In the Zone

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A Lease, License or Profit: The Appellate Division Revisits Distinctions in *Van Horn v. Harmony Sand & Gravel, Inc.*

By Daniel V. Madrid

On September 10, 2015, the New Jersey Superior Court, Appellate Division revisited the legal distinctions between a lease and a license in the context of a dispute over a 25-year-old agreement framed as a "Lease Agreement." In the published opinion, *Lisa Van Horn v. Harmony Sand & Gravel, Inc.*, Lisa Van Horn, the plaintiff, was the owner of a 45-acre parcel of land in Warren County, NJ, after inheriting it from her father, Earl Richmond Smith. In 1990, the plaintiff's father signed an agreement with the defendant, Harmony Sand & Gravel, Inc., which gave the defendant an exclusive right to "remove available soil materials and aggregates from the premises . . . during the term of the agreement." The agreement required the defendant to pay a fixed price per ton of materials removed from the premises and allowed the defendant to construct improvements to facilitate the extraction of such materials. The agreement had a 10-year term, but provided the defendant with discretion to terminate earlier in the event that it chose to terminate its mining operations.

On March 2, 2000, the plaintiff's father entered into a new agreement substantially similar to the 1990 agreement, but with the following material changes. The new agreement changed the 10-year term found in the initial agreement to "an indeterminate period of years until [the defendant] determines, in its sole discretion, that sufficient aggregate materials cannot be removed in a manner and/or in such amounts as to make it commercially reasonable to continue the removal of soil materials and aggregates from [the plaintiff's] properties." The new agreement also increased the per ton payments and imposed upon the defendant additional obligations upon termination of the agreement, including the duty to re-slope banks and spread stockpiled soil.

In 2002, the plaintiff inherited the property. In 2008 and 2012, the plaintiff sent notices to the defendant stating that the lease had been terminated and requesting that defendant vacate the property. In July 2012, plaintiff filed a declaratory judgment action to establish that the defendant's rights to the property were terminated and that the plaintiff was entitled to exclusive possession. After completing discovery, the parties agreed that there were no material facts in dispute and the plaintiff moved for summary judgment. The trial court granted summary judgment in favor of the defendant on the theory that the new agreement created a lease and that the lease was valid under the statute of frauds despite the absence of a defined term.

On appeal, the plaintiff raised the following issues. First, the plaintiff alleged that the new agreement was a license revocable at will. In the alternative, the plaintiff argued that if the agreement was a lease, it must be interpreted to run year-to-year terminable on reasonable notice. The Appellate Division requested that the parties submit supplemental briefing on whether the agreement is a profit a prendre.

Initially, the Appellate Division reviewed the distinctions between a lease and a license. Under New Jersey common law, a lease is an agreement where a landowner agrees to turn over exclusive possession of a property to another party for some period of time. During the period of the lease, the tenant's rights of possession and use are greater than the landowners. Additionally, leases with a term greater than three years are not enforceable unless they comply with the New Jersey statute of frauds. The statute of frauds requires an agreement to be signed by the party against whom it is sought to be enforced. The statute also requires a clear description of the leased property, the term and the parties to the agreement. In contrast, a license grants permission to use the land at the owner's discretion but limited to a specific purpose. A license is generally revocable at will and provides limited protection to the licensee.

In evaluating the intent of the parties, the Appellate Division ultimately characterized the agreement as a profit or "easement in gross." The Appellate Division noted that the agreement was not a lease as it did not grant exclusive possession to the defendant. The Appellate Division also found that the agreement was not a license as it was not revocable and was binding upon successors and assigns.

In concluding that the agreement was a "profit," the court noted that the agreement conveyed an interest in land that was less than exclusive possession, but still "alienable, assignable and inheritable." The court noted that a profit confers a right to remove something of value from land, including things such as "marl, loam, peat, sand, gravel, coal and other minerals." The court cited several cases that established a profit as a possessory right in land with analogous characteristics.

In *Harmony Sand*, the Appellate Division revisited the subtle distinctions between property interests. The court reaffirmed the tenet that in characterizing these agreements, substance trumps style and the key focus is the intent of the parties.

