In the Zone

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

Fox Rothschild LLP
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Recent NJ Opinion Favors Run-Down Health Care Facility

By John L. Grossman

A New Jersey Superior Court judge recently authored an opinion favoring the continued operation of a run-down health care facility, which serves as a great primer on the law surrounding zoning challenges and State preemption of local zoning ordinances. In *Mazel, LLC, et al., v. Township of Toms River, Dover Woods Healthcare Center, et al*[1], The plaintiffs, owners of a Ramada Inn in Toms River, New Jersey, filed a complaint in lieu of prerogative writs asserting that the conditional use giving rise to the original zoning approval of a neighboring facility known as Dover Woods no longer existed, that the facility operated as a non-permitted use within the zone, and that the owners must be restrained from continuing its current use until they obtained the necessary approval as a permitted use. The plaintiffs also sought to compel the defendant Township to require Dover Woods to comply with all, applicable Township land use ordinances and the terms and conditions of the original Planning Board approving resolution, issued in 1983.

The facts are essentially as follows: Dover Woods is located in the Rural Highway Business (RHB) zone. Dover Woods, initially known as the Dover Retirement Hotel, was built approximately thirty years ago and was designed with hotel specifications. Hotels were permitted in the RHB zone as a conditional use in 1983 when the Planning Board approved the development as a hotel and a state-licensed, residential health care facility (RHCF). Dover Woods continues to be licensed by New Jersey and is subject to the regulations of the Department of Community Affairs.

The 1983 Planning Board resolution recited the facts that: the developer proposed to construct a 136 unit hotel containing 240 beds on approximately six acres; the hotel was to provide dining and kitchen facilities not open to the general public, with additional indoor and outdoor recreational facilities and transportation amenities; and, the typical hotel guests were anticipated to be elderly, non-working, living on a fixed income, spouseless and, in many instances, with no family or with few visitors. The facility was not constructed under hospital or nursing home specifications, but rather was built to hotel specifications, although licensed by New Jersey at all times since its construction as an RHCF.

In 1991, the Township amended its zoning ordinance to expand the permitted uses in the RHB zone to include both "medical services facilities" and "hotels." As noted, hotels were previously permitted as conditional uses, only; medical services facilities were neither permitted uses nor conditional uses prior to the 1991 amendment.

In short, the facility has become exceedingly run-down, and its guests have often been found wandering about aimlessly in public, causing significant disturbances and burdening emergency services. Based upon these conditions, the plaintiffs argued that the Ramada Inn hotel business has suffered and sought injunctive relief. The current owner of the facility filed motions for summary judgment on all counts of the complaint. The Court granted summary judgment in favor of Dover Woods on virtually all counts for the following reasons.

The Court interpreted the Township's zoning ordinance to find that Dover Woods operated both as a hotel and a medical services facility, thus constituting two permitted uses within the RHB zone. In so doing, the Court analyzed the judicial function. While courts must construe zoning ordinances reasonably and liberally in favor of a municipality, mindful of any apparent legislative purpose or intent, they must construe restrictive zoning regulations in favor of a property owner because they limit property rights. Accordingly, courts may not infer restrictions beyond the clear and unequivocal language of a restrictive zoning ordinance. With those principles in mind, the Court found that Dover Woods constituted a hotel within the meaning of the applicable zoning ordinance. Simply, the facility as constructed met the definitional requirements. The Court also found that Dover Woods' status as an RHCF did not affect its status as a hotel, the two not being mutually exclusive. The Court then found that Dover Woods operated as a medical services facility within the definition of the ordinance, a broad category that included long-term, RHCFs, acknowledging that it must construe the definition of a medical services facility in favor of Dover Woods' use. In the absence of clear restrictive language, the Court could not infer that the drafters of the zoning ordinance intended to prohibit residential health care facilities in the RHB zone. Accordingly, the Court felt that its proper inquiry was not whether the zoning ordinance's definition for medical services facilities permitted residential health care facilities, but rather whether it clearly prohibited them. Finding nothing prohibitive, the Court construed the zoning ordinance to permit Dover Woods' use of the property as a state-licensed, RHCF and, in turn, as a medical services facility, a permitted use[2].

