

The New Jersey Supreme Court Clarifies the Elusive Concept of “Particular Suitability”

By Henry Kent-Smith

The New Jersey Supreme Court finally shed some much needed light on the elusive concept of “particular suitability.” In *Larry Price v. Himeji, LLC and the Union City Zoning Board of Adjustment*, (A-46-11) (068971) decided June 25, 2013, the New Jersey Supreme Court clarified the meaning and intent of “particular suitability” as it relates to commercial use variances considered pursuant to N.J.S.A. 40:55D-70(d)(1). In addition, the Supreme Court reaffirmed the principle that bulk or “c” variance relief pursuant to N.J.S.A. 40:55D-70(c)(2) is subsumed into the underlying use variance, so as to not require an applicant to provide separate, independent proofs for bulk variance relief when requesting a use variance. The Supreme Court’s guidance in this decision is much needed by land use practitioners, but still leaves each applicant to evaluate the specific issues of a particular property’s “suitability” for a proposed use.

The Himeji company applied to the Union City Zoning Board of Adjustment for a d(1) variance and multiple c(2) variances to permit the construction of a multi-unit high rise (six to eight stories due to variation in property slope) residential building in a R residential zone consisting of one to four family dwellings. The subject property borders a zone that permits multi-family high-rise buildings and is located at the end of the Palisades escarpment. A Steep Slope Overlay District further limited development by restricting the number of units as a function of the property slope.

The proposed project was opposed by Plaintiff Price, a long-time advocate for the strict enforcement of all zoning regulations in Union City. During the hearing process, Defendant Himeji revised its plan, including reducing the overall building height. The Zoning Board granted all of the requested variance relief, including a D(5) density variance, a D(6) height variance and numerous bulk variances. In its resolution, the Board adopted the applicant’s planning expert’s rationale with regard to the property’s particular suitability for the development of the proposed project, as well as the special reasons supporting grant of the requested use variance. The Board concluded that the bulk variance relief was subsumed within the grant of the use variance and found sufficient support in the record for the requested bulk variances.

Plaintiff Price filed a lawsuit challenging the Zoning Board’s action

and resolution. The Trial Court reversed the grant of the variances, and determined that “particular suitability” required a subject property be *uniquely* suited for the proposed use. In other words, the subject property *and it alone* would be the only property that could accommodate the requested use. On this basis, the Trial Court found the applicant had failed to demonstrate its property was singularly and uniquely suited for the proposed use. The Trial Court vacated the use variance approval, and therefore, did not rule on the bulk variances.

On appeal in an unpublished opinion, the Appellate Division reversed and reinstated the Zoning Board’s resolution of approval. The Appellate Division found the Trial Court’s interpretation of “particular suitability” was too narrow, and that a broader understanding of “particular suitability” was required under the MLUL. In reviewing the record before the Zoning Board, the Appellate Division found that the property was in fact particularly suitable for the proposed use, and the Board’s decision was entitled to deference. The Appellate Division exercised its original jurisdiction to resolve the issues relative to the density, height and bulk variances based on the record in an effort to avoid a remand and further litigation.

On grant of Price’s Petition for Certification to the Supreme Court, the Supreme Court affirmed the Appellate Division’s decision. In an opinion delivered by Justice Hoens,

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the Supreme Court established the concept of particular suitability is fact and site sensitive, requiring a finding that the general welfare would be served because a particular use is particularly fitted to the particular location. While the availability of an alternative location may be relevant to the “particular suitability” analysis, it does not prohibit the grant of the variance if another location is also suitable and available. As applied to the Himeji application, while there may be other locations in Union City that would be appropriate for the proposed high rise residential use, the Supreme Court upheld the Appellate Division’s finding that the subject property was well suited for the proposed development given its location, size, proximity to the high-rise zone, less sloped topography and access to two street frontages. These property attributes constitute a sufficient factual basis for the Zoning Board to find that the proposed high-rise use was particularly suitable for the subject property. Finally, the Supreme Court held it was appropriate for the Appellate Division to defer to the Zoning Board of Adjustment in the exercise of its fact finding and review of the testimony presented.

