In the Zone

Fox Rothschild LLP
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Presented by the Zoning and Land Use Practice Group

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Chairmen's Message

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The 2007 Atlantic Builders Convention will take place in Atlantic City from April 18-20. Please visit us at our booth, #1523, in the Convention Hall. We look forward to seeing you during the convention.

The Standard For Obtaining A Variance

by Kimberly A. Freimuth, Esq.

A variance is a strict departure from the literal enforcement of the provisions of a zoning ordinance. Under the Pennsylvania Municipalities Planning Code, an applicant for a variance may be either the landowner or the equitable owner of the subject property. A lessee is only permitted to pursue a variance if the lessee is specifically authorized to exercise the rights of the landowner under the lease.

An applicant may seek either a use variance or a dimensional variance. An applicant for a use variance is requesting to use the subject property for a use that is not permitted by-right within the applicable zoning district, while an applicant for a dimensional variance is seeking a by-right permitted use under the zoning ordinance, but requires relief from the dimensional restrictions of the ordinance, such as setback or minimum lot size requirements. The Pennsylvania Supreme Court has stated that when an applicant is seeking a dimensional variance, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations and, therefore, the grant of a dimensional variance is of lesser moment than the grant of a use variance, since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulations.

Generally, in order to obtain a variance, the applicant must demonstrate the following five (5) requirements to the municipal zoning hearing board:

(1) That there are unique physical circumstances or conditions peculiar to the particular property which create an unnecessary hardship.

(2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

(3) That such unnecessary hardship has not been created by the applicant.

(4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

Often, the most difficult requirement for an applicant to prove is that the alleged unnecessary hardship has been created by the conditions of the property itself and that the hardship has not been self-imposed by the applicant. The test for determining whether a hardship exists is not whether the proposed use is more desirable than the permitted use, but whether the property can be used in a reasonable manner within the restrictions of the ordinance.

In addition, it is important to remember that in granting any variance, the zoning hearing board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of the zoning ordinance.

For more information, please contact Kimberly A. Freimuth at 215.918.3627.

Recent Court Decision

DOWNINGTON AREA SCHOOL DISTRICT
v.
CHESTER COUNTY BOARD OF ASSESSMENT APPEALS
AND LIONVILLE STATION S.C. ASSOCIATES

APPEAL OF: LIONVILLE STATION S.C. ASSOCIATES

by Herbert K. Sudfeld, Jr., Esq.

This case involves the issue of whether the prevailing statutory scheme for tax equalization obviates the common law procedure for asserting an assessment challenge on the basis of tax uniformity under the Uniformity Clause of the Pennsylvania Constitution.

The Supreme Court considered this a case of first impression for the Court.

Here, the subject property was a strip shopping center which had been assessed in 1996-1997 at $5.8 million dollars as part of a countywide assessment at 100% of its fair market value. In 1999 the center was purchase for $10.4 million dollars. The local school district appealed the $5.8 million dollar assessment and the county board of assessment raised the assessment in 2000 to $6.5 million or $77.66 per square foot. The school district again appealed seeking an assessment of $8.5 million or $101.81 per square foot.

At the trial level, the parties stipulated to an $8.5 million dollar market value. At the time, the State Tax Equalization Board (STEB) ratio was 85.2% of fair market value. The established pre-determined ratio (EPR) for assessing taxable real estate in the county was 100% of fair market value.

Expert testimony indicated seven other shopping centers in the area were assessed from $47.87 to $89.62 per square foot and that the ratio of the assessed value to actual value for the comparable properties was in the range

of 34% to 69%. Appellant argued that an increased assessment would result in a violation of the constitutional requirement of tax uniformity. See PA. CONST. Art VIII, Section 1 ("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.").

