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# In the Zone

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## Rights of Shopping Center Owners To Regulate Free Speech and Public Discourse

By Craig L. Finger



States generally protect the rights of private property owners to enact regulations governing political protests, demonstrations and similar activities on their properties.

One notable exception is in the State of California, which has generally granted broad constitutional protections to individuals and groups to enter on shopping centers for such activities since the decision of the U.S. Supreme Court in *Robins v. Pruneyard* in 1980. In the *Pruneyard* case, local high school students set up a table in the courtyard of the Pruneyard Shopping Center in Campbell, California, seeking to solicit support for their opposition to a U.N. resolution. A security guard at the shopping center advised the students that their activities violated the shopping center's policy against publicly expressive activity and asked the students to leave. The students brought an action in the California Superior Court seeking an injunction prohibiting the owner from denying them access to the shopping center. The California Superior Court held the students did not have either a federal or state constitutional right to exercise their asserted rights on the shopping center property. The California Court of Appeals affirmed the Superior Court's decision, but the California Supreme Court reversed the decision of the California Court of Appeals finding that the provisions of the California constitution permitted the students to exercise their activities as the shopping center. On appeal, the U.S. Supreme Court affirmed the decision of the California Supreme Court and held that the exercise of the rights of free expression did not constitute a taking under the Fifth Amendment and did not constitute a denial of the owner's property without due

process of law under the Fourteenth Amendment.

The *Pruneyard* case followed a line of cases beginning in 1946 that saw the pendulum swing from favoring protecting the rights of individuals or groups to protecting the rights of shopping center owners. In *Marsh v. Alabama*, decided in 1946, the defendant was convicted in Alabama state court of trespass for remaining on the business district of a "company-owned town" to distribute religious literature after being warned to leave. The defendant claimed the conviction violated her First and Fourteenth Amendment rights. On appeal, the U.S. Supreme Court reversed the state court and held the state could not impose criminal punishment for distributing religious literature and the state statute violated the rights granted by the First and Fourteenth Amendments of the U.S. Constitution. In rendering its decision, the U.S. Supreme Court stated "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

More than 20 years later, in 1968, in *Amalgamated Food Employees Union Local 590 et al. v. Logan Valley Plaza, Inc.*, a Pennsylvania state court granted an injunction prohibiting union members from picketing a supermarket in a shopping center on the basis that the union's conduct constituted a trespass on the property of the supermarket and the shopping center. However, the U.S. Supreme Court, following the rationale in *Marsh v. Alabama*, reversed the state court's decision and held that since the shopping center was freely accessible and open to the public, the state could not use its trespass laws to exclude members of the public

wishing to exercise their First Amendment rights. The opinion of the U.S. Supreme Court noted that circumstances might exist where reasonable regulations governing the exercise of First Amendment rights might be warranted, such as where the property is not ordinarily open to the public, where the exercise of First Amendment rights would unduly interfere with the normal use of the property by other members of the public, etc. The U.S. Supreme Court reserved judgment as to the right to prohibit such protests if unrelated to the operations of the shopping center.

Just four years later, in 1972, the U.S. Supreme Court decided *Lloyd Corp., Ltd. v. Tanner et al.* In this case, the shopping center owner sought to prevent protesters from distributing hand bills protesting the Vietnam War in keeping with its strict policy prohibiting handbilling. The district court (following the decisions in *Marsh v. Alabama* and *Amalgamated Food Employees Union Local 590 et al. v. Logan Valley Plaza, Inc.*) found that since the shopping center was generally open to the public, it was the equivalent of a public business district and the prohibition against distributing hand bills violated the protesters' First Amendment rights. The district court issued an injunction restraining the shopping center owner from interfering with such rights. The U.S. Court of Appeals for the Ninth Circuit upheld the district court's ruling. The shopping center owner appealed to the U.S. Supreme Court claiming the court's decision violated its private property rights protected by the First and Fifth Amendments. The U.S. Supreme Court reversed the decision of the lower courts and vacated the injunction on the grounds that the activity in this case was not related to the shopping center's operations.

