In the Zone

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

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ATTORNEYS AT LAW

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Time To Review Your Pennsylvania Real Estate Assessments

By Robert W. Gundlach, Jr.

If you are the owner of a commercial, industrial, retail, office or other property in Pennsylvania, then now is the time to review the tax assessment for your property against its current market value. This same review is also applicable to residential properties. Today's economy has caused many property owners to experience declining rents, increased vacancy and the need to become "creative" in leasing space. These factors have aided an already declining real estate market in devaluing property for real estate tax purposes.

Unfortunately, county boards of assessments cannot 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, 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 You Do If You Think Your Real Estate Taxes Are too High?

First, you need to determine whether to file an appeal to the county board of assessment for your property. To do so, you need an experienced real estate assessment attorney and a qualified appraiser.

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 gives us the ability to make a preliminary determination as to whether a particular tax assessment is out of line.

The capitalization of income approach is the easiest and quickest test to determine the value of your property, whereas comparable sales require more information. 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 complete 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 arm's 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 to your assessment this year may be in order. We 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 appraiser. In Pennsylvania, appeals in Bucks, Chester, Delaware and Montgomery counties need to be filed on or before August 3, 2015. The deadline for filing an appeal in Philadelphia County is October 5, 2015.

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In This Issue:

Beware of the Bats

By Robert W. Gundlach, Jr

The U.S. Fish and Wildlife Service recently announced that it is protecting the northern long-eared bat as a threatened species under the Endangered Species Act. (Click here for information from the Department of Environmental Protection, here for information from the U.S. Fish and Wildlife Service and here for information from the U.S. Army Corps of Engineers). Yes, it is hard to believe, but now bats are endangered species. The same animals that our grandparents would chase with brooms out of their homes and barns now have to be protected when considering the development of land for businesses and new homes. This decision will surely add additional costs and delays to the already overburdened zoning and land use approval process, as this new regulation is just another layer of bureaucratic restrictions that will increase housing prices and send businesses out of the region to construct their real estate facilities. First, it was the bog turtle, then it was red-bellied turtle and now it is the long-eared bat. What's next, the stink bug?

Prompt Filing of Planning or Zoning Board Approvals Can Help Decrease Developer Vulnerability to Appeals

By Michael T. Lavigne

At what point does a planning board or zoning board approval become "final and unappealable," enabling a developer to feel confident that a critical contingency in its purchase and sale agreement has been satisfied, or that it can move forward with a construction project on property that it already owns, without fear of an objector coming out of the woodwork to challenge the validity of the approval?

Most seasoned developers are aware that in New Jersey there is a 45 day appeal period within which an objector must file suit challenging the validity of a planning or zoning board's approval. The 45 day period begins to run on the date that notice of the board's decision is published in the municipality's official newspaper of record. Even when a specific municipal official is designated by ordinance to arrange for the publication, it is generally good practice for the applicant to publish its own notice of decision in order to avoid the possibility of an oversight on the part of the municipality and to get the 45 day clock running as promptly as possible. The Municipal Land Use Law makes clear that the appeal period starts to run from the first publication of the notice of decision, whether arranged by the municipality or the applicant. A recent decision issued by the Appellate Division (four years after the New Jersey Supreme Court's holding in *Hopewell Valley Citizen's Grp., Inc. v. Berwind Prop. Grp. Dev. Co.*, 204 N.J. 569 (2011)), however, serves as a reminder that an applicant would be wise to not only promptly publish its own notice of decision, but also to advise the board's administrative staff of this fact and the date on which its notice was published, or else its efforts to close an objector's 45 day window of opportunity to file an appeal may go for naught.

In *Advanced Development Group, L.L.C. v. Board of Adjustment of North Bergen, et al.*, No. A-4576-12T2 (App. Div. 2015), the applicant, Church Hill Partners, L.L.C. applied to the North Bergen Zoning Board of Adjustment for approval to construct a mid-rise residential building. The Board voted to grant Church Hill conditional approval for its proposed project, and on November 13, 2012, adopted a resolution memorializing its approval. Church Hill arranged to have notice of the Board's decision published in *The Jersey Journal* on November 23, 2012. The Board also arranged to have its own notice of decision published, but its notice of decision did not appear in *The Jersey Journal* until December 12, 2012.

On December 10, 2012, the plaintiff's counsel filed a request with the Township of North Bergen pursuant to the New Jersey Open Public Records Act (OPRA) seeking copies of documents in connection with Church Hill's application. On December 20, 2012, the plaintiff's counsel contacted the Board's administrative staff to follow-up on the status of her OPRA request. The plaintiff's counsel learned that the Board had published a notice of its Church Hill decision in *The Jersey Journal* on December 12, 2012. The plaintiff's counsel was also advised by a member of the Board's administrative staff that they were not aware of any other publications of the Board's decision and that the Board was responsible for publishing its own notices. On December 21, 2012, the Board's staff faxed the plaintiff's counsel a copy of the notice of decision that the Board published in *The Jersey Journal*.

On January 22, 2013, the plaintiff filed a complaint in lieu of prerogative writs against the Board and Church Hill challenging the validity of the Board's approval of Church Hill's application. On March 19, 2013, the trial court granted the Board's and Church Hill's motions to dismiss the plaintiff's complaint, with prejudice, on the ground that its complaint had not been filed by January 7, 2013 (i.e., within 45 days of the date on which notice of the Board's decision was first published by the applicant on November 23, 2012). The plaintiff appealed the dismissal of its complaint to the Appellate Division, arguing that its complaint had been timely filed, or, alternatively, that the trial court should have exercised its discretion to enlarge the time period within which the plaintiff was allowed to file its complaint. On appeal, the Appellate Division reversed the trial court's order dismissing the plaintiff's complaints against both the Board and Church Hill.

