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In the Zone

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Time of Decision Legislation Abolished in New Jersey

By Jeffrey M. Hall

With the stroke of a pen, the abhorred "Time of Decision" Rule was abolished on May 5, 2010, when New Jersey Governor Chris Christie signed S-82 into law. While change was long overdue, it took a deep economic recession that particularly impacted real estate to bring about needed reform. While there are exceptions, the newly enacted law creates a "Time of Application" standard. Simply put, an applicant may now proceed before a land use board in reliance upon zoning ordinances and other development regulations in effect at the time the application is filed. Eliminated is the detested practice of municipal governing bodies changing the "rules of the game" midstream by a subsequent ordinance adoption.

Those who opposed the legislation as it wended its way through the New Jersey legislature contended that it would curtail municipalities from curbing growth. In actuality, the legislation may have the ameliorative effect of having municipalities focus on the overhaul of archaic and counterproductive zoning and other land use controls. Clearly, there will be ample time to do so as the effective date of the legislation is May 5, 2011.

The governor's office issued a statement that cites the principles of simplification and predictability as guideposts for his endorsement of the law. It also predicts the lowering of costs and encouragement of development activity. Noting that this legislation creates "a friendlier environment for job creation," it nonetheless maintains safeguards for public health and safety.

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Case Summary

***Borden and Feldman v. Cadles of Grassy Meadows II, LLC,* Superior Court of New Jersey, Appellate Division, Docket No. A-2386-08T1 (April 5, 2010)**

By Melvyn J. Tarnopol

This case explores the question of whether the borrower or the lender bears the burden of proceeding to establish the fair market value (FMV) of a business or commercial property. The facts of this case, in brief, are as follows.

In 1986, the lender made a loan to the borrower that was guarantied by, among others, the two guarantors seeking relief in this case. By 1992, the lender had prevailed against the borrower and the guarantors in a vigorously defended foreclosure action. The court in 1992 rendered final judgment in foreclosure and also a money judgment against the borrower and the guarantors.

Negotiations between the lender and the borrower continued through 1995. Those negotiations broke down and, in 1995, the foreclosure sale finally took place, at which time the property was sold to a third party for approximately $640,000, although the debt owed by the borrower and the guarantors exceeded $4,330,000. The borrower and the guarantors did not object to the sale pursuant to Rule 4:65-5 by serving a notice of motion within 10 days after the sale contending that the sale price was below the FMV. Thereafter, the lender took no action to collect the roughly $3.6 million deficiency on the judgment.

Then, in 2007, after the passage of 12 years, a successor to the lender attempted to enforce the deficiency against the guarantors.

The guarantors argued that the lender was estopped from bringing the action by its failure in 1995 to have brought an action in the foreclosure matter establishing the FMV of the property.

The court began its analysis by stating the fundamental principle that a mortgagee is not entitled to recover more than the full amount of its mortgage debt. The court noted that although the New Jersey statute requiring that a lender establish the FMV of a property sold at foreclosure does not apply to business or commercial properties, New Jersey case law provides that, in the case of business and commercial properties, a court will afford the borrower (and the guarantors) the right to bring an action in equity to establish the FMV. Upon

establishing the FMV, the borrower (and the guarantors) will receive a credit against any personal judgment under the note and the guaranty in the amount of the FMV. The question in this case is who has the burden of bringing the action to establish FMV, and when does that action need to be brought?

The court held that although a borrower (and its guarantors) have an equitable, although not a statutory, right to an FMV hearing, the time to demand such a hearing is at the time of the foreclosure sale. The burden is on the borrower to bring an action within 10 days after the foreclosure sale to demand an FMV hearing to establish the property's FMV. In this case, the guarantors wanted to establish the FMV 12 years after the original foreclosure sale, in the deficiency action brought by the lender. The court held that the deficiency action was not the proper forum to establish FMV but, instead, the action must be brought within the 10 days required by Rule 4:65-5 following the sheriff's sale in the foreclosure action. The court thus permitted the judgment to be pursued against the guarantors with no FMV credit.

It should be noted that the court stated that since the guarantors were named in the original mortgage foreclosure action, they had ample notice of the foreclosure action and had an opportunity to demand an FMV hearing in the foreclosure action. The court left open the question of what the result would have been if the guarantors had not been named in the foreclosure action.

