

The Jersey Devil Is in the Details

By John L. Grossman

If you want to limit the use of an access easement benefiting an adjacent parcel in New Jersey, then you'd better spell it out. A very recent decision issued in New Jersey and approved for publication by the Appellate Division represents the state of the law on this issue and is important for developers and others, particularly in the context of subdivisions. The case is entitled *Caribbean House, Inc. v. North Hudson Yacht Club, et al*, decided and approved for publication on December 30, 2013.

Caribbean House operates a "co-op" on a tract of land which it owns in Edgewater, New Jersey. The property is bordered on the east by the Hudson River and on the west by River Road. In 1968, Caribbean House subdivided the parcel, retaining the western portion bordering River Road for itself and conveying the eastern portion bordering the Hudson River to North Hudson Yacht Club (Yacht Club). In connection with its conveyance, Caribbean House granted to Yacht Club a ten foot wide access easement across Caribbean House's retained lands as a means of ingress and egress to and from River Road. Without the access

easement, the Yacht Club land would have been landlocked.

For the ensuing forty years, Yacht Club used the easement without incident for the benefit of its members, their guests, mechanics, police and fire department personnel, boat haulers, waste haulers, the Coast Guard Auxiliary and the Sea Scouts. In 2010, Yacht Club agreed to allow a local restaurant, the River Palm Terrace (River Palm), to use its parking lot to park, by way of valet service utilizing the access easement, River Palm's patrons' cars. This arrangement was made as a courtesy to a Yacht Club member who owned the restaurant, without payment and without a lease.¹

Caribbean House objected to the arrangement as impermissible, exceeding the use for which the easement was granted. Yacht Club disagreed and continued to allow River Palm to use the easement and to park its patrons' cars on Yacht Club's property. Caribbean House filed suit and sought summary judgment contending that a dominant estate, in this case Yacht Club, may not allow a third party to use its easement without benefit to the dominant estate, in the absence of a possessory interest. Yacht Club countered that it was free to invite whomever it wished to use its property, which could be accessed only by way of the easement.

The lower court granted judgment to Caribbean House, finding that Yacht Club was without authority to grant permission to a third party to burden the easement with uses not serving or benefiting Yacht Club. The Appellate Division reversed the lower court, finding that the easement granted to Yacht Club by Caribbean House was unlimited, thus constituting a general way for all purposes to which the Yacht Club's property might be devoted. Because the arrangement with River Palm did not constitute an impermissible use

of Yacht Club's property, and due to the nature of the easement, the upper Court found the arrangement to be within the scope of Yacht Club's easement.

The Appellate Division described the easement at issue as an easement appurtenant: that is, one created when the owner of one piece of property (the servient estate) grants rights regarding that property to the owner of an adjacent property (the dominant estate). In accord, the extent of the rights conveyed rests on the intent of the parties as expressed in the language creating the easement, read as a whole and in light of the surrounding circumstances.

The easement granted in this case was one for ingress and egress, without express limitation or restriction. Citing precedent, the upper Court stated that such an easement is available as a general way for all purposes to which the dominant estate, in this case Yacht Club's property, might be devoted, absent limitation placed on the extent of that use. The Appellate Division distinguished between those cases in which the owner of the dominant estate allows use of the easement to access property other than its own (such as to cross its lands to get to a beach), and those cases in which the owner of the dominant estate allows use of the easement to access only its own dominant, appurtenant estate. In the former cases, the owner of the dominant estate may not grant rights to a third party, unless provided for in the instrument by which the easement is created. In other words, unless the document provides otherwise, an appurtenant easement may not be used for the benefit of property other than the dominant estate. In the latter cases, and to the contrary, the owner of the dominant estate may grant rights to a third party without express enabling language, provided that the rights granted are solely to access the property of the

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¹ Yacht Club and River Palm later entered into a lease, but the existence or not of a lease played no part in the upper Court's decision.

dominant estate and for a purpose to which the dominant estate is properly put. In this case, that proper purpose was parking. Because the easement was used by River Palm to access only Yacht Club's property, it could not be accurately characterized as being used for the benefit of lands other than those to which it was appurtenant.

In short, the Appellate Division found that the easement granted to Yacht Club by Caribbean House was unlimited, and thus constituted a general way for all purposes to which the Yacht Club's property might be devoted. With this in mind, and particularly in situations in which subdivisions are created and access rights are conveyed, any limitations or restrictions on that

access must be spelled out clearly and definitively.

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Time To Review Your Pennsylvania Real Estate Assessments

By Robert W. Gundlach, Jr.