The Court rejected Price’s argument that particular suitability required the subject location be the only possible location for the use. The Court upheld a more general understanding of particular suitability, which would require the applicant to demonstrate the particular property as developed for the proposed use serves the general welfare, because the particular property location was peculiarly fitted for the use. While this may sound like tortured double talk, land use practitioners can now be guided by a rather clear understanding of how the particular suitability test is to be

applied. The Supreme Court requires detailed factual findings must be established by the applicant and found to be true by the Board. These findings must distinguish the subject property from surrounding sites. In summarizing its opinion, the Court held that a particular suitability analysis requires:

Demonstrating that a property is particularly suitable for use does not require proof that there is no other potential location for the use nor does it demand evidence that the project ‘must’ be built in particular location. Rather it is an inquiry as to whether the property is particularly suited for the proposed use, in the sense that it is especially well suited for the use, in spite of the fact that the use is not permitted in a zone. Most often, whether a proposal meets that that test will depend on the adequacy of the record compiled before the Zoning Board and the sufficiency of the Board’s explanation of the reasons on which its decision to grant or deny the application of use variance is based. (Opinion page 38).

The Supreme Court’s particular suitability test draws a distinction from standards established over the years relative to use variances.

In *Himeji*, the Supreme Court found that the high rise building was particularly appropriate, even though it violated numerous bulk standards in the low rise residential zone. The dual frontage, large size of the parcel, and its location mitigated any adverse impact of the structure on the property. The applicant demonstrated that the proposed use and structure could be accommodated by the parcel without adversely impacting the

overall neighborhood development scheme.

Finally, the Supreme Court affirmed the Appellate Division exercise of original jurisdiction to resolve the issues relative to the bulk variances. The trial court had not reached the bulk variances, as its reversal of the use variance was dispositive. The Appellate Division and Supreme Court affirmed both the use variance approval as well as the grant of bulk variance relief. In doing so, the court recognized there were no facts in dispute and the issue was to be resolved based on settled law. Opinion, 23-24. This affirmation of judicial efficiency in resolving land use disputes is most welcome.

The Supreme Court’s decision in *Himeji* provides much needed guidance in a very confusing area of law. However, the underlying consequence of *Himeji* is to continue to require enhanced proofs relative to development of commercial uses in zones that do not permit those uses. The Court’s deference to the legislature’s preference for zoning over variance does not solve the underlying problem of land use in New Jersey: how to adjust zoning ordinances to address particular property locations, and avoid the issue of spot zoning. Without legislative reform, this underlying tension between use variance and zoning will continue and will remain an impediment to development of commercial ratables in this state.

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When Can a Confessed Judgment Be Opened? A Case Summary

By Michael J. Kornacki

The case of *Thomas Ferrick and Janice Ferrick v. Edward W. Bianchini and SAB, LLC*, (2013 Pa. Super 116) involved a commercial real estate Tenant's efforts to strike or open a confessed judgment that was filed by the Landlord after a breach of the Tenant's lease. The Tenant raised a number of issues in an attempt to void or open the judgment, and the court's analysis is instructive in determining what a properly written confession clause should say, and what considerations are relevant in determining if a confessed judgment can or should be opened.

In April, 2009, Edward Bianchini entered into a 10-year lease with 12th Street Property LLC (Landlord) for space in a building located at 114 S. 12th Street, Philadelphia, PA. Bianchini intended to operate a restaurant from the premises. Later in April 2009, Bianchini assigned the lease to SAB, LLC (Tenant), but Bianchini remained liable under the provisions of the lease as a guarantor. The original lease, assignment and guaranty contained a confession of judgment clause. In addition, in the amendment to the lease that was executed in connection with the assignment, SAB, LLC and Bianchini agreed that the confession of judgment provisions in the original lease and the assignment would continue. In June 2011, the Tenant defaulted under the lease. In August 2011, the Landlord filed a complaint in confession of judgment and sought both past due rent and accelerated rent and fees for the remaining eight years of the lease term. In September 2011, Bianchini and the Tenant filed a petition to strike or open the confession of judgment pursuant to Pa. R.C.P. 2959. The court denied the petition, and in November 2011 Bianchini and Tenant filed an appeal to the Superior Court of Pennsylvania, raising a number of issues relevant to the question of whether the judgment should be stricken or opened.