In 1976, the U.S. Supreme Court decided *Hudgens v. National Labor Relations Board*. In this case, striking warehouse employees picketed their employer's retail store in a privately owned shopping center. The owner threatened to have the striking employees arrested for trespass if they continued to picket. The union then filed an unfair labor practice charge against the owner with the National Labor Relations Board. Relying on the *Logan Valley Plaza* case, the NLRB issued a cease and desist order against the owner. The case was appealed to the U.S. Court of Appeals for the Fifth Circuit, which remanded the case back to the NLRB in light of the U.S. Supreme Court's decision in the *Lloyd Corp.* case. The U.S. Supreme Court overruled the circuit court's order and held the striking union members did not have a First Amendment right to enter the mall for the purpose of picketing. The U.S. Supreme Court stated "that the rationale of

*Logan Valley* did not survive the Court's decision in the *Lloyd* case." This case essentially overruled the *Logan Valley* case, and the pendulum began to swing back in favor of shopping center owners.

Fortunately, there is good news for shopping center owners in most states. Except for California, which still follows the rationale set forth in the *Pruneyard* case, and several other states such as New Jersey, Massachusetts and Colorado, which have adopted versions of the *Pruneyard* rationale, the majority of state court decisions since *Pruneyard* have protected the rights of private property owners to enact regulations governing political protests, demonstrations and similar activities at their shopping centers and have held that individuals and groups do not have the unfettered right to enter private property for the purpose of picketing, demonstrating or conducting similar types of activities.

However, shopping center owners will likely be confronted with individuals or groups seeking to picket, demonstrate or undertake similar types of activities on their properties from time to time. What is a shopping center owner to do when faced with such situations? Some suggestions are for shopping center owners to implement a consistent policy against picketing, demonstrating or similar types of activities; to enforce the policies in a consistent, nondiscriminatory manner; and to post signs around the shopping center stating the opinions of any such individuals or groups gathering on the shopping center are not shared by the shopping center owner.

For more information, please contact [Craig L. Finger](mailto:Craig.L.Finger@foxrothschild.com) at 215.299.2717 or [cfinger@foxrothschild.com](mailto:cfinger@foxrothschild.com).

## Real Estate Transactions Under Section 1031 of the Internal Revenue Code

By **Peter L. Blacklock**



Section 1031 of the U.S. Internal Revenue Code ([26 U.S.C. § 1031](#)) (the Code) sets forth that gains and losses for certain exchanges of property are not recognized. Pursuant to §1031(A)(1) of the Code, in order for a taxpayer to defer capital gains upon the sale of real property, the relinquished property and the replacement property must be held by the exchanger (the holding requirement) for productive use in a trade or business or for investment (the use requirement).

The last volume of the *Real Property, Trust and Estate Law Journal* (45 *Real Prop. Tr. & Est. L.J.* 635 (2011)) includes an article by [Brant J. Hellwig](#), a professor at the University of South Carolina School of Law, titled "[The Holding Intent Requirement for Property Transferred in a Section 1031 Exchange](#)." Professor Hellwig's article notes that inasmuch as the Code does not mandate a duration for the holding requirement, coupled with the Internal Revenue Service's paradoxical position that the determination of the

taxpayer's intent regarding the property is to be made at the time of exchange, taxpayers and their advisers are forced to rely upon Internal Revenue Service rulings and limited case law for guidance.

Professor Hellwig commences his analysis by examining pertinent IRS rulings, all of which were issued in the 1970s and 80s and that universally concluded the taxpayer in question did not qualify for nonrecognition treatment under §1031. Conversely, the case law Professor Hellwig cites, including two Ninth Circuit Court of Appeals' affirmations of earlier Tax Court decisions, is generally more favorable to the taxpayer. In *Magneson v. Commissioner* (81 T.C. 767 (1983), *aff'd*, 753 F.2d 1490 (9th Cir. 1985)), the taxpayer exchanged investment property for like-kind property, then subsequently contributed the replacement property to a general partnership. The Tax Court held this prearranged transfer was a continuation of the previous investment, rather than a liquidation of the investment, thus satisfying the requirements of §1031. Similarly, in *Bolker v. Commissioner* (760 F.2d 1039 (9th Cir., 1985), *aff'g* 81 T.C. 782

(1983)), the Tax Court cited *Magneson* in ruling that when property received in a corporation liquidation was exchanged in a prearranged transaction for like-kind property, the holding requirement of §1031 was fulfilled.