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Commonwealth Court Quashes Appeal for Failure of Neighboring Property Owner To File Petition To Intervene as Party with Trial Court

By Loren D. Szczesny

***Joan Lescinsky and William Lescinsky v. Township of Covington Zoning Hearing Board* 1746 C.D. 2014 (Pa. Cmwlth. August 21, 2015)**

In Pennsylvania, it is not uncommon for neighboring property owners to participate in a zoning hearing by providing comments, statements or even testimony. However, simply participating in a zoning hearing does not necessarily grant the neighboring property owner status as a party to the appeal or, more importantly, standing to file an appeal to court. The Pennsylvania Commonwealth Court recently addressed this issue and confirmed the appropriate procedure for a neighboring property owner seeking to intervene as a party to a zoning appeal.

In the case of *Joan Lescinsky and William Lescinsky v. Township of Covington Zoning Hearing Board*, the property owners, Joan and William Lescinsky, filed an appeal to the township's Zoning Hearing Board after six different enforcement notices were issued by the township. The property owners appealed the enforcement notices and also requested a variance from the township ordinances. A neighboring property owner, Lorraine Sulla, participated in the hearing before the Zoning Hearing Board. Following the hearing, the Zoning Hearing Board denied the relief requested by the Lescinskys and they filed an appeal to the Lackawanna County Court of Common Pleas.

In the trial court, Sulla filed a Notice of Intervention in the appeal of Joan and William Lescinsky, however, Sulla did not file a Petition to Intervene with the court and obtain an order granting her party status in the action. In the appeal before the Court of Common Pleas, Sulla was allowed to participate as though she had properly intervened as a party.

While the appeal was pending before the Common Pleas Court, Joan and William Lescinsky reached a settlement with the township and entered into a stipulated settlement, which was approved as an order of the trial court. Sulla attempted to file an appeal from the order of the trial court, but her status as a party to the appeal was challenged by the parties to the settlement.

In its decision, the Commonwealth Court reviewed the rules governing intervention in land use appeals. Specifically, the court noted that Pennsylvania Rule of Civil Procedure 2328 requires an application for leave to intervene in the appeal from all individuals other than the property owner or tenant of the property directly involved in the action. Under Rule 2328, the application for leave to intervene must be made by a petition in the form of and verified in the same manner as an initial pleading in a civil action.

In the present case, although Sulla participated in the proceedings before the trial court, she did not file a petition to intervene as a party to the appeal. Therefore, Sulla was not a party to the appeal and had no standing to file an appeal from the trial court's order. Accordingly, her appeal to the Commonwealth Court was quashed.

While the holding in *Lescinsky* seems basic, it highlights the importance of proper intervention in any land use proceeding. Even though a neighboring property owner appears to have a position consistent with the municipality during a local zoning proceeding, agreements and settlements can be reached which might not achieve the objectives of the neighboring property owner. Therefore, it is important for each property owner to evaluate their own interests and intervene in any land use action or appeal to protect those interests despite the position taken by the local municipality or any other party.

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Homelessness and Vagrancy: A Legal Perspective for the Property Owner

By William F. Martin

Owners and tenants of commercial property in central business districts throughout the U.S. regularly come upon the homeless. Some of the observers will wonder "why doesn't the city do something about that?" In searching for an answer to that question, municipal authorities need to consider the allocation of scarce resources and assessments of social justice and fairness and how those concepts should be applied to the homeless and their use of streets, sidewalks and public parks.

However, a significant aspect of the potential answer to that question rests in judicial decisions throughout the years, which provide constitutional protection to the homeless and impose significant restrictions on how cities can regulate their activities.

The court decisions that protect activities normally associated with homeless individuals are generally based upon protections provided by the First Amendment and Eighth Amendment to the U.S. Constitution. As most Americans know, the First Amendment provides that "Congress shall make no law respecting an establishment from religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances." The amendment has been interpreted to apply those protections not just to the acts of Congress, but generally to governmental acts. As such, broad prohibitions against either panhandling

or vagrancy are generally subject to attack as being in violation of the First Amendment.