The first two issues involved claims that the trial court erred in failing to permit the parties to take discovery following the filing of Petition to strike or open the confessed judgment, and whether the trial court applied the appropriate standard of review when adjudicating the petition. The court disposed of the first issue by noting that issuance of a rule to show cause to open a confessed judgment was not compelled by Philadelphia Civil Rule 206.4, as maintained by the Tenant. The court agreed with the Landlord that the petition did not state a *prima facie* ground for relief that would compel the issuance of the Rule. Moreover, it was unclear why the Tenant needed discovery in support of its petition. The Tenant claimed that allowing the Landlord to confess judgment was grossly excessive because the Tenant made approximately \$700,000 in permanent leasehold improvements. However, the court noted that the Tenant took the premises as-is and was expected to make the improvements. The court stated it was unclear why the Tenant thought that allowing the Landlord to recover on a confession of judgment would be excessive, and went on to find that there was nothing in the lease that entitled the Tenant to any kind of credit for the improvements that the Tenant made to the premises.

Next, the Tenant claimed that the trial court failed to apply strict review and close scrutiny when it adjudicated the petition. However, the Superior Court found that the trial court recited the proper legal standard and concluded that the Tenant's arguments were refuted by the terms of the Lease and applicable law. The trial court determined that the signed lease, assignment and amendment were valid, the rent was properly accelerated and that repeated use of the warrant to collect successive judgments was permitted. The court determined that on its face, the confession of judgment

was valid and enforceable and that the proper standard of review was applied in adjudicating the petition.

The Tenant also alleged that the confession of judgment was not properly incorporated into the amendment and binding on the Tenant. The Tenant claimed that the confession of judgment had to be restated in the amendment and not merely referenced, and that the signature on the original lease did not bear a "direct relation to the provision authorizing the warrant" (quoting *Frantz Tractor Co. Inc. v. Wyoming Valley Nursery*, 120 A.2d 303 (Pa. 1956)). The Landlord argued, and the court agreed, that unlike in other cases cited by the Tenant, in the case at issue the connection between the original confession of judgment and the debtor was not in fact severed. The court distinguished a number of cases where the confession of judgment provision was on the reverse side of a pre-printed lease and the back page was not signed, and where the confession was in a separate addendum to the lease that was not signed — situations where the confession of judgment was physically separated from the balance of the lease. In this case, the court noted that although the addendum did not recite the confession of judgment again, Bianchini initialed or signed the conspicuous confessions of judgment in the Lease, the Assignment and the guaranty and executed each of those documents. The amendment also expressly references the confession of judgment in the lease and Bianchini, on behalf of himself and the Tenant, signed the Amendment. The court thus determined that Bianchini and the Tenant clearly consented to the confession of judgment.

Next, the Tenant alleged that the Landlord's prior exercise of the confession of judgment prohibited its reuse. In 2010, the Landlord had

previously confessed judgment under the lease. The court, however, pointed out that by its express terms, the confession of judgment language permitted successive actions and successive judgments, and stated that the confession of judgment would not be exhausted by one or more exercised thereof. The court also agreed with the Landlord that the amounts for which judgment was being confessed were distinct from the rents for which judgment was confessed in 2010.

Finally, and of particular note, the Tenant claimed that the trial court was permitting a double recovery, insofar as the Landlord both obtained possession of the premises and fully accelerated the rent for the balance of the term. However, the court drew a distinction

between the facts of the present case and a situation where a landlord attempts to confess judgment for both possession of the property and for rent for the balance of the term. While it was true that the Landlord had possession of the premises, the court found that the Tenant had actually abandoned the premises, and the Landlord merely re-took possession as a result of that abandonment. The court confirmed the general principal that a landlord must choose between taking possession of the property and collecting future rents, but in this case the Landlord was not attempting to exercise dual remedies. The Tenant could not prevent the Landlord from exercising his right to accelerate rent (and confess judgment for that rent) by

abandoning the premises, but the Tenant could claim a credit against the judgment at execution for any rent the Landlord received from a new tenant. Thus, Landlord's possession of the premises gave the Tenant a claim for a credit, but was not a reason to open or strike the confessed judgment.

As a result, the court affirmed the trial court's denial of the petition.