There are two lessons to be drawn from this case. First, lenders, if they intend to pursue guarantors under the guaranty, should name those guarantors in the foreclosure action, to avoid giving the guarantors the opportunity to claim prejudice by not having had the opportunity to establish the FMV credit in the foreclosure action. Second, borrowers and guarantors should seek an FMV hearing in the foreclosure action; failing to do so could result in the unpleasant surprise of having a money judgment enforced against them years later.

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Rail Options From Lehigh Valley to New York City Studied

By Robert W. Gundlach, Jr.

The Central NJ/Raritan Valley Transit Study (CNJ/RV) – Pennsylvania Component is an extension of the NJ TRANSIT CNJ/RV Transit Study, which assessed commuter bus and commuter rail transit improvement alternatives along Interstate 78 (I-78) in New Jersey. The purpose of the Pennsylvania Component Study, commissioned by the Lehigh Valley Economic Development Corporation, was to build upon the New Jersey portion of the study (New Jersey Component Study) by identifying and assessing options to improve rail and bus services along the Route 22 and I-78 corridors in the Lehigh Valley and the northern New Jersey/New York Urban Core (Jersey City, Newark, Midtown Manhattan and Lower Manhattan). The rail and bus options were developed to provide local decision makers with information to decide whether they warrant more detailed study and development.

According to the $250,000 study, it developed preliminary constructability, ridership and cost information for rail and bus alternatives that can be used to determine whether any alternatives are warranted and should be advanced. No final determinations have been made as a result of this study, and no funds have been identified to initiate the next phase of alternative development. The total cost to extend passenger rail the 17 miles from New Jersey to Allentown would be more than $600 million to carry the projected 800 daily riders.

As reported by the *Express-Times* newspaper, "[t]he capital costs appear too high and the projected ridership figures are too low at first glance but some officials feel the region can't afford not to look at the potential of rail."

The study findings were unveiled at a recent Regional Transportation Forum held in Bethlehem, PA, at a RenewLV forum (see video recording of event).

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Proposed Legislation in Pennsylvania

By David H. Comer

House Bill No. 2431 proposes to amend Section 1 of Article IX of the Constitution of the Commonwealth of Pennsylvania to reorganize local government with a county basis. The proposed legislation would establish the county "as the basic unit of local government."

Currently, there are 2,562 municipalities in Pennsylvania. There are 67 counties.

Representative Thomas Caltagirone of Berks County introduced the proposed legislation, which would provide the county as the basic unit of local government with jurisdiction over: (1) personnel, (2) law enforcement, (3) land use, (4) sanitation and (5) health and safety.

In essence, the proposal would eliminate townships, cities and boroughs as they currently exist, and, in turn, counties would oversee operations on a much broader scale.

In conjunction with his introduction of the legislation, Caltagirone wrote in a memorandum to all members of the House of Representatives that the intent of the legislation is "to provide the tools to establish municipalities under the jurisdiction of the county and determine the relationship among these municipalities and the county. I believe that in this effort to amend the Commonwealth of Pennsylvania Constitution, we may be able to model our municipal governments to a more efficient and effective structure."

Caltagirone added that the foregoing system is used by southern states and such a consolidation under a county government structure would "create less bureaucracy and cut down on duplication of services."

In order to become law, the proposed amendments would need to be passed in two consecutive sessions of the legislature and then face a statewide referendum.

There does not appear to be much support for the proposed amendments, at least from townships.

For example, the Pennsylvania State Association of Township Supervisors, which represents the commonwealth's 1,455 townships of the second class and more than 10,000 local officials, issued a news release, dated April 28, 2010, stating that it "strongly opposes House Bill 2431, which ... would radically change the way Pennsylvanians are governed."

House Bill 2431 was referred to the Committee on Local Government on April 20, 2010. It will be interesting to see whether this proposed legislation gains any traction.

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Recent Commonwealth Court Unreported Opinion Raises Eyebrows Among Municipal and Billboard Advertising Communities

By Ronald P. Kalyan, Jr.

A recent Pennsylvania Commonwealth Court ruling emanating from Delaware County addressed a municipality's ability to exclude billboards and has provided support to activists and municipalities seeking to curb such uses.