The Trial Court rejected the Appellant's argument holding instead that the school district's requested relief of $8.5 million dollars should be granted assessing the subject property at the EPR of 100% of fair market value. A divided Commonwealth Court affirmed the lower court noting that the 1982 Amendments to the Second Class A and Third Class County Assessment Law of 1931 required the utilization of the EPR (100% ratio) unless the common level ratio (CLR) varied from it by more than 15%. The Court reasoned that because the CLR/STEB of 85.2% varied from the EPR by less than 15% of the EPR (100%), the Trial Court's decision to assess the property was consistent with statutory requirements and rendered the Appellant's uniformity challenge meritless. Judge Friedman filed a noteworthy dissent to the Commonwealth Court opinion.

The Supreme Court overturned both the lower court and Commonwealth Court decisions recognizing that the taxpayer is entitled to relief under the Uniformity Clause where his property is assessed at a higher percentage of fair market value than other properties throughout the taxing district. The court based its opinion upon the general principle that the taxpayer should pay no more or less than their proportionate share of government. (citations omitted). The Court noted that "a taxpayer may prove non-uniformity by presenting evidence of the assessment to value ratio of 'similar properties of the same nature in the neighborhood'". (citations omitted). The Court further acknowledged that properties in the relevant taxing district are comparable properties for purposes of calculating the appropriate ratio of assessed value to market value. ("As all real estate is a class which is entitled to uniform treatment"). The Court did observe, however, that the courts may rely upon evidence concerning assessment to value ratio of similar property which, while not comprehensive is "nonetheless relevant" to the uniformity analysis. The Court stated that the 1982 amendments to the State Tax Equalization Board law establishing a STEB ratio and indicating that a margin of error of 15% above or below such figure, did not preclude the taxpayer from bringing a Uniformity Clause challenge. Thus, the Court held that it was not willing to void the constitutionally grounded common law procedure of determining tax uniformity which assures that a taxpayer pays no more or less than his fair share, in favor of a statutory procedure, "which does not account for potential discrimination among property owners of comparable properties."

Chief Justice Cappy filed a dissenting opinion.

Case of the Month-- Pennsylvania

Kohr v. Lower Windsor Township

by Robert W. Gundlach, Jr. Esq.

In Kohr, the landowner filed three separate preliminary subdivision plans proposing 579 single family and townhouse units on 332 acres in Lower Windsor Township, York County, PA. The Board of Supervisors rejected all three of the landowner's preliminary subdivision plans for, among other reasons, the fact that the Act 537 planning modules did not comply with the information required under the Township Ordinances. The trial court reversed the Board and held that the Township's processing of the application was in bad faith because it insulated itself in the decision-making process by categorically opposing the landowner's plan for the ownership and operation of the public sewer system. Further, the trial court held that once the Township indicated a willingness to oppose a specific choice of sewer system, it obligated itself to engage in a dialog with the landowner over which options they would not oppose. On appeal to the Commonwealth Court, the Township argued that the landowner failed to establish that the subdivision would be served by a "public sewer

system" and that landowner had obtained DEP approval. The Commonwealth Court upheld the decision of the trial court and noted the following:

- There is no requirement that the sewer planning process be completed prior to the granting of preliminary subdivision plan approval – only that the process be commenced.
- It is more reasonable and consistent to condition final approval of the development plan upon obtaining all the required permits from DEP – rather than rejecting the plan outright.
- Even though the landowner only had "an agreement to agree" with a public utility company to organize a public utility to operate the proposed sewage facility, the Township should have approved a preliminary plan conditioned on the landowner and the public utility obtaining all the necessary permits from DEP and the Pennsylvania Public Utility Commission for final plan approval.

Further, the Commonwealth Court found that the Township acted in "bad faith" by failing to discuss with the landowner their interpretation of the ordinance requirements. The Commonwealth Court cited to the Rahm case which held that a municipality has a legal obligation to proceed in good faith in reviewing and processing development plans and that such duty in good faith includes discussing matters involving technical requirements or ordinance interpretations with an applicant and providing an applicant a reasonable opportunity to respond to objections or to modify plans where there has been a misunderstanding or difference of opinion.