The 1983 Planning Board resolution contained standards for the developer's

[1] An unpublished written opinion by Vincent J. Grasso, A.J.S.C., Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-3505-12, decided November 26, 2013.

[2] The factual findings of the Court are not included here, being outside the scope of this article.

In This Issue:

operation of the facility higher than those required by State regulations. As a result, the plaintiffs sought to have the Township require the facility to comply with those higher standards. The Court denied that application, stating that a municipality, as an agent of the State, cannot act contrary to the State and cannot forbid what a State statute permits. Municipalities can exercise zoning power only through delegation of the State's authority, and they must consider the welfare of all of the State's citizens, not just the interests of the inhabitants in the particular locality. State preemption occurs when the legislature regulates a field so extensively and comprehensively that it evinces an intent to preclude concurrent municipal regulation of the same field. The Court considered the five factor test articulated by the state Supreme Court (not recited here), applied it to the facts, and found State preemption based upon the field of regulations governing the operation of RHCFs. Accordingly, the Court found that, to require literal compliance with the 1983 Planning Board resolution, would effectively impose more stringent municipal regulations on Dover Woods than those imposed by existing State regulations. It declined to compel the Township, despite the plaintiffs' arguments to the contrary, to interfere with Dover Woods' operations through literal enforcement of the 1983 Planning Board resolution, finding that to be an intrusion upon the State's regulatory authority.

In conclusion, the Court acknowledged the problems experienced by both the Township and local businesses as the result of the behavior of some of the "guests" at Dover Woods. However, since the plaintiffs' action was brought as a zoning challenge, it involved questions of law. The Court left open the option for the State, in a separate administrative action, to impose penalties on Dover Woods to force compliance with licensure requirements, if those requirements have been violated.

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Changes in NJ Real Property Tax Law

By Jeffrey M. Hall

2013 saw the enactment into law two pieces of legislation effecting real property taxation in New Jersey. The first established a demonstration project which potentially could have a radical effect on the administration of tax appeals in New Jersey. This law will be discussed in this month's issue. The second will affect farm properties that are subject to the Farmland Assessment Act of 1964 and the administration of the Act. It too will bring about significant changes but will be discussed in an upcoming issue.

On a demonstration or trial basis, significant changes in the administration tax assessment appeals are in store for 2014 in Monmouth County. In March of this year, the Governor signed into law P.L. 2013, c. 15 which is being implemented next year. The provisions of this law will be effective in Monmouth County which volunteered to participate as a demonstration county. As an owner or in many cases as a tenant, your right of appeal on property located in Monmouth County will be affected by procedural changes radically altering the timetable for filing and adjudicating an appeal. Immediate attention must be paid by taxpayers as the most significant change affecting tax payers is the new deadline established for filing a Tax Appeal. Under previous law, the deadline throughout New Jersey was April 1 (May 1 for properties in municipalities undergoing a reevaluation or reassessment). In Monmouth County municipalities, the deadline will now be January 15th, a full 2½ months earlier.

Where previously assessment cards were mailed to property owners on or around February 1st of the tax year, in Monmouth County the assessment cards were mailed to taxpayers last month. These cards confirm the existing assessment and the assessment for 2014.

The purpose of the law is to create "a real property assessment demonstration program to demonstrate a more cost-effective and accurate process of real property assessment administration". The law establishes a cap of four counties that can participate; however, only Monmouth County has chosen to participate in 2014. The underlying goal of the legislation is to stem losses municipalities incur from successful tax assessment appeals. Under current law, municipalities suffer the brunt of such losses even though they collect taxes for a number of governmental units (County, school district, fire district and the like). The law will require that future revaluations and reassessments of real property be performed on a County data system which system will also be used for compliance plans, assessment maintenance and added assessment calculations. A steering committee was created by the law for the administration of the demonstration project in participating counties. County tax board orders to municipalities to revalue now have more bite as the County Board can conduct a revaluation if the municipality fails to comply with its order.

The goal of this legislation is for appeals to be conclusively decided by the County Board of Taxation before the tax rate is established for a municipality and participating governmental units. Thus, County Board appeals should be concluded by April where, under the current system, appeals are not concluded until July or later.