The controversial decision involves a Memorandum Opinion authored by Pennsylvania Commonwealth Court Senior Judge Keith B. Quigley, in the case of *H. A. Steen Industries, Inc. d/a/a Steen Outdoor Advertising v. ZHB of Upper Providence*; 1224 C.D. 2008. The opinion was issued at the very end of 2009.

Steen initially challenged the validity of the Upper Providence Township Zoning Ordinance, which prohibited outright off-premises advertising signs, and filed applications to install two 16 foot by 48 foot, double faced monopole signs along two different roads in the township, after entering into rental contract agreements with property owners.

Despite finding that the township's ordinance totally excluded off premises advertising signs, the Zoning Hearing Board still denied Steen's application, in part, because the township presented evidence showing the proposed signs would be injurious to the health, safety and welfare of the traveling public.

Steen subsequently appealed the Zoning Hearing Board's decision to Delaware County Court of Common Pleas. The County Court upheld the Zoning Hearing Board's decision, and Steen subsequently appealed to the Commonwealth Court.

Before the Commonwealth Court, Steen argued that once the township's Zoning Hearing Board determined the ordinance totally excluded off premises advertising signs, it was required to allow Steen to erect its proposed signs. The Commonwealth Court disagreed. Citing other existing Pennsylvania appellate court authority, Judge Quigley determined that although an ordinance may exclude a proposed use, approval of that use is not necessarily automatic. The approval must still be predicated on suitability of the proposed site and various health and safety considerations. Accordingly, the Zoning Hearing Board was still allowed to consider public safety concerns before it finally approved the signs.

The Commonwealth Court then determined that the township introduced substantial evidence in the form of accident reports to show the proposed signs would be injurious to public health, safety and welfare – surprisingly, even though the accidents weren't necessarily caused by signs on the roadway per se. Judge Quigley was apparently swayed by the documentary and testimonial evidence presented by the township. The opinion emphasized that the township's accident reports established that a traffic safety problem existed, and the township's expert witness testified that the proposed billboards would only add additional distractions and increase the likelihood of accidents.

Despite Steen's objections, the Commonwealth Court deemed the township's "expert," a licensed PE in Pennsylvania and New Jersey, duly qualified to offer testimony on Pennsylvania traffic safety. Judge Quigley also ignored Steen's protestations that its own witness presented superior testimony and emphasized that the Zoning Hearing Board is the sole judge of the credibility of witnesses and the weight afforded their testimony.

Steen has appealed the decision to the Pennsylvania Supreme Court, which has not yet ruled on the Petition for Allowance to Appeal.

Please note that the decision is not a formal published opinion and, accordingly, cannot be relied on or cited in a brief, memo or pleading for precedential value. However, the decision certainly provides municipalities with a reason for hope and an indication as to how a local court and appellate court would evaluate the situation if confronted with it once again. Further, although not having binding precedential value, the case may still be used as being "influential" or as a helpful "guide" for zoning hearing boards, solicitors and local judiciary.

Consistent with Commonwealth Court Internal Operating Procedures, the township and a local activist group have filed petitions with the Commonwealth Court requesting that the Memorandum Opinion be reported and published due to the case arguably addressing matters of public interest and safety.

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Case Summary: *Hamm v. City of Wilmington*

A recent Superior Court decision clarifies the burden of proof with respect to the abandonment of a permissible non-conforming use

By Michael J. Isaacs

A recent Delaware Superior Court decision deals specifically with the burden of proof in the area of non-conforming uses. In *Hamm v. The City of Wilmington*, the property owner appealed the City of Wilmington Zoning Board of Adjustments decision upholding the Zoning Administrator's determination that insufficient evidence existed to show the continuity of the non-conforming use of Hamm's apartment building.