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Legislative Update in Pennsylvania

By David H. Comer

Senate Bill No. 721 proposes to add a provision to the Pennsylvania Municipalities Planning Code (MPC) that would prevent a zoning hearing board from intervening or otherwise becoming a party in a land use appeal.

Specifically, the proposed legislation would reconfigure the section of the MPC that addresses intervention in land use appeals by adding what would be Section 1004-A(b) that would state the following: "The zoning hearing board may not intervene or otherwise become a party in a land use appeal."

Senator Charles McIlhinney, who represents the 10th Pennsylvania Senatorial District that includes parts of Bucks County and Montgomery

County, is a sponsor of Senate Bill No. 721. Senator McIlhinney noted in a memorandum to all Senate members regarding the proposed legislation that a decision of the Commonwealth Court "essentially prevents a Borough or Township from settling a case with an applicant that has appealed an adverse decision of the Zoning Hearing Board to the Court of Common Pleas without the participation and consent of the Zoning Hearing Board." Senator McIlhinney's proposed legislation, according to his memorandum, would prevent a situation where a Township or Borough "was able to negotiate a settlement with a property owner ... and the terms and conditions of the settlement were satisfactory to the Township or Borough as well as to the

Judge of the Court of Common Pleas," but the Zoning Hearing Board did not agree and prevented the settlement.

As for the status of Senate Bill No. 721, it has not yet been passed. After Senate Bill No. 721 was introduced, it was referred to the Committee on Local Government, where it remains.

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Proposed Roofing Projects Act Burdensome To Local Government Unit Roofing Projects

By Ellen M. Enters

Pennsylvania Senate Bill No. 813 (Session of 2013) proposes a new Chapter 47 to the Commonwealth Procurement Code that would eliminate a local government unit's option to utilize cooperative purchasing for the procurement of roofing services and impose additional requirements on local government units when procuring roofing services.

This is a re-introduction of Senate Bill No. 1192 (Session of 2011). Chapter 47 is referred to as the Roofing Projects Act (RPA).[i] The term "local government unit" (LGU) is defined in the RPA as "[a] county, city, borough, incorporated town, township, school district, vocational school district, county institution district, home rule municipality, local authority or any joint or cooperative body of local government units or any instrumentality, authority or corporation thereof that has authority to enter into a contract." [ii] Accordingly, the RPA has broad applicability. The RPA states that that it preempts any contrary law, ordinance or regulation. [iii] If enacted, the RPA would take effect on January 1, 2014 and would apply to roofing project contracts initially advertised after the effective date of the RPA.

At the heart of the RPA is the definition of "roofing project," the term is defined as "a project to replace

or repair a roof of a facility owned by a local government unit. The term shall not include a project for the repair of 25 percent or less of the roof or a repair project that has a total cost of \$10,000 or less." [iv] Per this definition, the RPA applies to roof repairs and replacements only. Accordingly, the construction of a roof on a new building or on an addition to an existing building would arguably not be covered by the RPA, however, it is less clear whether the RPA is intended to apply if repair or replacement of a roof is part of a larger building renovation project. One could argue that the RPA applies only to stand-alone roofing projects since it refers to "a project to replace or repair a roof . . ." but it is not entirely clear. If it applies to larger building renovation projects that include roof repairs or replacements, then does it mean that the larger project must have a separate roofing prime contract in addition to the statutorily mandated general, electrical, mechanical and plumbing contracts? This would be a significant change in the law. Even if a separate roofing prime contract were not mandated for larger building renovation projects involving roof repairs or replacements, it would be prudent for an LGU to use a separate roofing prime rather than to potentially expose the entire general construction prime contract to the RPA.

Although the bill attempts to carve out [from the definition of "roofing project"] small roof repairs consisting of a repair of 25 percent or less of the roof or a repair project that has a total cost of \$10,000 or less, these carve outs are likely inadequate. [v] The \$10,000 threshold is wholly inadequate as most roof repairs would cost in excess of \$10,000. [vi] To apply the additional burdens and requirements of the RPA to such small projects will result in increased costs to LGUs, not to mention an increased administrative and financial burden on the Attorney General should there be a bidder challenge per Section 4707(b) (discussed below). Further, the carve outs do not recognize the need for emergency repairs.