The program is designed to run for four full tax years. After that, each demonstration county shall submit a report summarizing the successes and problems of their programs and containing recommendations for further legislative or administrative changes to the demonstration project.

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Lessor Beware: The Importance of Use Restrictions in an Oil and Gas Lease

Humberston v. Chevron, 75 A.3d 504 (Pa. Super. Ct. 2013)

By Reuben Asia

When you rent your cabin in the Poconos to a friend for a few weeks, you don't expect the friend to build a swimming pool in the back yard while he or she is there. In fact, you probably don't even think about telling the friend not to do this, let alone writing it down. However, if you or your business decides to lease land to an oil and gas company, you should most certainly consider limiting in writing exactly what the oil and gas company can do on the property. A recent Pennsylvania Superior Court case demonstrates what can happen when a landowner leasing property to an oil and gas company fails to set forth these limitations in the written lease. Without express restrictions, oil and gas companies have wide latitude under Pennsylvania law to do what is reasonably necessary to find and extract resources on leased land, and what these companies do to extract resources can be very surprising to some landowners.

In *Humberston v. Chevron*, the surprise the Humberstons encountered was a freshwater storage impoundment, a large water source for hydraulic fracturing, covering 11 acres of their property. In 2006, the Humberstons entered into a lease that permitted Chevron to explore for and remove natural gas from their 133-acre property in Fayette County, Pennsylvania. Because hydraulic fracturing requires a large amount of freshwater, Chevron constructed a freshwater storage impoundment on the Humberstons' land. In 2011, the Humberstons filed suit against Chevron, and they argued the lease did not permit Chevron to construct this impoundment on their property.

The Pennsylvania Superior Court disagreed and ruled in Chevron's favor. The court initially looked to the contract and held that the plain language of the lease contradicted the Humberstons' argument. The court determined the lease unambiguously stated Chevron could use "as much of the surface as is necessary or convenient … to explore for, develop, and produce [oil and gas] … using methods and techniques which are not restricted to current technology." The court evaluated this contractual language and found Chevron had used the land in an acceptable manner pursuant to the lease. Because access to large amounts of water is necessary for the hydraulic fracturing process, the construction of the freshwater storage impoundment was reasonably necessary "to explore for, develop, and produce [oil and gas]."

In addition to interpreting the express terms of the contract, the Superior Court reiterated that Pennsylvania law states: unless parties to the lease agree otherwise, the party who has the right to remove subsurface oil and gas from land has the right to go onto the land and use a reasonable portion of the surface to retrieve the natural resource. Without express restrictions in the lease, Chevron had the right to go onto the Humberstons' land and use as much of the surface as was reasonably necessary to remove the gas; and because extraction of the natural gas requires hydraulic fracturing and therefore access to large quantities of freshwater, Chevron had the right to build the 11-acre impoundment.

Before entering into a land lease with an oil and gas company, landowners must consider what use restrictions they would like in the agreement. If a landowner does not expressly limit the oil and gas company, Pennsylvania law permits the company to access and use the land in a way that is reasonably necessary to extract the subsurface oil and gas, which can include the construction of freshwater impoundments. And freshwater impoundments for hydraulic fracturing tend to be much larger than your average-sized swimming pool.

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Grant Funding Now Available As A Result Of Marcellus Shale Impact Fees

By M. Joel Bolstein

In 2012, Pennsylvania Governor Tom Corbett signed Act 13 into law, which authorized Pennsylvania counties to impose an impact fee on Marcellus Shale gas wells. Over $400 million in impact fees have been generated, and while the majority of the impact fees are going to local governments in areas where drilling occurs, some of the money is being made available in the form of Marcellus Legacy Fund grants by the Commonwealth Financing Authority for greenways, trails and recreation projects, and watershed restoration and protection projects.