Nonetheless, more precise "time, place and manner" limitations that are content neutral can sometimes be enforceable. For example, a limited prohibition against panhandling within a certain portion of a city may be permissible, but it would need to be applied equally – not only to an individual panhandler, but also to the Salvation Army kettle drum solicitor and the young girl with Alex's Lemonade Stand.

An independent line of cases has blocked application of municipal ordinances which generally seek to prohibit sleeping or lying on public streets, sidewalks or parks, based upon the protection provided by the Eighth Amendment to the U.S. Constitution, which states "excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted." The courts conclude that sitting, lying and sleeping are universal and unavoidable consequences of being human. If an individual does not have a place to conduct such activities, and if the state makes those acts illegal, the enforcement of that prohibition constitutes "cruel and unusual punishment." In cases where cities have been able to demonstrate that there are sufficient shelter resources to provide sleeping opportunities for all the homeless persons in a jurisdiction, then the broader anti-vagrancy statutes have been allowed to be enforced. But, if acceptable shelters are not available, then it becomes cruel and unusual punishment to cite or arrest an individual for sleeping in a public space.

Recently, the City of Philadelphia was involved in litigation that addressed issues involving the homeless, but from a different legal perspective. The city had established regulations to prohibit the public feeding of any individuals (including the homeless) along the Benjamin Franklin Parkway. Litigation was commenced by certain of the churches that provided the food to the homeless in a case captioned *Chosen 300 Ministries, Inc., et al v. City of Philadelphia and Mayor Michael Nutter.* In a decision dated August 9, 2012, Judge Yohn of the Eastern District of Pennsylvania issued a preliminary injunction against the city's continued enforcement of these regulations. Judge Yohn concluded that since the city was not providing a reasonable alternative location for the participating churches and ministries to feed the homeless, the city was violating the church's First Amendment right to free exercise of religion. Interestingly, the decision did not rest upon the rights of the homeless to utilize the parkway (presumably the judge had concluded that the limited geographic scope of the limitations passed constitutional scrutiny) but rather focused upon the rights of the individuals who were exercising their religion by "feeding the poor."

During the three-years plus since that decision was issued, city officials have been unsuccessfully seeking alternative locations for the feeding of the homeless, in order to be able to demonstrate to the judge that given the existence of alternatives, the city should be permitted to regulate such activities along the parkway.

The legal principles and cases briefly outlined above raise two unrelated policy challenges. First, is the question of whether the courts and civic authorities have insufficiently considered the interests of other stakeholders, including owners of commercial property. Streets, sidewalks and public parks are public goods to be shared among the members of the community. Is it appropriate that any one individual or groups of individuals should be permitted to monopolize these public goods? In the way of simple example, the bench that is slept on 12 hours a day by an individual is unavailable for a brief five minute visit by the office tenant from down the street. However, should significant need and deprivation be brought into this public policy calculus?

More specific to Philadelphia, the decision of Judge Yohn emphasized the need to provide public feeding locations that were very proximate to the existing feedings on the Benjamin Franklin Parkway. Over the last 20 years, as economic development and growth has advanced throughout Center City Philadelphia, there are increasingly fewer blocks that are appropriate to be utilized as large scale homeless feeding locations, given economic and land planning considerations. This circumstance of broadening areas of commercial development repeats itself in vibrant cities throughout the U.S. While this phenomenon can be derisively referenced in shorthand as NIMBY, a more subtle analysis involves an appropriate balancing of services to the homeless and poor against other valid policy interests of supporting capital investment and economic growth. Commercial real estate owners and investors can provide an important role in the public dialogue, which will continue around this issue.

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Vacating Streets in Pennsylvania

By Jennifer L. Wunder

Developers may encounter public or private streets running through land on areas where it wishes to build or provide open space. This is especially true when developing a number of adjacent parcels with roads traversing in between the parcels. In Pennsylvania, in order to remove the street and develop the land over it, the street must be properly vacated by the municipality in which it lies.

Boroughs

Pursuant to the Pennsylvania Borough Code, 8 Pa.C.S.A. § 101, *et seq.*, a borough has the authority, by ordinance, to vacate or close any street or portion of a street previously opened or laid out in the borough. It can do so on its own volition or by petition of any owner of property abutting the street to be vacated.

