In the Zone

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Tax Assessment Case Proves School Districts Maintain Broad Rights

By William F. Martin

With real estate assessments receiving increased attention, particularly in Philadelphia and its surrounding counties, the Commonwealth Court of Pennsylvania filed an interesting opinion on March 8, 2013, written by Judge Robert Simpson, in the case of *Guntram Weissenberger d/b/a Blackhawk Circle Apartments v. Chester County Board of Assessment Appeals and Downingtown Area School District*. The decision will not provide much encouragement to property owners concerned about their exposure to increased real estate tax assessments.

The Downingtown Area School District participated in an organization known as the Chester County School District Managers. That group hired a real estate appraisal firm to review the market values and assessments for all apartment complexes in Chester County, Pennsylvania, for the 2004 Tax Year (note that this decision – issued in 2013 – addresses a tax assessment from nine years prior). The Commonwealth Court noted that the consultant was hired to evaluate a different class of properties each year, one year looking at shopping centers, then apartment complexes, with other categories of properties to be reviewed in subsequent years.

The consultants identified six apartment complexes that were under-assessed in Chester County. The report indicated that five of the total six under-assessed complexes were in the Downingtown Area School District and two of these parcels, owned by Blackhawk Circle Apartments were significantly more valuable than the other under-assessed apartment complexes. So, the Downingtown Area School District made a "business decision" to appeal just the assessments for Blackhawk Circle Apartments and did not take any other assessment appeals that year for any other type of property, apartment complex or otherwise.

Following the appeal, the Chester County Board of Assessment Appeals increased each of the subject parcels by approximately $1 million, generating an additional tax bill of approximately $53,000. Blackhawk Circle Apartments filed an appeal contending that the increased assessments were in violation of the Uniformity Clause of the Pennsylvania Constitution and that the method for selecting the properties to appeal was arbitrary and capricious. Eventually, the Chester County Court of Common Pleas agreed with the property owner, and ruled that the method used by the Downingtown Area School District to select the properties for appeal was unconstitutional. The Downingtown Area School District appealed that decision to the Commonwealth Court.

The Commonwealth Court summarized the taxpayer's argument that the appeal by the school district of the assessment demonstrated a selective and discriminatory application of its right of appeal by targeting apartment complexes, particularly the Blackhawk Circle Apartment complex. In fact, the Blackhawk Circle Apartment complex was the only property subject to an assessment appeal by any school district in Chester County, despite claims that other apartment complexes were under-assessed. In its discussion, the Commonwealth Court noted that the taxpayer did not argue that its properties were over-assessed, and did not dispute the increased value assigned to its property. The only grounds for the appeal were that the taxpayer's property had been singled out in contravention of the uniformity clause of the Pennsylvania Constitution, which provides that "all taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws," and that the method of selecting the apartment complex assessment for appeal was "arbitrary and capricious."

The Commonwealth Court quickly dismissed the claim that the decision to appeal was "arbitrary and capricious." The Commonwealth Court deferred to the decision of the Downingtown Area School District to focus its efforts on an appeal that would generate significantly increased tax revenue, noting that "judicious use

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of resources to legally increase revenue is a legitimate governmental purpose."

The taxpayer also apparently left a gap in its case by asserting that other properties within the Downingtown Area School District were under-assessed, but failing to prove that other under-assessed properties were similarly situated to its own properties. The Commonwealth Court confirmed prior case law that in making uniformity arguments, an aggrieved taxpayer must first establish the various valuations at issue and subsequently show how disparate assessments violate the uniformity requirements. The Commonwealth Court confirmed that the Downingtown Area School District's had the statutory right to initiate assessment appeals and that filing such an appeal does not constitute an impermissible spot assessment. The existing case law allows for a methodology that narrows the class of properties that may be evaluated for appeal based on financial and economic thresholds and doing so does not, as a matter of law, show purposeful discrimination.

The majority decision was joined by four of the five judges on The Commonwealth Court panel. A single dissent by Judge Mary Hannah Leavitt focused on the fact that Blackhawk Circle Apartments had been singled out and that its competitors continued to be under-assessed. As a result, Judge Leavitt believed the school district had not complied with the prevailing requirement that similarly situated taxpayers should not be deliberately treated differently by taxing authorities. The competitive disadvantage faced by Blackhawk Circle Apartments, in the opinion of Judge Leavitt, was the precise result prohibited by the uniformity clause, and she concluded that the Chester County Common Pleas Court decision should be affirmed.