Hamm purchased a triplex apartment in Wilmington from the Estate of Anne Dorsey Hall. Hall had purchased the property in 1946 and resided in the second floor apartment from 1950 until her death on September 27, 2007. During those years, Hall rented out the other two apartments. The triplex had been originally zoned for multi-unit dwellings and, in approximately 1980, the area was rezoned for single-family dwellings. Hall continued to rent out the apartments as a permissible non-conforming use. In February 2007, seven months before her death, Hall broke her hip at home, was hospitalized and then entered an in-patient rehabilitation facility. Hall intended to return to her home; however, she died before she was able to do so. The triplex was sold by her estate. Hamm purchased the triplex in June 2008 and proceeded to make significant repairs to the property. In August 2008, he leased two of the three apartments. In September 2008, Hamm leased the third apartment. In moving quickly, Hamm intended to ensure that he had tenants in the triplex before one year had passed before August 2007, the date the previous tenant departed. Hamm was fully aware of the Wilmington ordinance that does not permit a non-conforming use to continue if one year has passed since the discontinuance of the use. Additionally, Hamm attempted to register the triplex with the Department of Licenses and Inspections. Hamm was notified by the City of Wilmington Administrator that he might be in violation of the non-conforming use ordinance and that more information would be required for the Zoning Administrator to determine if the use had in fact been abandoned. Hamm provided the Zoning Administrator with an affidavit from one of the tenants who stated that he was a tenant in the triplex until August 2007. Hamm also submitted an affidavit from Hall's niece indicating that tenants resided in the triplex through 2007.

The Zoning Administrator did not determine that the non-conforming use was lost but only determined that insufficient evidence had been presented to show that the non-conforming use had been continued. As a result, the necessary occupancy licenses were not issued and the Department of Licenses and Inspections brought criminal proceedings against Hamm for failure to register the three rental units. Hamm could not register the units until a decision was made regarding the non-conforming use. Hamm requested a hearing before the Zoning Board of Adjustment. The Board upheld the Administrator's finding that insufficient evidence existed to show continuity of a non-conforming use or that a vacancy was

due to circumstances beyond the owner's control. Hamm petitioned the Superior Court to overturn the decision.

In its decision, the court noted that the City of Wilmington asserted that Hamm had abandoned the non-conforming use of his triplex. The court ruled that the City had the burden of proving the abandonment of the non-conforming use. "It is not enough for the City of Wilmington to simply demonstrate that insufficient evidence exists to continue the non-conforming use." Rather, the City must affirmatively demonstrate the abandonment of such use, and the City failed to do so. The court further stated "for Hamm to have abandoned the non-conforming use of his triplex he must be shown to have intended to discontinue renting the apartments and to have acted on that intent."

In this case, Hamm did just the opposite by taking measures to ensure the non-conforming use continued and quickly seeing to it that tenants were installed in the triplex prior to the lapse of one year from the time the previous tenant departed. Finally, the court found that no substantial evidence existed to support a finding of abandonment of the non-conforming use by either Hamm or Hall. The court further found that the Board of Adjustment did not correctly apply the law in its finding that not enough evidence exists to show the continuity of the non-conforming use. The court clarified this by noting that Hamm was not required to show continuity; rather the City of Wilmington was required to demonstrate abandonment, which it did not do.

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Lead-Based Paint Rules Go Into Effect – and New Amendments Announced

By Carrie B. Nase

On April 23, 2010, the U.S. Environmental Protection Agency announced that renovations and repairs of pre-1978 housing must now be conducted using safe practices to protect children and pregnant women from exposure to lead-based paint. Information on compliance can be found at the EPA Lead Safety web site.

However, in the same notice, the EPA announced plans to move forward on several amendments to the now-effective rule. The proposed changes, include:

- A final rule to apply lead-safe work practices to all pre-1978 homes, effectively closing an exemption that was created in 2008 for owner-occupied housing. The rule will become effective 60 days after publication in the Federal Register.
- A notice of proposed rulemaking to require dust-wipe testing after most renovations and provide the results of the testing to the owners and occupants of the building. For some of these renovations, the proposal would require that lead dust levels after the renovation be below the regulatory hazard standards. The agency expects to finalize the rule by July 2011.
- An advance notice of proposed rulemaking to announce the EPA's intention to apply lead-safe work practices to renovations on public and commercial buildings. The advance notice also announces the EPA's investigation into lead-based paint hazards that may be created by renovations on the interior of these public and commercial buildings. If the EPA determines that lead-based paint hazards are created by interior renovations, it will propose regulations to address the hazards.

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PA Legislature Opens Special Session on Transportation Funding

By Robert W. Gundlach, Jr.

The Pennsylvania state legislature began its special session on infrastructure funding on May 4, 2010. The large number of state roads and bridges falling into disrepair, increased traffic congestion and widening gaps in funding prompted Governor Rendell to call for a funding solution from the legislature. While the legislature is still struggling with ways to cope with the state's $1.1 billion general budget funding gap, some lawmakers are examining mechanisms to raise an additional $500 million solely for critical infrastructure expenses.