One of the primary foci of the RPA is an attempt by the legislature to address what it perceives to be the use of proprietary specifications in roofing projects and undue influence over LGUs by professional consultants, manufacturers, contractors and vendors in the roofing business. The legislature does this by, among other things, requiring that the specifications be prepared by an architect or engineer, attempting to define brand name equivalents, prohibiting use of certain specification features to reject a substitution, imposing additional advertising requirements and requiring financial disclosures.

[i] Section 4701

[ii] Section 4702

[iii] Section 4709

[iv] Section 4702 (emphasis added)

[v] Section 4702. Section 4704(a) contains familiar language that a local government unit, contracting officer or design professional may not divide a roofing project into smaller projects to avoid the application of this chapter.

[vi] One would assume the \$10,000 reference is to the \$10,000 bid threshold that applied to most LGUs prior to 2012. However, the legislature increased the bid threshold to \$18,500 for most LGUs in 2012 and such threshold is adjusted on an annual basis. Thus, one would assume, at a minimum, that this outdated reference would be corrected prior to enactment of the RPA, as failure to do so could conceivably require LGUs to bid roofing projects that are below the applicable bid threshold.

Section 4703(b) of the RPA mandates that the plans and specifications for a roofing project be prepared by a design professional and bear the stamp or seal of the design professional who prepared the plans or specifications.^[vii] "Design professional" is defined as either a professional engineer as defined in the act of May 23, 1945 (P.L. 913, No. 367), known as the "Engineer, Land Surveyor and Geologist Registration Law," or an architect as defined in accordance with the act of December 14, 1982 (P.L.1227, No.281), known as the "Architects Licensure Law," who is retained by the local government unit to draft specifications for a roofing project or to advise the contracting officer on awarding a roofing contract."^[viii] It appears the intent of this section is to require an LGU to hire a licensed architect or engineer to prepare the plans and specifications. It is unclear whether an LGU that has a licensed engineer or architect on staff (i.e. an employee of the LGU) satisfies this definition of being "retained by the local government unit" or whether the LGU is required to hire an outside design professional and incur an additional expense.

The RPA continues to permit the use of brand names in specifying materials in order to signify the kind or quality of materials sought.^[ix] However, it attempts to establish a standard for determining brand name equivalents.^[x] Importantly, it appears that an LGU can still require a bidder to notify the LGU either pre-bid or with its bid whether the contractor intends to use a brand name equivalent and to prohibit post-award substitutions. However, any such

procedures will need to comply with Section 4703(d), which prohibits the use of certain specification features to disqualify proposed substitutions – such as (i) requirements applicable to substitute materials that differ substantially from the requirements to be met by the materials named in the specifications; (ii) provisions conferring authority to accept or reject substitute materials upon persons other than the contract officer acting upon the recommendation of the design professional who prepared the specifications; (iii) testing requirements that may be met by only one manufacturer's materials, however, specifications may require materials to meet standards issued by independent testing organizations; (iv) testing requirements that are exclusionary due to time or expense for compliance; and (v) provisions setting a standard for, or placing a restriction on, the use of substitute materials that are not related to the purpose, function or activity for which the contract is awarded.^[xi] Accordingly, should the RPA be enacted, LGUs and their Design Professionals will need to review their current substitution procedures for compliance with Section 4703(d).

Sections 4705(a) and (b) of the RPA require professional consultants, manufacturers, contractors and vendors to disclose any ownership, investment or compensation relationship with any architect, engineer, consultant, materials manufacturer, distributor or vendor by completing and signing the certification set forth in subsection 4705(e). The certification is required to be submitted to the LGU by the professional consultant prior to the

time the professional services are engaged, and by the manufacturers, contractors and vendors with the bid.^[xii] Section 4705(e) contains the required form of certification. While this requirement may seem innocuous, it is additional paperwork that the bidders must collect from any applicable manufacturers, contractors and vendors and submit with their bids and that LGUs must in turn collect from their professional consultants and bidders. While the legislature likely intends these as a measure to protect LGUs, it is nevertheless additional paperwork and increased administrative burden on LGUs, which already collect a plethora of paperwork on construction projects (e.g. prevailing wage certifications, E-Verify statements, bonds, certificates of insurance, etc.). It would also, arguably, impose a duty on the professional consultants, manufacturers, contractors and vendors to update the certificates during the course of the project if the information in the original certificate were no longer accurate.