If you are the owner of a commercial, industrial, retail, office or other property in Pennsylvania, then now is the time to review your properties' tax assessment against its current market value. This same review is also applicable to your residential properties as well. Today's economy has caused many property owners to experience declining rents, increased vacancy and the need to become "creative" in leasing space. These factors have aided an already declining real estate market in devaluing property for real estate tax purposes.

Unfortunately, county boards of assessments cannot reassess property every year based on the local economy. As a result, the real property taxes assessed against your property by the county board of assessment for county, municipality and school district taxes may be out of proportion to the actual value of your property or the value attributable to your property by capitalizing the income you receive from the property.

What should you do if you think your real estate taxes are too high?

First, you need to determine whether to file an appeal from the county board of assessment for your property. To do so, you need an experienced real estate

assessment attorney and a qualified appraiser.

On commercial and industrial properties, as well as rental residential properties, two calculations often make the determination as to whether or not to appeal. Capitalization of income and comparable sales gives us the ability to make a preliminary determination as to whether a particular tax assessment is out of line.

The capitalization of income approach is the easiest and quickest test to determine the value of your property; whereas comparable sales require more information. Up to date information on costs, square footage, occupancy, types and number of leases, use, location, mortgage amounts and interest rates, rental income and expenses is necessary to complete the capitalization approach. Recent comparable sales within the last year before filing of an appeal should be noted and analyzed. Financing implications must also be taken into account to determine whether the sale is an arm's length sale or was the result of a mortgage foreclosure or workout agreement. For residential properties, the most reliable determination is of course comparable sales of similar homes within a reasonable distance from the subject property.

With the above in mind, now is the time of year to review your real estate tax assessment on any and all property owned. If the market value utilized by the board of assessment is inconsistent with the market value of your property, or if you have experienced rental income problems over the last few years, then an appeal from your assessment this year may be in order. We can help you make that determination in short order. If an appeal of your assessment appears warranted, we may suggest further analysis by a qualified appraiser.

In Pennsylvania, appeals for the Philadelphia suburban counties need to be filed on or before either August 1 or September 1, depending upon the county in which you own your property. The deadline in Bucks, Chester, Delaware and Lancaster counties is August 1, 2014. The deadline for filing an appeal in Montgomery County is August 1, 2014 and for Philadelphia County is October 6, 2014.

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Billboard Regulation: The Commonwealth Court's Recent Top Hits

By Reuben Asia

In the last quarter of the 2013 calendar year, the Commonwealth Court of Pennsylvania decided three cases that provide insight into billboard regulation

in Pennsylvania and its municipalities. These three cases help explain important legal concepts, and an understanding of these concepts can be beneficial

to individuals involved with outdoor advertising and land use more generally.

Smith v. Hanover Zoning Hearing Board: De Facto Billboard Bans in Pennsylvania

Under Pennsylvania law, a municipality cannot completely ban billboards; a municipality may, however, regulate billboards, including their height, size, use, and location, within its municipal limits. In *Smith v. Hanover Zoning Hearing Board*, the Commonwealth Court discussed just how much regulation a municipality can institute before the amount of regulation creates a *de facto* billboard ban and the regulation must be amended. The plaintiff, Smith, had filed an application for permits to construct two billboards with LED lights in Hanover, Pennsylvania. The proposed billboards, however, exceeded the permitted height limit and were to be located in districts where Smith's billboards were prohibited. Because of this, the applications were denied, and Smith appealed. Smith maintained his proposed billboards would only be economically profitable if they violated Hanover's zoning ordinance, and because the billboards would only be economically profitable if built in violation of the ordinance, Smith argued Hanover had, for all intents and purposes, banned billboards in violation of Pennsylvania law.

After reviewing the evidence, the Commonwealth Court determined the Hanover ordinance did not create a *de facto* ban on billboards. The court explained the borough's zoning code did not function as a ban on billboards simply because it would prevent Smith from making a profit off of his proposed signs; to be a *de facto* ban, the court reiterated the regulations must make the construction and/or ownership of any billboard economically infeasible. Smith had only shown that his proposed LED billboards would lose money, not that it was economically impractical for any billboard, including non-LED billboards with lower construction and operating costs, to be built and survive in the permitted district. With respect to the height limit set forth in the ordinance, the court explained that while it might be reasonable and even beneficial for a municipality to permit billboards to be taller than the limit, this limit was not a ban. The height limit did not exclude billboards from the municipality, and the limit was therefore permitted.