This case reaffirms the requirement of a municipality to work with a landowner in good faith and to, where appropriate, grant preliminary/subdivision land development approval conditioned upon receipt of other regulatory permits and approvals.

If you should have any further questions concerning this case, please contact Robert W. Gundlach, Jr., Esquire at 215.918.3636.

Case of the Month-- New Jersey

Menk Corp. v. Township Committee of Barnegat

by Jack Plackter, Esq.

This case holds that in the Mount Laurel context a court can compel a municipality to vacate streets even though the vacation process is a legislative process.

This Action raised an issue of first impression arising out of the implementation of the Mount Laurel Doctrine. Menk Corporation sought to compel the Barnegat Township Committee to vacate three unimproved paper streets to allow Menk to proceed with a 347-unit inclusionary housing development that would provide thirty-five affordable housing units.

Menk appeared before the Barnegat Township Planning Board on June 24 and July 22, 2003, seeking preliminary site plan approval for its development.

On two occasions after the approvals, Menk asked that the Township vacate the unimproved paper roads.

The Township responded on May 16, 2005, that it would not vacate the streets. The litigation followed.

Menk contended that the paper streets within its development were not needed for any public purpose. In addition, Menk asserted that the Township's refusal to vacate the streets impedes the creation of affordable housing because it would require complete re-engineering of the project to accommodate the present street layout thereby causing delay and significant cost generation and the resulting street system would violate the Residential Site Improvement Standards.

The Township claimed in response to the litigation that it had an absolute right to decide whether it should vacate a street and the court simply cannot interfere with the exercise of the municipality's discretion. Secondly, it argues that its refusal does not have Mount Laurel implications because Menk could redesign its plans to incorporate the present roads.

The general rule is that the decision to vacate a street lies in the sound discretion of the governing body and that power is subject to limited review by the courts. Vacation of public streets is essentially a legislative function. Therefore, it is a plenary power which is only subject to judicial review based on constitutional claims, those instances tainted with fraud or palpably not in the service of a public interest, or when there is a clear perversion of the power itself.

Other courts have indicated that the controlling criterion under the statute is whether the vacation of a street will serve the "public interest." The court's function is confined to a determination whether factors other than the public interest and welfare have influenced the governing body's legislative action. While vacation ordinances, in another setting, might be valid exercise of municipal power, "they must be viewed in the light of the present factual context, in order to ascertain the quality of those acts."

Thus, the central issue in the case was whether the court should interfere with the Township's discretion based upon the plaintiff's contention that the court needs to do so in order to vindicate the Mount Laurel doctrine.

As the Supreme Court said in Mount Laurel I*, it is beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation.... It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries. *Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity*.

The court indicated that it was convinced that, in deciding what is in "the public interest," courts should not confine themselves exclusively to the parochial interests of the municipality invoking its power to vacate. Opinions in the land-use context have emphasized the obligation of a municipality to consider the welfare of the region when the governing body exercises its legislative authority. The insularity and parochialism of the Chinese wall theory of municipal zoning has long since been discredited. The MLUL itself recognizes this principle, by providing that one purpose of zoning is "to ensure the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities...." Because zoning powers are derived from the State's general authority, a zoning decision "must consider the welfare of all of the State's citizens, not just the interest of the inhabitants in a particular locality."

The court specifically invited the Township to demonstrate any public interest in maintaining the paper streets. The Township conceded that there was none other than its intractable claim that the court cannot tell it what to do.

It is evident that the Township's refusal to act affirmatively to vacate the streets in this factual context had constitutional implications when viewed within the framework of the Mount Laurel doctrine. It was not necessary to demonstrate that defendant was willfully delaying plaintiff's project or that it was affirmatively placing obstacles in the path of the opportunity to produce affordable housing. However, the fact is that there was simply no sustainable public interest in maintaining the three unused and unneeded streets. To the contrary, there was a strong public interest in eliminating them so as to promote the construction of affordable housing quickly and without delay or unnecessary cost generation.