Section 4706 of the RPA imposes additional advertising requirements for mandatory pre-bid meetings and bid openings. If the LGU makes attendance at its pre-bid meeting mandatory, then the LGU is required to "publish notice of the time and date of the prebid meeting twice in one newspaper of general circulation published or circulating in the county where the roofing project is located at intervals of not less than three days. The first notice may not be published less than 14 days prior to the date of the meeting. If attendance at a prebid meeting is not advertised as required,

[vii] Section 4703(b)

[viii] Section 4702 (emphasis added)

[ix] Section 4703(c)

[x] See Section 4703(c) and definition of "brand name equivalent" in Section 4702

[xi] Section 4703(d)

[xii] Sections 4705(a) and (b)

then the [LGU] may not refuse to accept a bid from a bidder on the sole basis that the bidder failed to attend the prebid meeting.”[xiii] Accordingly, should the RPA be enacted, LGUs desiring to disqualify any bidder that does not attend the mandatory pre-bid must comply with these additional advertising requirements.

Similarly, the RPA requires that, in addition to advertising as required by any other provision of law, the LGU must “publish notice of the time and date of the opening of bids for a roofing project twice in one newspaper of general circulation published or circulating in the county where the roofing project is located at intervals of not less than three days. The first notice may not be published less than 14 days prior to the date fixed for the opening of bids. If the date and time fixed for the opening of bids was not advertised in accordance with this section, any contracts awarded by the [LGU] after the opening of bids are void, and the [LGU] must readvertise a new date and time fixed for the opening of bids as required by this section.”[xiv] Notably, the repercussion of not advertising properly is severe, as the awarded contracts are void. Presumably this provision is intended to apply if the advertising impropriety were discovered prior to or shortly after the award of the contract, however, it does not expressly state this.[xv] Voiding of the contract after materials have been ordered and work is under way would result in significant unintended consequences and liabilities for the parties involved.

One of the most notable provisions of the RPA is that it permits a prospective

bidder or bidder to challenge the specifications as not complying with Section 4703. Section 4707(b) provides:

“At any time up to ten calendar days after a roofing contract is awarded, a prospective bidder or any bidder not awarded the contract may file a complaint with the Attorney General or his or her designee alleging that the specifications used in the solicitation for, or award of, a roofing project contract violate section 4703 (relating to roofing project specifications). The person challenging the specifications has the burden of demonstrating that the specifications violate this chapter. If the Attorney General or the Attorney General’s designee concludes that the specifications do not comply with this chapter, the Attorney General or the Attorney General’s designee shall declare any contract awarded void and shall direct the contracting officer to revise the specifications and reinitiate the solicitation procedure. The contracting officer shall provide documentation to the Attorney General certifying that the specifications have been modified to comply with this chapter. The decision of the Attorney General or the Attorney General’s designee regarding the compliance of the specifications is final and may not be appealed.”[xvi]

Accordingly, LGUs would be wise to build time into their roofing project schedules to allow for this 10-day post-award complaint filing period. Although this section does not state what role the LGU is to play in an Attorney General investigation, it is likely an LGU would incur lost administrative time and possibly professional fees if involved in the

investigation. Certainly, re-issuance of the specifications and re-bidding of the project would result in lost time and money for an LGU.

In addition to a bidder’s or prospective bidder’s remedy under Section 4707(b), the RPA contains three other enforcement remedies, two of which are available to LGUs. Section 4707(a) contains a broad remedy that states that “[a] contract awarded in violation of this chapter is voidable by the contracting officer.”[xvii] As noted above, while the voiding of a contract awarded in violation of the RPA is fitting if the violation were discovered prior to or shortly after an award is made, the voiding of a contract after a notice to proceed has been issued, materials ordered or work commenced is more problematic. Further, it is unlikely an LGU would risk voiding a contract as it may then find itself in the position of having to defend its decision and incur legal fees doing so if the bidder to whom the contract was awarded challenges the decision. Thus, it is unlikely this remedy would be utilized by LGUs unless the violation is clear.

