In the Zone

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Does the New Jersey Economic Opportunity Act Legislation Have Legs?

By Jeffrey M. Hall and Daniel V. Madrid

Introduced earlier this year, the New Jersey Economic Opportunity Act of 2013, A3680, appeared to be destined for quick passage. Touted to spur growth within the state, it quickly passed through the Assembly Commerce and Economic Development Committee (Committee), which proposed amendments but reported on the legislation favorably. Since this report in March 2013, the legislation was transferred to the Assembly Budget Committee where it seems to have stalled.

The bill, 47 pages in length, seeks to expand two economic development incentive programs and phase out three incentive programs administered by the New Jersey Economic Development Authority (EDA). Those being phased out include the very popular Business Employment Incentive and the Urban Transit Hub Tax Credit programs. However, with job creation and retention the paramount goal, the legislation plans to merge five incentive programs into two programs. The Committee believes this streamlining will enhance the state's ability to attract and retain businesses.

Two major changes are packaged in the proposed legislation as a result of the Committee's work. First, the eligibility for the economic development incentives will be geographically expanded. This expansion will be coupled with lower eligibility thresholds for businesses seeking to take advantage of the programs. It is anticipated that more businesses will, as a result, become eligible. Second, the bill modifies GROW NJ to allow New Jersey to better match or exceed competing states' financial incentive packages. This is achieved in part by reducing the capital investment and employment eligibility standards for applicants. While eligibility is expanded geographically, smart growth areas are given priority in the form of bonuses. Finally, the Economic Redevelopment and Growth Grant (ERG) program would be the sole program offering redevelopment incentives. In this case, the objective is to help close project financing gaps and build public infrastructure that would complement redevelopment projects.

The Committee's amendments specifically propose to: (1) delete Section 13 to allow municipalities to determine the percentage of low and moderate income housing includable in a project; (2) set a maximum value of tax credits that the EDA can approve for an ERG redevelopment incentive grant; (3) enhance the structure of the ERG program in order to encourage new applications; (4) adjust ERG project caps and give a bonus award for certain project financing gaps; and (5) change the term workforce housing to moderate income housing as defined by the Fair Housing Act.

Assemblywoman Bonnie Watson-Coleman, one of the primary sponsors of A3680, is the Mercer Employer Legislative Committee's featured speaker at its monthly luncheon on May 3. It is anticipated she will discuss this legislation along with other issues of interest to the business community. For information about the luncheon, contact Liz Tindall at Liz@midjerseychamber.org.

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Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 270 proposes to establish the "Highway Corridor Enhancement Act," which would authorize municipalities to acquire highway corridor conservation easements and provide for highway corridor overlay zoning and outdoor advertising permits.

Representative Bernie O'Neill, who represents the 29th Legislative District, which includes portions of Bucks County, was the prime sponsor of House Bill No. 270. In connection with House Bill No. 270, Representative O'Neill authored a memorandum that, in part, stated the following: "The proposed Highway Corridor Enhancement Act will enable municipalities to assure the reasonable, orderly and effective display of outdoor advertising devices. The bill also seeks to protect public investment in highways, promote the welfare, convenience and recreational value of public travel and preserve the natural beauty of our state."

Representative O'Neill added that House Bill No. 270 re-emphasizes existing local zoning powers and authorizes municipalities, among other things, to acquire highway corridor conservation easements in accordance with applicable law, establish Highway Corridor Overlay Districts, pursuant to the Pennsylvania Municipalities Planning Code, and provide for a permitting process for the construction, location and maintenance of outdoor advertising devices.

As for the status of House Bill No. 270, it has not yet been passed. Shortly after it was introduced, it was referred to the Committee on Local Government, where it remains.

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Commercial Brokers' Lien Law Enacted in Delaware

By Michael J. Isaacs

The Delaware legislature has passed the "Commercial Real Estate Brokers' Lien Act." The "Lien Act" or the "Brokers' Lien Act" applies to real estate "Brokers" who hold a broker license from the Delaware Real Estate Commission with respect to the sale or rental of real estate in the State of Delaware. The Act applies to Brokerage "Agreements," which means any written agreement for the payment for brokerage services of a broker for the management, sale, purchase, lease or other conveyance or acquisition of commercial real estate. Commercial real estate does not include single family residential units such as residential condominiums, townhomes and mobile homes.