The lesson for taxpayers is that the protection provided by the uniformity clause is not always as broad as they would like, and that school districts maintain broad rights to appeal assessments that are too low in the opinion of the districts.

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Local Interference with Developer's Attempts To Secure Wastewater Treatment Services Does Not Rise to Level of Federal Civil Rights Violation

By Clair Wischusen

In *Fortune Development L.P. v. Bern Twp. et al.*, the Eastern District of Pennsylvania dismissed a federal civil rights action under 42 U.S.C. § 1983, brought by developer Fortune against various municipal entities and officials.

In 2005, Fortune obtained a deemed approval of its preliminary plan to develop an age restricted community known as "Waters Edge" in Bern Township, Pennsylvania. Nevertheless, Fortune's development of Waters Edge was stalled by the actions of certain municipal entities and officials in obstructing Fortune's efforts to obtain wastewater treatment services for the project.

Because Bern Township has no public wastewater treatment facility, Fortune initially contacted Bern Township to request some of its reserved capacity at neighboring Leesport Borough Authority (LBA). The Township denied the request, stating there was insufficient capacity. Fortune then applied to the Township to develop an on-site treatment facility. The Township denied that application on the basis that the property lacked access to the Schuylkill River.

Fortune thereafter hired a wastewater treatment expert who concluded that the LBA plant had additional capacity to serve the Waters Edge project. The LBA initially agreed to undertake a capacity analysis and apply for re-rating from the DEP if additional capacity was found. Fortune's principal appeared at a LBA meeting with a check for $23,000. However, the LBA instructed Fortune that it needed to go through the Bern Township Municipal Authority (BTMA), per the request of Bern Township. Fortune's principal then attended a BTMA meeting and advised BTMA of the additional capacity at LBA. The BTMA responded that another developer wanted the same capacity. Fortune and the other developer agreed to split LBA's costs while reserving their individual rights to the capacity. Although LBA's engineer confirmed the additional capacity existed, BTMA did not allocate the capacity to either developer, stating it needed an additional $20,000 from each for equipment and engineering work.

As another alternative, Fortune sought wastewater services from Reading Area Water Authority (RAWA). Fortune entered an agreement whereby RAWA agreed to use its eminent domain power to take an easement over land owned by the Greenway Association to enable Waters Edge to connect to RAWA for water and sewer services. After RAWA filed the Declaration of Taking, Bern Township and Greenway entered an agreement of sale purporting to convey the Greenway property to Bern Township for a dollar.

That agreement of sale never actually closed and is alleged to be a sham transaction. Bern Township and Greenway thereafter filed preliminary objections to the taking. The trial court sustained the preliminary objections but the Commonwealth Court reversed. Bern Township and Greenway have since petitioned for allowance to the Pennsylvania Supreme Court.

Fortune filed a federal civil rights action under 42 U.S.C. § 1983 against Bern Township, BTMA, LBA, five individually named Bern Township Supervisors, Greenway and the Vice President of Greenway's Board. Fortune asserted federal claims for procedural and substantive due process, as well as state law claims for intentional interference with contractual relations and civil conspiracy. The defendants all filed motions to dismiss. For the reasons set forth below, the court dismissed Fortune's federal claims with prejudice and declined to exercise supplemental jurisdiction over the remaining state law claims.

The court first dismissed Fortune's procedural due process claim. To state a procedural due process claim a plaintiff must allege: 1) deprivation of an individual interest encompassed within the 14th Amendment; and 2) the procedures available did not provide due process of law. Fortune alleged that the municipal defendants deprived it of its legitimate claim of entitlement to wastewater treatment services from LBA without due process of law. The court held that Fortune failed to state a claim for violation of procedural due process because the Pennsylvania Sewage Facilities Act (Act 537) provides a constitutionally adequate procedure known as a special request, by which Fortune could have sought a modification of the Township's sewage plan and obtained administrative and judicial review of defendants' denial of wastewater treatment services.

Next the court dismissed Fortune's substantive due process claim. To establish a claim for substantive due process in the Third Circuit a plaintiff must show: 1) that government actors deprived him of an interest protected by the substantive due process clause; and 2) that the deprivation "shocks the conscience." Fortune alleged that the municipal defendants violated its substantive due process rights by taking arbitrary and conscience-shocking actions intended to stop Fortune's development, including: 1) denying Fortune's request for capacity from the LBA plant; 2) denying Fortune's application for a private, on-site wastewater treatment plant; 3) delaying implementation of additional capacity Fortune identified at the LBA plant and offering a portion of that additional capacity to another developer; and 4) entering into a sham sales agreement with intent of stopping the Waters Edge development.