The second enforcement remedy available to LGUs is in Section 4707(d), which allows LGUs to “bring acivil action in the court of common pleas against any person who knowingly provides false information or knowingly fails to disclose an ownership, investment or compensation relationship in violation of section 4705 (relating to disclosure of financial interest). In the event the court finds a violation of section 4705, the local government unit may recover any costs that, when compared to the competing bids, are excessive or

[xiii] Section 4706(a) (emphasis added)

[xiv] Section 4706(b) (emphasis added)

[xv] Section 4707(b) contains a 10-day post-award period for a bidder to challenge the specifications as violating Section 4703. However, there is no corresponding 10-day post-award period limiting a challenge on an advertising impropriety under Section 4706(b), which leaves the drafter’s intent unclear.

[xvi] Section 4707(b) (emphasis added)

[xvii] Section 4707(a) (emphasis added)

unnecessary costs to the local government unit and are reasonably attributable to the nondisclosure of the financial relationship.”^[xviii] While it’s noteworthy that that this remedy is provided, without the ability to recover enforcement costs (e.g. investigation fees, expert witness fees, attorney fees, etc.), this remedy may not be a viable option for many LGUs as the expense of litigation would likely be prohibitive.

The last enforcement remedy to be discussed is Section 4707(c), which contains a potential civil penalty. It provides that “[t]he Attorney General may petition a court with jurisdiction to impose a civil penalty on any person who knowingly violates this chapter in an amount not to exceed \$25,000 per violation, plus any investigative costs incurred and documented by the Attorney General.”^[xix] This section applies to any person and to the whole Chapter 47. Accordingly, a LGU could be fined \$25,000 plus investigative costs if it is determined, for example, that it knowingly advertised improperly in violation of Section 4706, knowingly wrote a specification in violation of

Section 4703, or knowingly accepted a pecuniary benefit in violation of Section 4704(b).

Last, but not least, Section 4708 of the RPA prohibits the use of cooperative purchasing for a roofing project. It states “[n]otwithstanding any other law, a local government unit may not procure a roofing project or the materials for a roofing project from or through a cooperative-purchasing agency or cooperative-purchasing agreement. A local government unit shall personally bid its roofing projects according to this act and the public-bidding laws applicable to that purchasing entity.”^[xx] Accordingly, a LGU would be prohibited from using cooperative purchasing for a “roofing project” as defined in the RPA. It is notable that this language also prohibits the use of cooperative purchasing for the purchase of roofing materials alone. Accordingly, LGUs would not be able to take advantage of volume discounts on roofing materials that could be obtained through use of cooperative purchasing. A LGU could still use cooperative purchasing to procure a new roof on a new building or a new roof on an addition to a

building, as these projects would appear to be outside the definition of “roofing project.”

It is unfortunate that at a time when budgets for LGUs are so tight a bill would be introduced that would prohibit the use of cooperative purchasing for roofing projects and roofing materials, thereby forcing each LGU to incur its own design professional fees and advertising fees and duplicate the administrative bid process over and over again, rather than pooling their resources and reducing costs by doing so. This proposed legislation is especially disheartening given that intergovernmental cooperation among local governments in Pennsylvania has been encouraged for more than 60 years.^[xxi]

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[xvii] Section 4707(a) (emphasis added)

[xviii] Section 4707(d) (emphasis added)

[xix] Section 4707(c) emphasis added)

[xx] Section 4708 (emphasis added)

[xxi] See e.g. Section 5-521 of the Pennsylvania Public School Code of 1949, 24 P.S. Section 5-521 (authorizing joint agreements with other political subdivisions)

NJ Commercial Property Owners Beware - Tis the Season for Chapter 91 Requests

By Jeffrey M. Hall

Summer is the time that commercial owners and tenants of New Jersey properties should pay close attention to Chapter 91 requests issued by municipal assessors. Chapter 91 is a state law that has been used to claim many a worthy appeal filed with the Tax Court and the County Boards of Taxation over the years. We recommend that any taxpayer contemplating tax relief and seeking a reduction in property taxes for non-residential property timely respond to Chapter 91 requests.