On November 22, 2013, the Commonwealth Financing Authority approved the release of more than $28.5

million in grants from the Marcellus Legacy Fund. Of that total, $16.5 million was divided between 116 projects involving the development or improvement of greenways, trails and recreation areas. The projects weren't all in areas where drilling is occurring, in fact, this round of funding included projects in Bucks, Chester, Delaware, Montgomery and Philadelphia counties, where there is no Marcellus Shale exploration. The greenways, trails and recreation program funds can go toward the planning, acquisition, development, rehabilitation and repair greenways, of recreational trails, open space, parks and beautification projects. The limit on funding is $250,000 and most projects require a 50 percent match. For profit businesses are eligible to apply, along with municipalities, non-profits, and watershed organizations. Developers in southeast Pennsylvania with projects that involve creating greenways or parks should consider including Marcellus Legacy grant funding in the project funding mix, despite the name.

Marcellus Legacy grant funding is also available for watershed restoration and protection projects. The latest funding announcement included $5.6 million to support 32 watershed and restoration projects. Again, those projects aren't confined to areas where drilling is occurring, with projects in Chester, Delaware and Philadelphia county receiving funding. The funding is targeted at projects designed to restore and maintain restored stream reaches impaired by uncontrolled non-point source discharges and polluted runoff. The idea is to improve water quality in the targeted streams so they can be removed from PADEP's list of Impaired Waters. Watershed restoration and Protection Program grants are available to for-profit businesses, as well as municipalities and watershed organizations. The maximum grant is $300,000 and there is a 15 percent match required.

Information on the Marcellus Legacy Fund can be found on PA DCED's website at http://www.newpa.com.

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Land Bank Deal in Philadelphia City Council Could Make Underutilized Properties Available for Redevelopment

By Adam H. Cutler

Thousands of underutilized properties in the City of Philadelphia could be made available for redevelopment in the future, thanks to a compromise that ensured passage of the Philadelphia Land Bank bill. The Land Bank bill is intended to streamline the process for getting blighted properties out of the hands of absentee owners (or the City itself) and into the hands of private developers and Community Development Corporations for coherent redevelopment in line with City and neighborhood planning efforts. A prior discussion of an earlier version of the bill is here.

The compromise deal worked out by City Council President Darrell Clarke and the primary sponsor of the bill, Councilwoman Maria Quiñones-Sánchez, focuses on the role that Philadelphia City Council members will have in approving transfers of abandoned properties. Council approved the addition of the amendments to the bill, and voted in favor of final passage in Council's last meeting of 2013.

The amended language includes a continuing role for the Vacant Property Review Committee (VPRC) advisory board favored by Council President Clarke, but with additional mechanisms to make the VPRC process more transparent, such as publishing meeting agendas and transcripts online and requiring advance public notice of VPRC meetings. Further, Council members will not be required to give written consent, pursuant to the longstanding Philadelphia tradition of councilmanic prerogative, for each parcel to be acquired by the Land Bank – instead, Council's approval role will be limited to an annual review of the Land Bank's strategic plan and sign-off on the Land Bank's expenditures.

Some Land Bank proponents had argued that the inclusion of the VPRC as an additional layer in the process will perpetuate existing delays in the disposition and acquisition of vacant and abandoned properties; Council President Clarke and his supporters had argued that the VPRC will provide necessary oversight for the appointed Land Bank board. It remains to be seen, now that the Land Bank is law, how quickly the City of Philadelphia will be able to get the necessary machinery up and running (including budgetary support for the coming fiscal year), and whether and to what degree the system contemplated by the amended bill will actually speed up the process by which vacant and abandoned properties can be acquired from the City by private developers and CDCs for redevelopment and restoration to the City's tax rolls.

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More Activity At The State House Seeking To Spur Economic Growth In The Garden State

By Jeffrey M. Hall

A number of legislators have signed on as primary sponsors and co-sponsors of a bill tagged as "New Jersey Economic Opportunity Act II of 2013," currently pending in both legislative houses as A4501 and S3030. This legislation would amend and expand the legislation signed into law by New Jersey Governor Chris Christie in September known as the New Jersey Economic Opportunity Act of 2013 (the Act). A key hurdle was passed recently with the Senate Economic Growth Committee reporting out the bill favorably after a second reading with a referral to the Senate Budget and Appropriations Committee on Thursday, November 14th.