The Act provides the broker with the right to place a lien upon commercial real estate that is the subject of a brokerage agreement for the unpaid amount of compensation due the broker as stated in the brokerage agreement, provided that the brokerage agreement expressly states the following:

1. The amount or the method of calculating the amount of compensation for the services of the broker; and
2. That the brokerage agreement is a binding contract under state law; and
3. The identity of the real estate that is covered by the brokerage agreement by description and/or tax parcel number.

Section 26.04 of the Act provides that the brokers' lien shall attach to the commercial real estate upon the broker filing an Affidavit and Notice of Brokers' Lien in the form required by the office of the Recorder of Deeds in the county where the commercial real estate is located. The broker must then, within 10 days, cause a copy to be served upon the person or entity charged by certified mail, return receipt requested or process server. The Affidavit and Notice of Brokers' Lien may only be filed by an attorney admitted to the Bar of the Supreme Court of the State of Delaware.

The lien shall be recorded within 90 days of the failure to pay upon completion of all duties required under the Brokerage Agreement. The Affidavit and Notice of Brokers' Lien shall be effective for one year following the date of filing and while any litigation concerning it is pending.

As you may expect, this has been a hot topic among real estate attorneys in the State of Delaware.

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Rebuilding Nonconforming Structures – A New Jersey Case Summary

By Alexander M. Wixted

The New Jersey Appellate Division recently decided a case that addressed the extent to which a property owner can rebuild a structure that constituted part of a pre-existing, nonconforming use under the municipal zoning code. In *Motley v. Borough of Seaside Park Zoning Board of Adjustment* (decided March 4, 2013), the Appellate Division sided with the municipality, holding that because the property owner's demolition of his nonconforming residence exceeded "partial destruction," the stop-work order issued by the municipality was valid.

This case is noteworthy because New Jersey's Municipal Land Use Law, the statutory framework for real estate development in New Jersey, does not expressly define what constitutes a "partial destruction." N.J.S.A. 40:55D68 provides, in pertinent part: "Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof." The land development ordinances of most municipalities incorporate the statutory language when addressing the repair or maintenance of pre-existing, nonconformities. As such, cases like these are extremely fact-sensitive, but it is essential that the property owner be aware of the legal standards and work collaboratively with the local officials.

In *Motley*, the plaintiff owned a residential property located in the Borough of Seaside Park's R-3 (Residential) zone, which is restricted to single-family uses. The property contained two structures (a front home and a rear home) that were erected in the 1930s, well before the adoption of the Borough's current zoning ordinance. The front home was damaged after pipes in its hot water system burst and caused significant water damage. The owner applied for a use variance to construct a second floor addition to the home as an expansion of a non-conforming use. The Zoning Board of Adjustment denied the application, citing the numerous pre-existing bulk variances and the rationale that the proposed development would not further legitimate land use goals.

In response, the property owner shifted direction and planned to rehabilitate the home in disrepair. He sought and was issued a zoning permit to allow "repair [and] renovation of [the] existing dwelling" and to allow replacement of the air-conditioning unit. Construction plans were provided with the application. The zoning officer approved the zoning permit application, but noted that there was to be [n]o expansion of [the structure's] dimensions", and "[s]iding, shingles, additional [windows] only – no bumpouts." The owner began the rehabilitation. It became apparent that the water damage was much more significant than anticipated, which would have resulted in the need to replace rotted floor beams and removal of the exterior walls.

The Borough building inspector determined the entire structure was not habitable and determined it needed to be removed. Without involving the zoning officer for his opinion on the impact of a demolition on the protected pre-existing, nonconforming status, the owner proceeded with the demolition down to the original foundations and footings. The owner began new construction and had replaced some of the floor beams and installed new framing. The Borough's code enforcement officer discovered the extent of the demolition and issued a stop work order.

After three public hearings and extensive testimony, the Board denied the owner's request to have the stop-work order vacated on the basis that the extent of the removal exceeded the scope of the zoning approvals granted under the zoning permit. The Board cited the language of the zoning ordinance, which mirrored the statute, on partial demolition. In the Board's view, the demolition of the front building comprised "total destruction," not mere "partial destruction."