Professor Hellwig next focuses on legislative rationale for maintaining nonrecognition treatment under §1031. He concludes that administrative, equitable and market-efficiency considerations all support removing impediments to nonrecognition.

Due to the inherent complexities arising from interpreting Section 1031, taxpayers should always seek professional guidance when contemplating transactions which may fall under this abstract section of the Code. Lawyers in the firm's Real Estate Department work closely with tax lawyers in the firm in advising clients on whether real property interests held by clients may qualify for tax-free exchange treatment.

For more information, please contact [Peter L. Blacklock](mailto:Peter.L.Blacklock@foxrothschild.com) at 561.804.4457 or [pblacklock@foxrothschild.com](mailto:pblacklock@foxrothschild.com).

## New Jersey Case of the Month: Insight Into Court’s Review of Applications Under NJ Conversion Bill

By Daniel V. Madrid



In July 2009, the New Jersey legislature adopted the “Age Restricted Conversion Bill” (N.J.S.A. 45:22A-46.3), et seq. (the Conversion Bill) in an attempt to reduce the

existing glut of age-restricted housing and address the state’s deficiency of affordably priced workforce housing. The Conversion Bill created a mechanism for developers to convert approved age-restricted residential developments into developments with no age restriction by requiring a developer seeking such a conversion to set aside 20 percent of the units in the converted development as affordable housing units in accordance with the Council on Affordable Housing (COAH) regulations. The bill was intended to spur economic activity by allowing residential developers to reduce the oversaturated inventory of age-restricted housing while simultaneously providing municipalities with a tool to address their affordable housing obligation.

Not surprisingly, the bill met with substantial opposition from municipalities throughout the state, which expressed concerns the bill infringed on local rule and would ultimately result in an influx of school-age children and corresponding demands on already limited resources. Several years later, New Jersey courts are now being tasked with reviewing planning board actions on applications under the Conversion Bill. In *Heritage at Town Lake, LLC v. Planning Bd. of the Borough of Sayreville*, \_\_\_ N.J. Super. \_\_\_ (Law. Div. 2010), the Superior Court of New Jersey, law division, provides an early framework for how courts will analyze the denial of conversion applications in the first published decision that addresses the Conversion Bill.

Heritage at Town Lake, LLC (Heritage) is the owner of Block 136.15, Lot 76 in Sayreville, New Jersey (the property). In 1998, Heritage secured major subdivision approval for 260 single family lots before

the Sayreville Planning Board. In 2005, Heritage amended its plan to permit the construction of 200 age-restricted residential units based on Sayreville’s senior citizen housing density bonus. In 2007, Heritage amended the 2005 approval and obtained preliminary and final site plan approval to construct 184 age-restricted, multifamily units, citing the lack of market demand as the basis for the requested reduction.

In February 2010, Heritage filed an application to convert the age-restricted units to non-age-restricted units in accordance with the Conversion Bill. The application provided for 20 percent of the converted residential units to be designated for affordable housing as required by the Conversion Bill. In support of the application, Heritage provided the expert testimony of a professional engineer, a traffic engineer, a professional planner and a principal of the company. This testimony was tailored to address each of the proof standards under the Conversion Bill, which require the applicant to establish each of the following:

- The site meets the Residential Site Improvement Standards parking requirement;
- The recreation improvements and other amenities to be constructed on the site have been revised, as needed, to meet the needs of a converted development;
- The water supply and sanitary systems are adequate to meet the needs of the converted development, in accordance with the applicable New Jersey regulations; and
- If additional water supply, sewer capacity or parking is needed and the developer is unable to obtain it, the number of dwelling units in the converted development are reduced accordingly.