Key Takeaway: A plaintiff can show that a municipality's regulation of billboards is so extensive that it amounts to a *de facto* ban if the plaintiff can demonstrate the municipality's ordinance makes the construction of all billboards economically impractical.

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Smith v. Hanover Zoning Hearing Board continued:

An Application of the "Fair Share" Principle to Billboards

The "fair share" principle was initially created to remedy exclusionary zoning practices against lower income residential developments and is premised on the concept that a municipality, through its zoning regulations, must provide for the land-use needs of all categories of people who might want to live in the municipality. While some Pennsylvania Commonwealth Court decisions suggest the "fair share" principle should be limited to the residential housing context, other Commonwealth Court decisions have applied the principle to the commercial realm. In the *Smith* case, when the borough prohibited Smith from erecting his billboards, he argued the borough's zoning ordinance prevented Hanover from taking on its "fair share" of billboards. The Commonwealth Court, without definitively concluding the "fair share" principle applies to the commercial realm, determined Smith hadn't shown that the "fair share" principle was even violated. To prove a violation, Smith had to show that the billboard needs of the people in the community were not being met, whereas Smith had only shown that billboards were only permitted in a small area of the municipality. Because Smith failed to produce the requisite evidence of a "fair share" principle violation, the Commonwealth court found the "fair share" principle was not violated.

Key Takeaway: Whether the "fair share" principle definitively applies in the commercial context is still unclear. However, to prove a violation of this principle, a plaintiff must show that the municipality's zoning ordinance prevents the land-use needs of all categories of people who might want to live in the municipality from being met.

* * *

Lynn McConville and Dea M. McAlonan v. the City of Philadelphia:

The "Standing" Requirement

In *Lynn McConville and Dea M. McAlonan v. the City of Philadelphia*, the Commonwealth Court dealt with the significant issue of exactly who is permitted to bring a lawsuit against another party. McConville and McAlonan both filed lawsuits against the City of Philadelphia, challenging the legality of an agreement the City entered into with a number of billboard owners. This agreement allowed the billboard owners to resolve disputes with the City through arbitration, as opposed to through the existing administrative and judicial process. Before dealing with the substance of McAlonan's and McConville's arguments against the agreement, the Commonwealth Court had to determine whether these two individuals had the requisite "standing" to sue.

To sue another party, a plaintiff must fulfill a legal requirement known as "standing." A plaintiff frequently has standing when he or she has a substantial, direct, and immediate interest in the lawsuit. A plaintiff has a substantial interest in the lawsuit when his or her interest is greater than the common citizen's concern in seeing that people follow the law. A plaintiff has a direct interest in the lawsuit when the matter complained of actually caused harm to the plaintiff's interest. A plaintiff has an immediate interest if there is a causal connection between the actions complained of and the injury the plaintiff sustained, and the interest is within the zone of interests sought to be protected by the statute or constitutional guarantee at issue. To determine if a plaintiff satisfies these standing requirements, a court analyzes the facts of the case for each separate plaintiff.

McAlonan filed her claim against the City of Philadelphia after a billboard collapsed onto and damaged her property. After the collapse, the billboard owner began to reconstruct the billboard, and McAlonan notified the City, arguing the billboard was in violation of the zoning ordinance and could therefore not be rebuilt. After receiving McAlonan's complaint, the City issued a violation to the billboard owner, but the City later rescinded that violation

and issued a building permit without notifying McAlonan. When McAlonan learned the City had issued the permit to rebuild, McAlonan filed this lawsuit, seeking to invalidate the previously mentioned agreement that she learned the owner had entered into with the City. She did not, however, file a proper complaint over the actual issuance of the permit before the appropriate agency or court.

McConville owned property in the City and could see the remains of a billboard from her land. McConville believed the billboard she could see was not in compliance with the City zoning ordinance, so when she noticed that the billboard was being reconstructed, she filed a complaint with the City. After receiving McConville's complaint, the City issued a violation to the billboard owner, and the billboard owner appealed the issuance of this violation. While the appeal was pending, the billboard owner entered into the previously mentioned agreement with the City, and after entering into the agreement, withdrew its appeal at the next hearing and moved to have the issue resolved via arbitration pursuant to the agreement. McConville subsequently filed this lawsuit, arguing the agreement unlawfully permitted the billboard owner to continue to litigate the violation even after the billboard owner withdrew its appeal, and McConville argued that the withdrawal of the appeal had resolved the matter in her favor.