There are five primary areas that the bill seeks to address as summarized by the statement of the Senate Economic Growth Committee. The legislation, as reported by the Committee, seeks to modify and correct some provisions of the Act and implement "additional economic development initiatives." First, the bill will extend the $50 million cap on appeal bonds. The essential purpose of an appeal bond is to allow a party challenging a trial court's judgment to appeal a judgment but only after posting an appeal (supersedeas) bond but, at the same time, protect the party prevailing at trial. In 2003, a $50 million cap on appeal bonds had been imposed on certain tobacco companies. S3030 would allow a court to reduce an appeal bond to an amount lower than the judgment amount.

Secondly, the legislation would grant a developer credit against its corporate business tax or gross income tax liability for capital investments made to a formerly licensed health care facility. A developer seeking to repurpose such a facility would apply to and seek approval from the New Jersey Economic Development Authority for an allocation of credits. If allowed, a tax credit of 50 percent of the developer's capital investment could be taken over a 10 year period. As reported out by the Committee, the tax credit would apply to a former hospital that had been repurposed as a non-acute health care and health support services center.

Thirdly, the bill seeks to address an apparent oversight in the Act which did not authorize an exception to the 20 percent affordable housing set aside. This occurred when the Act merged the qualified residential project portion of the Urban Transit Hub Tax Credit Act into the Economic Redevelopment and Growth Grant Program. S3030 will extend the exemption to such projects in those situations where the municipality in which the project is located has satisfied its affordable housing obligations.

Fourthly, this legislation proposes to amend the ERGG Program to allow an additional $200 million of tax credits for certain types of housing; however, the legislation would direct the EDA to give priority to qualified projects located within 10 of the 21 counties in New Jersey. An existing resident that would be displaced as a result of a qualified residential project would have the limited right of first refusal to purchase or lease a unit that is constructed as a result of the grant of the tax credit.

Lastly, the legislation aims at increasing the attractiveness of New Jersey as a film production venue. The bill would expand the existing tax credit formula from $10 million to $50 million for film production tax credits and $5 million to $10 million for digital media production tax credits. Similarly, the percentage of the tax credits would be increased from 20 percent to 22 percent but only if purchases of goods and services are made from businesses within or residents of an urban enterprise zone. If passed, the law's sunset would be extended from 2015 to 2020.

Interestingly, the sponsors of this legislation have not appeared to gain much support. Noticeably missing to date is the usual string of legislators signing onto the bill. While recently reported out of committee favorably, we learned that the bill has been withdrawn from consideration. It will be introduced in the new legislative session next year as two bills to ease passage of the noncontroversial provisions while the sponsor drums up support for the more nettlesome provisions.

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Bob Klausner Named One of 50 Most Powerful and Influential Real Estate Leaders in NJ

Bob Klausner was included in a list of the "50 Most Powerful Real Estate Leaders in New Jersey" by *NJ Biz: Real Estate & Construction Report* (Fall 2013). With more than 25 years of both legal and business experience in the real estate industry, Robert possesses in-depth insight and hands-on knowledge into leasing, acquisitions and dispositions, joint venture structuring, financing and build-to-suit development. He has also been recognized for his reputation among clients and in the industry by *Chambers USA*, which noted him as a leading real estate attorney in New Jersey.

Recent Approvals

Approval has been obtained from the Hatfield Township Zoning Hearing Board in Hatfield Township, Bucks County, PA, to allow a day-care use by special exception. In addition, Fox also obtained multiple variances for the client, including variances from front yard building setbacks, parking setbacks and impervious coverage, to allow the development of a 10,000 square foot day-care and 4,500 square feet of retail and restaurant space.

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Robert W. Gundlach, Jr. and Kimberly A. Freimuth represented Metropolitan Development Group in Warrington Township to obtain zoning ordinance and map amendments to the Warrington Township Zoning Ordinance to allow a mixed use townhouse and commercial project on Route 611 in Warrington Township, Bucks County, Pennsylvania. Rob and Kim are continuing to represent Metropolitan on this project to obtain subdivision and land development approval for this mixed use project.

Robert W. Gundlach, Jr. represented a client to obtain subdivision and land development approval for a new 50 home townhouse community on Lincoln Highway in Falls Township, Bucks County, Pennsylvania. The townhomes in this community are being constructed by Ryland Homes.

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