Heritage’s professional engineer testified that the only proposed change to the site plan was to modify the approved bocce courts (intended to service the age-restricted community) to passive

recreational space. He further testified that there was sufficient water and sewer available for the development and the allocated capacity would not be impacted by the conversion. Heritage’s traffic expert testified that there would be no sufficient changes to the traffic patterns due to the conversion and the plan provided adequate parking for the residential units. Heritage’s planner testified that the recreational elements were suitable for the persons who would likely reside at the development. Additionally, the planner testified that the conversion would not result in a negative impact to the zone plan or public good. Lastly, a principal of Heritage explained there was no market for senior citizen housing either in Sayreville or in the surrounding municipalities. Due to the lack of market demand, there was also no construction financing available to develop the project as previously approved.

The Board denied Heritage’s application for conversion and set forth the following reasons in its resolution for the denial:

- The applicant failed to provide the Planning Board with sufficient information to confirm its ability to develop the site in accordance with principles of sound planning;
- The proposed conversion was inconsistent with the Borough’s Master Plan as the Master Plan calls for construction of housing that addresses the needs of senior citizens;
- Because the applicant’s prior approval utilized the density bonus provided for age-restricted housing, the grant of the conversion would unilaterally increase permissible density in violation of the ordinance;
- The applicant failed to provide the Planning Board with sufficient information or analysis of the residential component.

Heritage used the enforcement mechanism provided under the Conversion Bill to challenge the Planning Board’s denial by action in lieu of prerogative writs.

In reviewing Heritage’s appeal, the court framed its review with the following two questions: (1) have the statutory factors contained in the conversion statute been met, and (2) if so, was the Board’s denial unreasonable as to mandate a reversal by this court? The court further noted that, “if the Board’s decision is without reason or for the wrong reason, the decision is unreasonable.” The court systematically analyzed each of the Board’s purported bases for the denial and rejected each in holding that the Board’s decision was unreasonable.

In its analysis, the court noted the legislature’s clear intent was for planning and zoning boards to consider conversion applications as permitted uses, as opposed to use variances. As such, the court rejected the Board’s argument that the application was inconsistent with the zoning ordinance, as the Conversion Bill deems any application for conversion to be treated as a permitted use. The court also

rejected the Board’s argument that the application would violate the Master Plan, which supports the development of age-restricted housing to fill a need in the community. The court noted that Heritage provided uncontroverted testimony that there was no demand in the market for age-restricted housing due to an oversupply of age-restricted housing approvals. The court further reasoned the Conversion Bill’s intent was to provide needed low and moderate income housing in lieu of age-restricted housing. Finally, the court addressed the issue related to the sufficiency of the recreational amenities by exercising its statutory authorization to impose reasonable conditions on the approval. Because the proofs suggested the conversion would result in school-age children, the Board required the development of a “tot lot” as a condition of the conversion.

In its concluding remarks, the court noted that it rejected the application of *Sica v. Bd.*

*of Adj. of Twp. of Wall* as the appropriate standard of review in a conversion application. The court stated the *Sica* standard, which is applicable for a use variance application for inherently beneficial uses, is not appropriate for conversion cases. Rather, the standard should be more akin to a bulk variance standard, which requires the board to determine if the variance can be allowed without substantially impacting the zone plan or the public good. The case suggests that courts will give reviewing boards very little discretion in reviewing conversion applications in order to effectuate the legislature’s intent. So long as an applicant is able to meet the statutory criteria, the board will need to provide separate and independent testimony to show the grant of the conversion will result in substantial detriment to the zone plan or public good.

For more information, please contact [Daniel V. Madrid](mailto:Daniel.V.Madrid@foxrothschild.com) at 609.844.7413 or [dmadrid@foxrothschild.com](mailto:dmadrid@foxrothschild.com).