The court held that Fortune's substantive due process claim was foreclosed by *Ransom v. Marrazzo*, 848 F.2d 398 (3d Cir. 1988), in which the Third Circuit held that entitlement to water and sewer services is not a property interest entitled to substantive due process protection. The court noted that interests protected by the substantive due process clause are narrower than the interests protected by procedural due process. The author questions the court's conclusion that Fortune's substantive due process claim was predicated solely on entitlement to wastewater services. Rather, it would appear that Fortune's fundamental interest in the use and enjoyment of its property was at issue because without wastewater services, Fortune could not make use of its property. Although it did not reach the second prong, the court also found it doubtful that the defendants' actions rose to the level of "conscience-shocking."

The *Fortune* case is one of a number of cases demonstrating the reluctance of federal courts to afford relief under Section 1983 in the land use context.

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Fox Wins NAIOP Awards

Fox Rothschild, specifically due to the work of Robert Klausner, was recently named the 2013 NAIOP Creative Deal of the Year Award winner for Klausner's representation of Prism Capital Partners in connection with the lease of Biomet Spine and Bone Healing Technologies Headquarters in Parsippany, NJ.

Klausner and his clients were also the recipients of the 2013 NAIOP Office/Mixed Use Deal of the Year Award for his work with Vision Equities LLC/Rubenstein Partners in connection with the sale of Bayer Healthcare of 100 acres in Whippany, NJ to be used as Bayer Healthcare Headquarters. The firm represented Vision Equities, LLC/Rubenstein partners in connection with the construction contracts for the renovation of approximately 600,000 square feet of buildings on the site.

Watch Those Environmental Questionnaires!

By Philip L. Hinerman

After years of court decisions, it is clear to real estate attorneys that "as is" real estate contracts are not "as is" when it comes to environmental conditions. This was underscored again in the recent decision of *Revell v. Guido*, in New York state appellate court.

The appellate court reviewed the sale of property in which the seller filled out a property information statement submitted to him by his real estate agent. In the area where information on the septic system was requested, the seller wrote "septic system totally new, leach field totally replaced – new 5,000 gallon holding tank." It turns out the statement was a little short on facts.

Several years prior to the sale, the seller had received notice of code violations about his old septic system. He retained a consultant to install a new system, which was essentially an upgrade with the addition of two 2,000 gallon septic tanks. Later, when the seller filled out the disclosure form, he was aware that the upgraded system was not functioning properly either.

In the real estate transaction, the parties stipulated that the sale was "as is." When the buyer discovered the septic problem, a suit followed. The seller pointed out a provision called a "merger provision" that stated the purchase agreement incorporated all of the information obtained during investigation and there were no other agreements. He also pointed out the disclosure form contained a general qualification that "all information deemed reliable but not guaranteed."

The New York appeals court reviewing these facts first noted that New York follows the standard of "caveat emptor" – buyer beware – in commercial real estate transactions. However, the court then stated that sellers may be liable if the failure is "active concealment." Because the seller admitted the falsity of the statement made in the questionnaire, and the buyer asserted that it had relied on that statements, the appellate court said that the trial court needed to review and determine whether the buyer had relied on the false statement.

The New Jersey appellate court reasoned that the "totally new" statement in the property description was misleadingly false. The seller had said the system had been replaced twice at great expense to him, and thus, in his opinion, the system was totally new and the statement was not false. The appellate court sent the case back to determine whether the reliance on these statements was reasonable and if the buyer could have ascertained the facts on his own.

Most states have property disclosure laws requiring sellers to prepare these types of statements. In New York, property disclosure laws require disclosure, but the only penalty for non-compliance is a reduction of $500 in the purchase price. Some real estate lawyers advise clients to pay the $500 penalty rather than running the risk of making a material misstatement.

This logic can be extended to the questionnaires filled out in the Phase 1 environmental review process. Many consultants ask the sellers to fill out questionnaires as part of the due diligence process. Under the EPA's "All Appropriate Inquiry" rule, which provides a defense to some environmental liabilities, questionnaires are part of the information that should be obtained by prospective purchasers and could impact the ability to succeed in environmental defenses. Expect that these statements can be examined in connection with defenses.