According to the governor, Pennsylvania is home to 5,646 structurally deficient bridges and 7,000 miles of roadways in desperate need of repair. And, the administration and Democratic lawmakers are advocating a variety of different revenue-raising taxes and fees. Such ideas include increasing the state gas tax by as much as 12 cents per gallon (currently at 31 cents); levying new taxes on large oil companies; increasing vehicle registration fees; creating public-private roadways where a private company builds and tolls a roadway; leasing the Pennsylvania turnpike; and, tolling parts of interstate roadways, despite the recent rejection by the federal government to allow tolling on I-80.

Cost-cutting plans are also under consideration such as merging PennDOT and the Turnpike Commission as well as the reduction of state employees at PennDOT.

While Governor Rendell stated it would be disastrous for Pennsylvania if lawmakers do nothing to resolve the state's infrastructure revenue woes, lawmakers seem more intent on working on the state's general budget first.

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PA Environmental Quality Board Adopts New Regulations for E&S Controls and Stormwater Management

By M. Joel Bolstein

On May 17, the Pennsylvania Environmental Quality Board adopted new regulations that impose stricter controls on erosion and sedimentation and post-construction stormwater runoff. The new rules will now go to the General Assembly and to the Pennsylvania Independent Regulatory Review Commission (IRRC) for a 30-day review period. It's possible that there will still be some fighting over the new regulations, inasmuch as the IRRC previously provided extensive comments concerning cost-benefit, which do not appear to have been addressed by PADEP.

The new regulations amend 25 Pa. Code Chapter 102. The revisions are comprehensive and include changes to definitions, imposition of enhanced erosion and sedimentation control planning requirements, changes to permit application requirements and increased permit fees, changes to post-construction stormwater management, including long-term operation and maintenance, anti-degradation implementation, riparian buffer requirements and new permits-by-rule. The regulations incorporate updates to the federal stormwater permitting requirements promulgated in two phases in 1992 and 2002. Pennsylvania maintains delegation of the federal program, so some of the new regulations were adopted to implement the second phase of the federal requirements, according to PADEP.

Of particular significance to developers, the new regulations impose an array of highly technical and onerous post-construction stormwater management (PCSM) requirements. Under the regulations, new earth disturbance activities that require permit coverage must have written PCSM plans. Developers that received permits prior to the effective date of the regulations and are renewed prior to January 1, 2013, are authorized to implement the PCSM plan in accordance with the terms of the existing permit. After January 1, 2013, the renewal of any permit issued before the effective date of the regulations must comply with the terms of the new regulations, so developers need to be very mindful of those deadlines. The regulations not only address what needs to be in the PCSM plan but also state that the plan itself must be prepared by a person trained and experienced in PCSM design methods and techniques "applicable to the size and scope of the project being designed." The PCSM plan under the new regulations must contain a long-term operation and maintenance schedule, which provides for maintenance and inspection of BMPs in perpetuity. PCSM plan stormwater analysis must take into consideration a predevelopment site characterization and assessment of soils and geology and appropriate infiltration and geotechnical studies. Under the new regulations, for sites with existing impervious cover, the predevelopment evaluation must include an analysis for the 2-year/24-hour storm event that factors in "20% of the existing impervious area to be disturbed must be considered meadow in good condition," but it also allows the developer to demonstrate impracticability and stormwater volume reduction to the maximum extent practicable to protect existing water quality and uses. The computations required are highly technical and will require an ever-increasing sophistication on the part of outside consultants. The changes instituted by the regulations are comprehensive and require special attention by anyone with a development in the planning stages. They undoubtedly will have a significant impact on new development throughout the Commonwealth.

Click here for a copy of the regulations.

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Prescriptive Easement for Recreational Use Over a Body of Water

By Regina M. Flaherty

The Connecticut Supreme Court issued its opinion in the case captioned *Frech v. Piontkowski* (No. SC 18400) on May 4, 2010, addressing the question of whether, among other things, a prescriptive easement for recreational use over a body of water was available as a matter of law.