The municipal assessor will mail a request to the addressee of record requesting completion of a summary of the income and expenses for an income-producing property – the so-called Income and Expense (I&E) statement. The I&E statement comes in a prescribed format. It is geared to capture information from income-producing properties, but even owners of owner-occupied commercial

properties must comply to preserve the right to appeal an assessment. It is not a defense in a tax appeal that the property is not income producing – the key is whether the property is capable of producing income.

I&E statements must be filled out completely; there are no shortcuts. Incomplete requests are deemed evasive as intending to defeat the law's goal of gathering information for use by the assessor to establish the correct assessment for a property. They must also be filed with the assessor within 45 days of mailing.

Opportunities to reduce real property taxes should not be overlooked in New Jersey with its high real estate taxes. While the deadline for filing a standard tax appeal to challenge next year's assessment is April 1, 2014, please note that there are other deadlines throughout the calendar year for other types of appeals.

Assessors are sending their Chapter 91 requests now. In a way, they are setting traps now for inattentive taxpayers who may lose out on a strong appeal if the request is ignored. Failure to file an I&E statement will invariably result in a dismissal of a tax appeal petition or complaint as assessors use Chapter 91 noncompliance as a tool in defending tax appeals. Accordingly, be on the alert for the assessor's Chapter 91 request. Even if responses to an I&E statement were not filed in previous years, filing a response this year may pave the way for prospective tax relief by appeal or negotiation in a future year.

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The Dreaded Capital Stock/Franchise Tax Remains Alive on “Life Support”

By Owen Knopping

For the past decade, the PA Department of Revenue has been committed to abolishing the PA Capital Stock/Franchise Tax, which is a tax on the value of a corporation's capital stock. The value is determined by a fixed formula. The structure of real estate transactions has been influenced by the existence of this tax. Instead of holding real estate in a corporation or in a limited liability company (which is taxed as a corporation for purposes of this tax), as a general rule, real estate has been held by limited partnerships. Under this structure, the general partner, generally, is a limited liability company that holds a minor interest, i.e. one percent in the entity and thus, the parties have successfully minimized

the tax implications of the tax and, at the same time, insulated the “owners” from personal liability related to claims against the real estate.

The Department's good-faith intention to abolish this tax has been compromised by the revenue needs of the state's budget. The initial goal was to completely phase-out the tax at the end of 2008, through a series of tax rate reductions. Due to revenue needs, the tax was extended, with continued tax rate reductions, with the anticipated phase-out at the end of tax year 2013. Included in the current state budget that was signed into law by the Governor on July 9, the tax was extended for another two years, i.e. phase-out to expire at the end of tax

year 2015. Again, the phase-out includes further reductions of the rate -- reduced to 0.67 mills for tax year 2014 and to 0.45 mills for tax year 2015.

In view of the history associated with the goal to abolish the tax completely, real estate investors must continue to be sensitive to the tax implications of this tax in planning the appropriate structure for holding real estate.

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Attorneys Named to Who's Who in LA Law

Kenneth Kecskes and Mark Levinson were named to the Los Angeles Business Journal's list of "Who's Who in L.A. Law" for 2013.

Ken's practice focuses on real estate, land development and equity investment transactions. He counsels clients on acquisition, disposition, construction, entitlement, leasing, joint venture, entity formation and financing matters.

Mark serves as co-chair of Fox Rothschild's financial services industry practice. He represents and guides clients in a wide range of strategic corporate, securities, real estate and financing transactions, with a particular focus in municipal finance.

Recent Successes

Jeffrey M. Hall recently assisted McNeill Properties V, LLC, owner of 4152 Quakerbridge Road in Lawrence Township, New Jersey, and operator through a sister entity of a Golds Gym facility on the site, in the application of a preliminary and final site plan and variance approvals. The current gym facility totals 66,560 square feet but a decision was made to expand the facility in order to offer a broader range of programming. The applicant proposed a two story 19,559 square foot addition. The site presented some design challenges; most notably, lack of space to accommodate parking for the addition as required by the land development regulations. Therefore, a significant parking variance was required. Through effective presentation of operator testimony as a foundation for the traffic engineer and the latter's testimony, a variance of 77 parking spaces from the required 431 was approved. This amounted to a deficiency of approximately 18 percent.

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