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New Jersey Appellate Division Clarifies Scope of Blight Finding Under Local Housing and Redevelopment Law

By Henry Kent-Smith

A recent decision by the Appellate Division makes clear the requirement that a finding of blight is a necessary prerequisite to the exercise of the area in need of redevelopment finding under the Local Housing and Redevelopment Law (LHRL).

In *62-64 Main Street LLC, et al. the Mayor and Council of the City of Hackensack, et al*, A3257-11T4, the Appellate Division amplified the prior Supreme Court ruling of *Gallenthin Realty v. Borough of Paulsboro*, 191 N.J. 344 (2007) as applied by the Appellate Division in *Hoagland v. City of Long Branch*, 428 N.J. Super. 321 (App. Div. 2012). These cases collectively mandate that in order to designate an area in need of redevelopment, a planning board and governing body must not only make a determination that the affected area satisfies the findings established under N.J.S.A.

40A:12A-5, but also make a finding of blight applicable to the proposed redevelopment area. These cases reflect the constitutional requirement of a blight finding as a necessary prerequisite to the use of eminent domain under the LHRL.

There has been some dispute as to whether the scope of the *Gallenthin* holding requiring the finding of blight in instances involving findings related to other purposes of the LHRL, other than just purpose (e). See *Gallenthin Realty v. Borough of Paulsboro*, 191 N.J. 344 (2007), N.J.S.A. 40A:12A-5(e). In *62-64 Main Street*, the Appellate Division makes clear that under the LHRL, in order to designate an area in need of redevelopment, a municipality must make "a finding of actual blight before private property may be taken for purposes of redevelopment." *62-64 Main Street Slip Opinion at 9*. The *62-64 Main Street* holding amplifies the Appellate Division's prior decision in *Hoagland*, where the Appellate Division held that "the Constitution requires a finding of actual blight before private property may be taken for purposes of redevelopment." *Hoagland v. City of Long Branch*, 428 N.J. Super. at 324.

The facts of *62-64 Main Street* are all too familiar for those active in redevelopment projects. The plaintiffs own property that was found by the Planning Board to be in need of redevelopment and confirmed by the Mayor and Council as blighted, based on perfunctory findings associated with dilapidation and "faulty layout." *Slip Opinion at 5,6*. In the Planning Board's resolution, the Board found that plaintiff's property contained buildings that showed signs of structural deterioration, were boarded up and had been subject of a code enforcement notice to demolish the buildings to correct unsafe conditions. *Slip Opinion at 6*. Based on these facts, the Planning Board found that the property satisfied criteria (a), (b) and (d) under the LHRL. N.J.S.A. 40A:12A-5.

While on its face, these findings would be indicia of blight, the Planning Board ignored the fact that the property owner intended to develop the property by seeking a variance from the existing zoning. *Slip Opinion at 7*. The Board simply ignored the property owner's attempts to secure approval to improve the properties on its own, which proposals were denied by the City. *Id*. The Appellate Division found that both the Planning Board and Mayor and Council's resolutions contained insufficient findings of blight, because both bodies did not give any consideration as to whether the conditions were simply temporary, or represented a blight condition that heightened the need for redevelopment power in order to remedy the blight condition. *Id. at 8*.

62-64 Main Street represents the continued expansion of the findings required to designate an area in need of redevelopment, where the finding of blight is either not made, or is based upon insufficient credible evidence to support the blight finding. The finding of blight is a constitutional prerequisite to the exercise of the redevelopment authority where the use of eminent domain is authorized. Only recently have courts more carefully examined redevelopment designations to assure that this necessary prerequisite finding of blight is in fact applicable to particular properties.

One aspect of a blight finding that is more problematic as a result of *62-64 Main Street* involves those situations where the property owner seeks to redevelop a property either in accordance with local zoning, or through variance relief, but without recourse to the Redevelopment Authority. *62-64 Main Street* gives property owners another necessary defense against intrusive municipal use of eminent domain under the LHRL.

In response to these recent case law developments, the legislature is considering a bill that will modify the LHRL to permit municipalities to adopt redevelopment ordinances that expressly **exclude** the use of eminent domain. On May 20, 2013, A-3615 passed the Assembly and appears to be headed for adoption. It may be that this modification to the LHRL will sidestep the requirement for a finding of blight, as eminent domain will not be authorized under this form of redevelopment. However, the interplay between the LHRL and more traditional zoning pursuant to the MLUL under this legislation has yet to be delineated. There may be constitutional issues associated with this new form of redevelopment. Given the recent case law developments, however, it is likely the Legislature will adopt this new form of redevelopment authority under the LHRL.

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