When a petition is filed, the borough council shall hold a hearing following at least 15 days' notice to the owners

of abutting real estate not joining in the petition and at least 15 days' notice in a newspaper of general circulation.

After the hearing, the borough council will either move to deny the petition or vacate the street by ordinance. If vacated by ordinance, the borough shall append to or reference in the ordinance a map or survey of the vacated street and a list of the owners of abutting properties. The ordinance must be authorized for advertisement at a public meeting and published once a week for two successive weeks in a newspaper of general circulation, with the second publication being at least 10 days, but not more than 30 days, prior to enactment of the ordinance.

A borough is unable to vacate a street or portion of a street if it provides the sole means of access to any lot or tract of land, unless those to whom access would therefore be denied consent to the vacation of the street. It is important to note that the vacation of a street terminates the public right in or to the street, but does not affect the private right of any owner of abutting property. These private rights may be terminated by written agreement of such owner, however.

Once an ordinance is passed and the 30-day appeal period has run, the borough will execute deeds conveying the vacated area to the owners of the abutting property, with each owner taking to the center line of the vacated street where their property abuts.

First and Second Class Townships

The street vacation procedures under the First Class Township Code, 53 P.S. § 55101, *et seq.* and the Second Class Township Code, 53 P.S. § 65101, *et seq.* are similar to those under the Borough Code. The board of commissioners of a first class township may vacate a street or portion thereof either upon petition of a majority in interest of abutting property owners or in its own judgment for public convenience. This includes the ability to vacate a public street that has been unopened for a period of 30 years.

The board shall give 10 days' notice to any affected property owners of a hearing on the petition or proposed vacation. Upon approval of the vacation, the board shall file a written report with a draft or survey of the vacated street and the names of the abutting property owners. Any citizen of the township may file exceptions to the report along with a petition for review within 30 days after filing of the report.

In a second class township, the board of supervisors must act on a petition to vacate a road within 60 days of filing. If the board fails to do so, the petitioners may present their petition to the court of common pleas.

If the board denies the petition to vacate, the petitioners may then petition the court of common pleas for appointment of viewers under the General Road Law within 30 days of the denial.

Before passing an ordinance vacating the street, whether by petition or on its own volition, the board must give 10 days' written notice of the hearing on the proposed ordinance to the owners of property adjacent to the street. If the ordinance is enacted, the board must file a copy with a draft or survey of the road showing the location and width thereof. Any resident or owner affected by the ordinance has 30 days after enactment to file exception to the ordinance with a petition for review.

Final Note

When a developer wishes to build over streets or roads running through or adjacent to its land, it is important to have the street or road properly vacated by the municipality to prevent any future claims of right in and to the vacated street or road. Developers should attempt to work with any adjacent property owners to have them join in or consent to the petition to the board in order to prevent opposition to the vacation.

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The Lesser Known Provisions of New Jersey's Economic Development Legislation

By Daniel V. Madrid

Within two years of its adoption, the New Jersey Economic Opportunity Act has been responsible for successfully attracting and retaining businesses throughout the Garden State. Through the Grow New Jersey Assistance Program (Grow NJ), the state provides a tax credit to virtually any business, other than point-of-sale retail, that creates or retains jobs in New Jersey and makes a capital investment at a qualified business facility. The success of this program is evidenced by the more than 130 projects that have been approved since September 2013. These projects promise the creation of nearly 19,000 new jobs and the retention of 17,000 jobs otherwise in danger of leaving the state. While much has been written and discussed about the Economic Opportunity Act, the details of two integral components of the legislation are still being hashed out.

Grow New Jersey Tax Credit Transfers

The first issue relates to how businesses can monetize the tax credit once awarded. By way of background, Grow NJ tax credits are awarded based on the number of jobs a company creates or retains in the state. In addition to the jobs factor, a company is required to make a capital investment in industrial or office property as a prerequisite to an award. This capital investment can include either the rehabilitation of an existing building or new construction and the required capital investment is tailored accordingly.