## Legislative Update in Pennsylvania

By David H. Comer



Senate Bill 1100 proposes to impose a natural gas impact fee and, as will be discussed in detail herein, provide for a model zoning ordinance.

As for the model zoning ordinance, the proposed purpose is:

- (1) To optimize the development and use of the Commonwealth’s oil and gas reserves by increasing reasonable consistency in zoning and other municipal regulation,
- (2) To foster expeditious and efficient handling of municipal oil and gas permitting procedures and
- (3) To allow municipalities to enact regulations under the Pennsylvania Municipalities Planning Code.

The proposed legislation would give the Pennsylvania Public Utility Commission the authority to develop and adopt a

model ordinance to fulfill the purposes of this section.

Interestingly, the model zoning ordinance shall do all of the following:

- (1) Authorize oil and gas development as a permitted use by right in all zoning districts except residential districts. (The PUC may develop a model zoning ordinance that allows oil and gas development in residential zoning districts by conditional use or special exception with conditions dependent on the density of existing uses within the district and the isolation distances achievable in each residential district.);
- (2) Authorize natural gas compression stations as:
  - (A) A permitted use by right in all agricultural, industrial and commercial districts and
  - (B) A conditional use in all other zoning districts; and

(3) Authorize natural gas processing plants as:

- (A) A permitted use by right in all industrial districts and
- (B) A conditional use or special exception in agricultural districts.

Additionally, the model zoning ordinance shall **not** do any of the following:

- (1) Impose limitations on the hours of operation on drilling operations;
- (2) Impose limitations on noise, light, height or security or fencing on drilling operations, natural gas compressor stations or natural gas processing plants if the limitations are more stringent than limitations imposed on construction activities for other similar land uses (The model zoning ordinance may include limitations on noise, light, height and security and fencing for equipment or processes that are unique to the gas industry and are rational,



nondiscriminatory and reasonably defensible in the particular zone where they apply.);

- (3) Have a permit review period for uses by right that exceeds 30 days for complete and responsive submissions;
- (4) Impose restrictions on vehicular access routes for overweight vehicles except as authorized under:
  - (A) 75 Pa.C.S. (relating to vehicles); or
  - (B) The Pennsylvania Municipalities Planning Code; and

- (5) Regulate storm water, erosion and sedimentation control or grading where the use is subject to regulation by the department through an Erosion and Sedimentation Control General Permit or similar permit.

Furthermore, the proposal requires that an ordinance adopted by a county or municipality to regulate oil and gas shall not contain more stringent standards than the model ordinance adopted by the commission.

It will be interesting to see whether the proposed model zoning ordinance gains any traction.

For more information, please contact [David H. Comer](mailto:dcomer@foxrothschild.com) at 610.397.7963 or [dcomer@foxrothschild.com](mailto:dcomer@foxrothschild.com).

## A Primer for Obtaining Outdoor Advertising Sign Permits Along New Jersey's Limited Access Highways

By *Jeffrey M. Hall*



The billboard industry is highly regulated in New Jersey and in other states. Consequently, potential sign locations are scarce due to a number of limitations – such as spacing between signs, zoning and the like –

built into the regulations. However, if a location is identified on a well-traveled highway, a sign location can be extremely profitable. This article addresses the steps required in order to obtain a permit for a new sign along a limited access highway in New Jersey. Additional measures are required when a proposed location intended to show to a limited access highway will be installed on public property.

As an initial matter, an applicant for an outdoor advertising sign permit must be licensed to do business by the New Jersey Department of Transportation's Office of Outdoor Advertising (OOAS) as an outdoor advertising (OA) company. When engaged in the business of outdoor advertising, an individual or other legal entity cannot hold off-premise sign permits (with limited exceptions) unless licensed as an outdoor advertising company. Accordingly, the first step for an applicant is to obtain a license to engage in outdoor advertising in New Jersey. In order to maintain the license, once issued, an annual renewal fee must be paid.