Because the Township conceded that there remains no public interest in retaining the paper streets within Menk's property and given the need to vacate those streets to allow development and the concomitant production of affordable housing, the court directed the Township to adopt a road vacation ordinance within sixty days of the date of the opinion surrendering all public interest in the paper streets within Menk's property.

While this case is in the Mount Laurel context, it signals a change in that courts are now willing to look into municipal refusals to act in the legislative process. A court may be willing to review a municipal refusal to act when a project otherwise complies with all the regulations and there is no reason not to act other than to delay, frustrate, or stop the approval process.

For more information on this case, please contact Jack Plackter, Esquire at 609.572.2200

*The Mount Laurel doctrine requires each municipality in New Jersey to provide a realistic opportunity for the development of affordable housing within the boundaries of the Municipality

Condo Corner-- Pennsylvania

Homeowners' Right to Install Satellite Dish in a Condominium

by Carrie B. Nase, Esq. & Kimberly A. Freimuth, Esq.

Homeowners are offered with many different providers of cable television, including satellite television. However, those homeowners who wish to receive cable television through satellite providers, such as DIRECTV or The Dish, may be restricted from doing so since many condominiums impose restrictions regarding the placement of satellite dishes within the community.

Condominium Associations are limited to the type of restrictions they can impose based on the Federal Communications Commissions' Over-the-Air Reception Devises Rule (the "FCC Rule"). The FCC Rule prohibits any restriction, including but not limited to zoning and land use regulations, a private covenant, or a condominium or planned community association restriction, on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property that impairs the installation, maintenance or use of an antenna that is used to receive direct broadcast satellite service, including direct-to-home satellite service, or to receive or transmit fixed wireless signals via satellite, and that is one meter or less in diameter. 47 C.F.R. § 1.4000. The FCC Rule states that a regulation impairs the installation, maintenance, or use of an antenna if it (i) unreasonably delays or prevents installation, maintenance, or use; (ii) unreasonably increases the cost of installation, maintenance, or use; or (iii) precludes reception or transmission of an acceptable quality signal.

The FCC Rule has raised many questions as to the type of regulations a condominium association is permitted to implement with respect to the placement of satellite dishes. The FCC Rule only applies to property within the exclusive control of the satellite user. It does not apply to common areas within a condominium. Therefore, a condominium association can prohibit the placement of a satellite dish on the common elements, including, but not limited to the roof and/or exterior wall of a multi-family dwelling. On the other hand, a condominium association cannot prohibit the placement of a satellite dish on a balcony or patio that is exclusively used by the homeowner. However, they can prohibit the satellite dish from protruding from the balcony or patio.

For more information regarding restrictions on satellite dishes in condominiums and planned communities, please contact Carrie B. Nase, Esquire at 215.918.3615.

Condo Corner-- New Jersey

by John P. Kaplan, Esq.

Micheve, L.L.C. v. Wyndham Place at Freehold Condominium Association, 381 N.J. Super. 148 (App. Div. 2005), does not stand for a total preclusion of the collection of a non-refundable contribution to working capital upon the transfer of title to a condominium unit.

Nearly two years ago, the New Jersey Appellate Division ruled in *Micheve* that a condominium association cannot impose a $750.00 special assessment solely upon new purchasers of condominium units as it was

discriminatory and violated the particular governing documents, which mirrored the Condominium Act's requirement that all assessments that may be used for common expenses be proportional. Since that time, the issue repeatedly arises as to whether or not any contribution to the association's working capital can be collected upon the transfer of title to an individual unit.