Grow NJ tax credits may only be used to offset New Jersey corporate business tax, insurance company tax and franchise

tax. As such, a company's ability to use these credits is limited to the company's corresponding New Jersey tax liability. Although the statute allows a recipient to carry forward unused credits for a period of 20 years, businesses may need immediate capital to offset the cost of the required development.

To address this issue, the legislation allows a recipient to apply for a tax credit transfer certificate covering one or more years, provided that the sale shall not be less than 75 percent of the transferred credit amount. However, the transfer provision (set forth in *N.J.S.A.* 34:1B-248) provides little procedural guidance. Moreover, those considering a tax credit transfer need to think through issues such as the following: (i) the projected timing of the initial issuance of the tax credit certificate; (ii) appropriate damages for breach; (iii) indemnities in the event that the recipient defaults under its incentive agreement or otherwise loses the benefit of the credits; and (iv) changes in the law that may affect the validity of the tax credits. As the market for these credits matures, procedures and best practices are being established by practitioners.

Long Term Tax Abatement for Garden State Growth Zone Development

N.J.S.A. 52:27D-489r allows developers located in one of the four "Garden State Growth Zones" (GSGZ), i.e., Paterson, Passaic, Trenton and Camden, to qualify for a 20-year tax abatement program. The program allows a developer to claim an exemption from payment of property taxes on the improvements to the eligible property for an initial 10-year period. In the 11th year, the developer is required to pay the municipality 10 percent of the taxes on the improvements. The amount of taxes owed on improvements increases by 10 percent each year until full taxes are due in the 20th year. After the termination of the exemption, the property (including all parcels, land and improvements made thereto) is assessed and subject to taxation in the normal course. Any exemption obtained is also fully transferrable upon the sale of real property so long as the new owner meets the requisite criteria.

To qualify for the 20-year abatement, the following criteria must be satisfied: (i) the property must be an "eligible property," i.e., residential, commercial, industrial or other business property located in a GSGZ that receives a Certificate of Occupancy or is transferred in a legal sale on or after July 1, 2013; (ii) the GSGZ had to adopt an ordinance to opt-in to the 20-year abatement (note: Paterson, Trenton and Camden adopted opt-in ordinances); (iii) the developer must establish a "Garden State Growth Zone Development Entity" (GDE) to own the property; and (iv) the developer shall be required to complete the improvements prior to September 18, 2023.

Although the law regarding the 20-year tax abatement resembles and often mimics the procedures for the long term tax abatement under the Local Redevelopment and Housing Law (LRH), many open questions exist. In contrast to the formation of an urban renewal entity under the LRHL, the statute does not expressly require the New Jersey Department of Community Affairs' approval for the formation of a GDE. Additionally, the language regarding allowable net profits for GDE is opaque and ambiguous. Lastly, it is incumbent upon municipalities to adopt procedures for to guide GDEs in their pursuit of the 20-year abatement.

Recent Developments

Despite the open issues and shortcomings of New Jersey's economic legislation, it is clear that procedures are being established and enhanced over time. Additionally, the legislation itself continues to be modified to address new challenges related to economic development. As an example, Senate Bill No. 2458 (3R) amends the Economic Redevelopment and Growth Grant (ERG) component of the New Jersey Economic Opportunity Act to support the development of parking by municipal parking authorities and certain private developers.

Under S-2458, developers and municipal parking authorities can apply for a grant or tax credits under the ERG program when they develop mixed use parking projects. These projects are defined as "a redevelopment project undertaken by a municipal redeveloper in a Garden State Growth Zone, the parking component of which shall constitute 51 percent or more of any of the following: (i) the total square footage of the entire mixed use parking project; (ii) the estimated revenues of the entire mixed use parking project; or (iii) the total construction cost of the entire mixed use parking project." The caveat is that if developed by a private developer, the parking component of the mixed use parking project is required to be operated and maintained by a municipal parking authority for the term of the financial incentive agreement. The bill also authorizes the Economic Development Authority to grant tax credits for mixed use parking projects if the estimated amount of the incremental revenues pledged towards the state portion of an incentive grant is inadequate to fully fund the amount of the state portion of the incentive grant.

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