To apply for a sign permit, the OA company needs to apply on a form prescribed by OOAS. The application fee is \$200. The property owner or owner's agent must sign the application before it is submitted. The information requested on the form is straightforward, but here are a few suggestions with respect to some of the items:

1. Under "Dimensions of Sign Face, Height of Sign Supports," the HAGL is inserted.
2. "Location of Sign" should be descriptive of the location (e.g., "S/S of I-95, 100 feet west of Public Service utility pole 123456"). **Reference must be made to a fixed point – utility pole with identifying number, distance from an intersection, bridge or "other permanent point of reference."** OOAS does not regulate the setback from the highway so that measurement is neither binding nor necessary.
3. Under "Advertisement to be Displayed," a general description such as "general advertising" will suffice.
4. Note on the first page the section for the property owner's signature. It is best to match the signature to the record owner's name.
5. Sketch of Location. This is well explained. However, note that a signed and sealed scaled drawing prepared by a NJ licensed surveyor will need to be submitted at a later date.

6. The application fee as noted is \$200.
7. The application is submitted to the NJ Department of Transportation, Office of Outdoor Advertising Services, via mail at P.O. Box 600, Trenton, NJ 08625-0600 or can be delivered to NJDOT, OOAS, 1035 Parkway Avenue, Ewing, NJ 08618-2309. For Federal Express, the phone number to insert is 609.530.3337.

As an intermediate step, OOAS will issue a notice that serves as a preliminary determination. If favorable, it will instruct the applicant to submit a scaled drawing prepared by a licensed surveyor within 45 days. The drawing must include the following:

1. The county, municipality, block and lot of the property on which the proposed sign is to be erected;
2. The name of the property owner;
3. The distance from the proposed sign to the permanent point of reference the applicant has specified in the initial application discussed above as measured along the nearest edge of the pavement;
4. The distance the sign will be from the right-of-way line;
5. The route numbers and name of all highways shown on the drawing;
6. An arrow indicating north; and
7. The scale of the drawing.

If an applicant wishes to expedite the application's processing, a drawing

## IN THE ZONE

completed by a licensed surveyor can be submitted as part of the first submission of the application. However, an applicant can submit the surveyor's drawing after the NJ DOT conditionally approves an application. In that case, the location shown on the drawing must be identical to the location shown on the initial application or the permit will not be issued. Also, if the surveyor's drawing is not submitted within 45 days, the application will be denied and a re-submittal necessary. However, if these procedures are properly followed, OOAS will issue a conditional permit for the sign location subject to proof that all municipal approvals have been obtained.

As noted, "all relevant necessary approvals" must be obtained in accordance with the municipality's ordinances. Satisfactory evidence of municipal approvals is a building permit or a land use board resolution of approval. However, there is one final requirement that is called into

play when the proposed sign location will be on public property. In that situation, the applicant must appear before the local planning board or zoning board of adjustment at a public hearing the purpose of which is to afford the public the opportunity to comment after notice is duly given. In limited circumstances, there is an exception to this last requirement. OOAS will accept a statement from an authorized municipal official that the municipal ordinances do not require a public hearing or a local approval for the billboard location proposed in the application.

In summary, an applicant needs to pursue the following steps in this order:

1. Apply to OOAS for a conditional permit on the form attached;
2. Once OOAS notifies the applicant that the location is approved, commission a licensed surveyor to prepare the appropriate scaled drawing;
3. Submit the scaled drawing within 45 days of the date of approval spelled out in #2 above; and
4. Obtain and submit either municipal planning board approval (if required) and a building permit or a letter from an authorized municipal official indicating that such approval is not necessary.

For more information, please contact [Jeffrey M. Hall](mailto:jhall@foxrothschild.com) at 609.895.6755 or [jhall@foxrothschild.com](mailto:jhall@foxrothschild.com).

Jeff has represented the Outdoor Advertising Association of New Jersey, participated in the writing of New Jersey's Billboard Statute and regulations and other significant legislation affecting the billboard industry and been involved in seminal cases involving billboards in New Jersey, including *Bell v. Stafford Twp.* and *RC Maxwell Co v. Galloway Twp.*



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