The owner challenged the Board's decision in the Superior Court and won, whereupon the trial court lifted the stop-work order and allowed the owner to reconstruct the walls and loft (provided the structure's dimensions were not expanded), but disallowed the expansion of the loft area to constitute a living space. The trial court's rationale centered on the policy considerations of promoting safety code compliance and the replacement of unsafe floor boards and walls. Essentially, the trial court determined that so long as the rehabilitation of the front building remained within the dimensions as existed before, the renovation did not constitute total destruction notwithstanding the demolition to the foundation.

The Appellate Division disagreed with a policy consideration of its own – the law disfavors the continuation of nonconforming uses and structures. As the court noted, "[i]n essence, the test of whether a nonconforming use or structure may be restored or repaired is whether there has been some quantity

of destruction that surpasses mere partial destruction." There is no bright-line percentage test on how much of a structure needs to be destroyed in order to constitute partial versus total destruction (*Note: It is commonplace to have such standards in a commercial or industrial lease, which is acceptable*). The court also admonished the property owner for seemingly allowing the property to fall into a state of disrepair, and for the apparently lack of specificity and clarity in the construction drawings submitted to the zoning officer for review in conjunction with the issuance of the permit.

On a related note, the Appellate Division affirmed the trial court's refusal to lift the stop-work order based upon the owner's argument of "equitable estoppel." Under this theory, where a party properly relies in good faith on a governmental action (here, the issuance of zoning and construction permits), and the governmental official acted in good faith in the performance of his or her duty, but that the decision was ultimately incorrect, the government is estopped (i.e. barred) from reversing its decision to the detriment of the relying party. Here, the Appellate Division was unconvinced that the owner acted with good faith reliance on the issuance of the zoning and building permits and noted that the owner could have consulted the zoning officer before removing flooring, walls and beginning to erect new walls. The court further noted that equitable estoppel is rarely invoked against a governmental entity.

Of course, municipalities are empowered under the Municipal Land Use Law to adopt ordinances to specifically address the partial versus total destruction matter. The court's decision states in a footnote that the rear building of this property was damaged by Superstorm Sandy. As the shore communities continue to recover from the effects of Sandy, one should keep a watchful eye as to how the governing bodies address rebuilding efforts for pre-existing, nonconforming properties.

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CHOP Sign Variance Approval

By Jeffrey M. Hall

Fox recently represented the Children's Hospital of Philadelphia (CHOP) on an application seeking variances for facade signage. Variance requests for facade signage can be tricky as sign ordinances typically operate on a "one size fits all" basis that rarely coincides with the building occupant's needs. Here, the zoning ordinance permitted a single sign on each façade with a maximum size for each sign of 20 sq. ft. CHOP proposed six façade signs on one side of the building that totaled nearly 100 square feet -- 79.68 sq. ft. for the main sign and 20 sq. ft. for the five smaller signs -- a nearly five-fold increase over the allowable area. Also, the design for each of the five smaller signs incorporated three colors, but Gibbsboro Township's ordinance only allowed a maximum of two colors per sign.

The signs incorporated logo elements that, over the years, CHOP had introduced at its outpatient locations throughout the Delaware Valley. The branding has been highly successful in identifying CHOP's facilities for parents of patients and other visitors, thus the branded signage at this location was extremely important. The Gibbsboro location is situated on a busy four-lane county highway and motorists only have a brief moment to identify the site and safely pull into the parking lot. The on-site manager, the Vice President of the outpatient locations and a sign consultant testified in support of the three variances. Despite the location being in a historic preservation district and the variances greatly exceeding ordinance requirements, the Gibbsboro Borough Planning Board approved the variances by a four to zero vote, recognizing the need for the facility's proper identification for safety purposes. While the application seemed headed for a denial at the start, the applicant's witnesses helped to carry the day with solid testimony that demonstrated the need for the size, type and number of signs.

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Other Recent Approvals:

Carrie Nase obtained final land development approval for AAD Properties, LLC for a proposed 20-unit condominium project located on East Johnson Highway in the Municipality of Norristown.

Carrie Nase obtained preliminary/final land development approval for Westrum Development Co. to construct a luxury high-end apartment building, comprised of 149 units, on Sandy Street in the Municipality of Norristown. Carrie was also successful in securing a variance for Westrum Development Co. to exceed the maximum building height.

Carrie Nase was successful in obtaining a variance from the City of Philadelphia Zoning Board of Adjustment to allow the development of a Subway sandwich shop in the Rising Sun Plaza, located at 5675 Rising Sun Avenue.

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