Pursuant to New Jersey Court Rule 4:69-6(c), a court may enlarge the time within which a complaint shall be filed "where it is manifest that the interest of justice so requires." Here, the Appellate Division concluded (as did the New Jersey Supreme Court in the *Hopewell Valley* case) that the lower court should have exercised its discretion and enlarged the time period within which the plaintiff had to file its complaint challenging the Board's approval, determining that it was reasonable for the plaintiff's counsel to rely upon the representations made by the Board's administrative staff regarding when notice of the Board's Church Hill decision had been published. In the court's view, it could not be said that the plaintiff had slumbered on its rights, because it endeavored to ascertain when the Board published its notice of decision and filed its complaint within 45 days of the date that the Board's notice of decision was published.

It is noteworthy that the court was unmoved both by the fact that: (i) its decision afforded an objector an additional 15 days beyond what would otherwise have been the deadline to file suit challenging the validity of the applicant's approval (nine more days than the extension that was awarded to the objectors in the *Hopewell Valley* decision), and (ii) Church Hill asserted that on January 7 and January 8, 2013 (45 days following the date on which it had arranged to have notice of the Board's decision published in *The Jersey Journal*), it spent approximately $56,000 in furtherance of its approved project, presumably under the assumption that it no longer faced the risk of an appeal. With respect to the latter, the court reasoned that Church Hill was constructively on notice of the possibility

of a judicial enlargement of the 45 day appeal period pursuant to Court Rule 4:69-6(c) and the cases applying the same, and that Church Hill's claims that it would be prejudiced by a court-ordered enlargement of the appeal period rang hollow in light of its decision to incur projected-related expenses prior to the date that the Hudson County Planning Board issued its approval with respect to the project on January 17, 2013.

As illustrated by the outcome in this case, a developer in New Jersey seeking to minimize the time period during which its zoning or planning board approval remains vulnerable to an objector's legal challenge can bolster those efforts not only by promptly filing its own notice of the board's decision in the local newspaper of record, but also by advising the board's administrative staff of that fact and providing them with a copy of the notice bearing its publication date, so that the staff can be in a position to accurately advise any interested members of the public as to the relevant dates.

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Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 613 proposes to create what would be known as the "Tax Exemption and Mixed-Use Incentive Program Act," which would, among other things, authorize local taxing authorities to provide for tax exemption incentives for certain deteriorated industrial, commercial, business and residential property and for new construction in deteriorated areas of communities.

Representative Judy Ward, who represents residents of a portion of Blair County from the 80th District of Pennsylvania and is one of the sponsors of House Bill No. 613, wrote that the proposed legislation "allows developers and property owners to receive a tax abatement incentive once they apply and are approved to rebuild upon an abandoned or blighted property or in a deteriorated area."

The proposed legislation establishes standards and qualifications and also provides for an exemption schedule.

As for the status of House Bill No. 613, it passed by a vote of 191-0 in the House of Representatives on May 13, 2015. As of June 26, 2015, the bill remains under consideration in the Senate.

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Lot Purchase Agreements – Not Your Typical Agreement of Sale

By Robert W. Gundlach, Jr. and Carrie B. Nase-Poust

In the last 10 years, we have seen a substantial reduction in the number of local and regional home builders. This has led to a reduction in the number of parties who are available and able to purchase land for new homes. We are not talking about buyers who simply "tie-up" property to "flip it" and make a buck. We are talking about buyers who have the ability to take property through the entire approval/permitting process and then build homes on the building lots. As a result, there is less opportunity for landowners and developers to sell unapproved land or approved building lots. These landowners and developers are now faced with the decision, after taking their land through the approval/permitting process, to install the site improvements themselves and then sell approved and improved building lots to national or regional home builders. The negotiation of a lot purchase agreement to sell approved and improved building lots is much different than negotiating an agreement of sale to sell either unapproved land or approved building lots. Click here for a checklist listing some of the issues that need to be considered as a seller of approved and improved building lots when negotiating your agreement. This checklist can serve as a starting point in your negotiations but is certainly not a substitute for engaging legal counsel at Fox Rothschild who are experienced in the negotiation of these types of agreements.

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Waters of the U.S.

By Robert W. Gundlach, Jr.

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers have released their rule for defining "Waters of the United States." The rule outlines what waters are federally protected under the Clean Water Act. Permits from the Army Corps of Engineers are required under the rule for all dredging and filling activities related to construction in these areas. The agencies have, however, codified a number of exemptions in the rule relating to ditches that do not flow year round; settling basins used during construction activities; erosional features that do not have a bed, bank and ordinary high water mark; and stormwater control features that are created in dry land, among others.

ICSC Conference Information

The annual ICSC Convention in Las Vegas was held in May and was attended by more than 35,000 participants. Robert W. Gundlach, Jr., Jeffrey M. Friedman and David N. Tanner, from the Real Estate Department at Fox Rothschild, all attended this annual convention. Click here to view a recap of the convention.

The local PA/NJ/DE ICSC conference is scheduled to be held in Center City Philadelphia on September 9 and 10; with the exhibit floors open on September 10. If you are planning to attend this ICSC conference in Philadelphia, please reach out to your contact at Fox Rothschild for an invitation to an event that our firm is co-hosting on September 9. Should you have any further questions, please contact Rob Gundlach at rgundlach@foxrothschild.com 215.918.3636.

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