This decision did not address a situation where the governing documents provide for proportional assessments from the inception of the condominium, where no discriminatory claim can be made, and obviously no claim of conflict with the Act. Wendell A. Smith, Dennis A. Estis, Christine F. Li, Condominium & Community Association Law, § 8:2.9 at 162 (2007). Likewise, when it is acceptable for such provisions when they are adopted at the inception of the condominium and do not run afoul of the Act, "it is difficult to understand how such provisions later adopted would run afoul of the Act." Id. Even if such provisions were to "impose a burden on alienation of a unit, units are equally encumbered by this restrain on alienation." Id. Therefore, adoption of proper provisions to the condominium's governing documents should not preclude a unit seller from collecting a contribution to working capital on behalf of the condominium association upon the transfer of title to the unit.

Legislative Update-- Pennsylvania

by David H. Comer, Esq.

In the early stages of the regular session of 2007-08, House Bill 72 was introduced that proposes to amend the Pennsylvania Municipalities Planning Code by providing for an educational impact fee and assessment in certain school districts. To date, specifics of House Bill 72 are not available, but similar legislation has been proposed - but not enacted - in the past. The legislation previously proposed sought, among other things, to impose educational impact fees on residential development to allow school districts to be reimbursed for additional costs associated with increased enrollment stemming from new residential development.

Legislative Update-- New Jersey

PROPERTY TAX REFORM – REAL REFORM OR MIRAGE?

by Jeffrey M. Hall, Esq.

After exhaustive review of New Jersey's real property tax system, the Legislature appears to have settled on modest relief without any meaningful reform. A-1 (the "Bill"), proposes to cut real estate taxes up to 20%, subject to a phase out based on reported income of property owners.

The Legislature's leadership, in an effort to provide property tax relief to property owners, established a joint legislative committee last summer to study this issue and to provide recommendations in light of its findings. After

conducting numerous hearings and analyzing submissions and other materials, the committee came up with eleven recommendations. The first recommendation proposed the replacement of the current homestead rebate with a system of credits with the benefit being increased to 20% for as many taxpayers as resources will allow. In response, A-1 was introduced on January 25, 2007. Co-sponsored by Assemblymen Roberts, McKeon and Burzichelli, the Bill proposed a 20% percent property tax cut for households earning up to $100,000, a 15% percent cut for incomes over $100,000 up to $150,000, and a 10% percent cut for incomes over $150,000 up to $250,000. This relief would be financed from state sales tax revenue.

While some believe this is a positive step, others claim it is unconstitutional basing their objections on the Uniformity Clause of the State Constitution. That clause requires that "the tax levy issued by each municipality shall tax all property on the same basis, regardless of use, and various exemptions to the property tax." Additionally, the Bill proposes a property tax levy cap to control various areas of government spending and lead to greater fiscal accountability. One such proposal, which would affect new government hires, would replace the pension system with a 401(k)-type retirement plan. Furthermore, the Bill would restrict elected officials holding more than one position in government from enhancing their pensions. The Governor has signed property tax relief legislation into law.

New Approvals

by Jessica Woll, Paralegal

- We obtained preliminary/final land development approval along with eight waivers from the Subdivision and Land Development Ordinance, from the New Britain Borough Council in New Britain Borough, Bucks County, to allow the development of an 8,700 square foot industrial building.
- We obtained a special exception from the East Rockhill Township Zoning Hearing Board in East Rockhill Township, Bucks County, to allow the expansion of several nonconforming structures by 50%.
- We obtained dimensional variances from the Upper Makefield Township Zoning Hearing Board in Upper Makefield Township, Bucks County, to allow the construction of a single family detached dwelling on a lot containing less than the minimum required lot area and lot width.
- We obtained multiple variances, including variances from impervious surface, woodland disturbance, steep slope disturbance, setback and parking requirements from the Doylestown Township Zoning Hearing Board in Doylestown Township, Bucks County, to allow the development of a commercial project utilizing several existing buildings and including the construction of a new bank and a new commercial building containing about 16,000 square feet.
- We obtained preliminary/final land development approval from the Doylestown Township Board of Supervisors in Doylestown Township, Bucks County, to allow the development of a commercial project utilizing several existing buildings and including the construction of a new bank and a new commercial building containing about 16,000 square feet.

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