This case arose in the context of a nonnavigable, artificial body of water (a reservoir) that "was created in 1890 by the erection of a dam on the property currently owned by the defendants, twenty-five feet in height from the bottom of a brook situated on the property. The original purpose of the dam was to provide water to the water towers serving the steam locomotives at the Old Saybrook Railroad Junction."

The plaintiffs own lots created by a subdivision in 1974 that abut the reservoir. The defendants own the reservoir and the land under it. The exact boundary between the reservoir and the abutting properties and the ownership of that land was disputed at trial.

The plaintiffs (and their predecessors in interest) have enjoyed boating, swimming, fishing, ice fishing and ice skating on the reservoir for more than 25 years. One of the plaintiffs installed wooden pallets at the water's edge to gain easier access to their boat. The other plaintiff trucked in sand to create a beach area along the water's edge.

While prescriptive easement claims are fact intensive, this case addressed a number of prescriptive easement requirements and procedural steps that are instructive.

The defendant claims that the court erred in concluding as a matter of law that an abutting landowner may acquire a prescriptive easement over a nonnavigable, artificial body of water for recreational purposes. The court distinguished two decisions from other jurisdictions (Pennsylvania and Ohio) that were offered to support the defendant's claim that a prescriptive easement over a body of water was not available as a matter of law. In the Pennsylvania case, the Pennsylvania court rejected a claim that an easement in gross could arise from the casual, recreational use of a lake for a few months each year by prescription. The Ohio Supreme Court rejected a claim for an easement by prescription for use by the public of a privately owned lake. This case was distinguished by the "public use" component and the lack of sufficient factual basis for the plaintiff's claim in that case. The Connecticut Supreme Court found in the instant case that an easement for recreational use over a nonnavigable, artificial body of water was available as a matter of law.

The court did not find persuasive the defendant's further claim that by granting the prescriptive easement to plaintiffs, a "unique burden" is imposed on the servient estate of maintaining the dam in perpetuity. The court viewed this concern as addressing the "scope" of the easement that may arise by prescription rather than the ability of the court to find such an easement as a matter of law.

The defendant claims, among other things, that the trial court improperly concluded that the plaintiffs had established all of the requisite elements to acquire such prescriptive easement. The elements of a prescriptive easement for recreational use of a body of water are outlined in Connecticut General Statutes Section 47-37, which provides: "No person may acquire a right-of-way or any other easement from, in upon or over the land of another, by the adverse use or enjoyment thereof, unless the use has been continued uninterrupted for fifteen years. In applying that section, this court repeatedly has explained that [a] party claiming to have acquired an easement by prescription must demonstrate that the use [of the property] has been open, visible, continuous and uninterrupted for fifteen years and made under a claim of right." [citation omitted]

The defendant contends that recreational use of a body of water is too intermittent and does not leave adequate traces to offer sufficient notice. The court responds that meeting the elements of a prescriptive easement is a question of fact.

The defendant contends that because the use of the reservoir was not constant, it was not continuous. The requirement that the use be continuous does not mean the use must be constant. The court stated that the nature of the easement will dictate the type of evidence that is required to prove it. There is precedent that seasonal use is sufficient to satisfy the continuity requirement. The court has stated the requirement that the use be continuous is satisfied if it is proven that the use was uninterrupted for a period of at least 15 years pursuant to Connecticut General Statutes Section 47-37.

The court did not find the defendant's actions they claimed "interrupted" the continuous use to be sufficient. The defendant's actions included posting "No Trespassing" signs by the reservoir on more than one occasion (since the plaintiffs removed such signs); ejecting the son of one of the plaintiffs from the property on two occasions; asking people using the water in front of the plaintiffs' property to leave; and sending a letter to the one of the plaintiffs objecting to a satellite dish placed on the plaintiff's property. Connecticut General Statutes Section 47-38 provides for notice to interrupt continuous use in an adverse use and/or possession situation. The defendant failed to comply with this statute.

Finally, after review of the facts found by the trial court and the law of this case, the court found that the "use of the reservoir by the plaintiffs and the Marzano family was such that a reasonably diligent owner

would have learned of its existence, nature and extent. The trial court's findings are sufficient to support its determination that the plaintiffs' use was open and notorious."

