appellate Division, on August 27, 2012, please contact me.

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Joel Bolstein Appointed to PENNVEST Board

M. Joel Bolstein, partner and co-chair of Fox Rothschild's Environmental Practice, was recently appointed to the board of the Pennsylvania Infrastructure and Investment Authority (PENNVEST) by Governor Tom Corbett on September 18. PENNVEST funds sewer, storm water and drinking water projects with low cost financial assistance throughout the state, and also assists businesses to locate and expand their operations in Pennsylvania to create permanent, well-paying jobs.