One interesting development was that at the trial court, the defendant retained an expert who was a surveyor to speak to the issue of whether the lot owners' property actually abutted the body of water (and to determine where the boundaries of the defendants' and plaintiffs' properties were located). The trial court discounted the evidence presented by the expert by its review of subdivision maps and other documentary evidence presented at trial without the benefit of contradicting expert testimony.

Following are some of the lessons for, and reminders to, landowners in protecting their property from adverse use and possession claims:

- Landowners must be diligent in monitoring the use of their properties (and bodies of water located thereon). The court found somewhat intermittent recreational use of a body of water over a period exceeding 15 years could give abutting owners a prescriptive easement by meeting the requirements of open, notorious and continuous use.
- If a landowner detects adverse use of their property, follow the statutory guidance of notice to "interrupt" the adverse use rather than the occasional erection of "No Trespassing" signs and verbal sparring with recreational users of the property.
- You don't always need an "expert" when the opposing party has an "expert" since the court may discount expert testimony by facts gleaned from documentary evidence.

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House Bill Would Dramatically Expand Reach of Federal Clean Water Act

By Kimberly A. Freimuth

In a move that would dramatically expand the scope of the Clean Water Act by replacing the phrase "navigable waters of the United States" with "waters of the United States," Rep. Jim Oberstar (D-Minn.), chairman of the House Transportation and Infrastructure Committee, on April 21 introduced H.R. 5088, the America's Commitment to Clean Water Act (ACCWA).

This change would have an enormously negative impact on the home building industry, effectively extending the federal government's reach to all waters, including storm sewers and retention basins, roadside ditches and seasonal streams.

The expansion of federal jurisdiction proposed in the bill would lead to many more land development and residential projects requiring federal permits and would exacerbate permitting delays—increasing construction costs and driving down housing affordability.

H.R. 5088 was introduced with two co-sponsors, Reps. Vernon Ehlers (R-Mich. and John Dingell (D-Mich.).

By comparison, when Oberstar introduced a similar bill in the last Congress, the Clean Water Restoration Act, he had almost 160 co-sponsors.

Oberstar has indicated that he would like to bring H.R. 5088 to the House floor for a vote in September, which would require his committee to consider the measure in the next few months.

On the Senate side, there has been no action since the Environment and Public Works Committee approved S. 787, the Clean Water Restoration Act, last June. At that time, Sen. Mike Crapo (R-Idaho) said he had placed a "hold" on the bill and indicated that he would filibuster to prevent it from moving to the Senate floor. Crapo is still committed to preventing the bill from moving forward.

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Are Hospital Exemptions in Jeopardy?

By Jeffrey M. Hall

Yet another Tax Court decision applying N.J.S.A. 54:4-3.6 (the Exemption Statute) was issued that should give pause to New Jersey's Medical Centers. Before the court in *AHS Hospital Corp v. Town of Morristown*, were cross-motions for summary judgment, pre-trial motions seeking to dispose of the case by means in lieu of a lengthy trial. Morristown succeeded in securing a favorable decision on its issues, but the hospital did not. As summarized by the Tax Court's web site:

> "The court found that portions of buildings owned by Morristown Hospital and used as offices and a café were not exempt from local property taxes as hospital purpose properties because the spaces were used by private physicians and other private third parties for profit making purposes. The court also found that there exists a genuine issue of material fact as to whether the use or operation of the remainder of the subject property was conducted for profit."

This decision is another in a long line of cases that underscore the fact-sensitive nature of exemptions and the contests over whether they are validly claimed. Noting the three-prong test for exemption, the court here found that space leased to physicians and a café were subject to profit-based agreements and thus taxable as real estate in failing to meet the third (or "profit motive") prong. Moreover, the tax-exempt status of the entire medical center was called into question by the judge's denial of the hospital's cross-motion based on disputed material facts. In defeating the hospital's motion, Morristown pointed to the hospital's Form 990 declaring "unrelated business income" in the amount of $3,371,000 and its Form 990-T, which disclosed income for lab services to non-patients. Further, it showed that the hospital had $1,100,000,000 in income-producing activity and paid its senior executive official roughly $2,850,000 in annual compensation, placing him in the top 20 of hospital senior executives throughout the country.

It is recommended that further proceedings in this matter be followed by the hospital industry. The court's ruling is troubling as it appears to give an opportunity to municipalities to question the entirety of a hospital's operations and call its exempt status into question.

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