While the billboard owner argued McConville did not live close enough to the offending billboard to have standing to sue, the Commonwealth Court determined McConville did in fact have standing. The court noted the case was not about whether the billboard was lawful; it was about whether the agreement the billboard owner and the City entered into was legal. When the billboard owner withdrew its appeal of the violation, the court determined McConville arguably obtained some measure of relief. Then, when the billboard owner moved the issue into arbitration pursuant to the agreement with the City, the relief McConville arguably received was nullified, and McConville was thereby potentially harmed. Because McConville could show the agreement potentially caused her harm, she demonstrated a substantial, direct, and immediate interest in seeing the agreement invalidated.

The court determined, on the other hand, that McAlonan did not have standing. The harm McAlonan suffered was a result of the billboard falling on her property and her subsequent failure to file a proper complaint; the harm was not a result of the agreement. Though McAlonan argued the existence of the agreement caused her to lose faith in the system and persuaded her not to file her complaint properly, the court determined this did not create a sufficient causal link between McAlonan's harm and the potential illegality of the agreement. Because McAlonan did not have a sufficient interest in the agreement, the court determined she did not have standing.

Key Takeaway: An individual must fulfill a legal requirement known as "standing" to sue a party. Standing frequently requires the suing party to have a substantial, direct and immediate interest in the lawsuit. A substantial interest is any interest greater than the average citizen's interest in seeing that people follow the law. A direct interest exists when the matter complained of caused the suing party harm. A plaintiff has an immediate interest if there is a causal connection between the actions complained of and the injury the plaintiff sustained, and the interest is within the zone of interests sought to be protected by the statute or constitutional guarantee at issue.

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MC Outdoor, LLC v. Board of Commissioners of Abington Township:

The Effect of a Township Commissioners' Resolution on a Pending Challenge before the Township's Zoning Hearing Board

In *MC Outdoor, LLC v. Board of Commissioners of Abington Township*, the Commonwealth Court examined the interplay between a zoning board's authority to resolve challenges brought before it and the board of commissioners' ability to alter ordinances. MC Outdoor wanted to construct five advertising signs on properties in Abington Township, but the applicable sections of the zoning ordinance only permitted the signs if they advertised goods or services that were available on the property on which they were located. MC Outdoor therefore filed a challenge to the applicable sections of the ordinance with the Township's Zoning Hearing Board and argued the ordinance was an impermissible ban on off-site advertising signs.

Three months after MC Outdoor filed its challenge and while the challenge was still pending before the Zoning Hearing Board, the Township's Board of Commissioners adopted a resolution declaring the challenged ordinance sections invalid. According to Pennsylvania statute, the Commissioners then had 180 days either to 1) enact a curative amendment or 2) reaffirm the ordinance's validity. Within approximately two months of the decision to invalidate, the Commissioners rescinded the resolution and reaffirmed the ordinance's validity. MC Outdoor subsequently filed suit in court, arguing the Commissioners' resolution resolved its challenge before the Zoning Hearing Board in its favor.

The Commonwealth Court held the Commissioners' resolution of invalidation did not resolve the challenge before the Hearing Board in MC Outdoor's favor. The court explained that even though the Commissioners had declared the ordinance invalid, the Commissioners had rescinded that resolution. Moreover, even if the Commissioners hadn't rescinded the resolution, the Commissioners' resolution of invalidation still wouldn't have rendered MC Outdoor's challenge moot. If the Commissioners pass a resolution invalidating an ordinance after a challenge to the ordinance is pending before the Zoning Hearing Board, that resolution does not establish that the ordinance is invalid as a matter of law. The resolution is only persuasive evidence that the Zoning Hearing Board can consider at its hearing concerning the ordinance's validity.

Key Takeaway: A resolution passed by the commissioners is NOT a final decision and can be reversed. Parties should wait for the commissioners to pass the curative amendment to the ordinance before relying on the resolution. If a resolution invalidating an ordinance is passed after a challenge to the ordinance is pending before the Zoning Hearing Board, the resolution does not establish that the ordinance is invalid as a matter of law.

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Clearing the Fog on the PA Supreme Court's Marcellus Shale Decision

By Adam H. Cutler

There's been a good bit of confusion in the early reactions to the Pennsylvania Supreme Court's decision in *Robinson Township et al v. Commonwealth of Pennsylvania, et al.*, declaring that key aspects of the Act 13 revisions to Pennsylvania's Oil and Gas Law are unconstitutional. The following is a review of the main points to help clear the fog.

Cutting right to the chase, the main results of the Supreme Court's 4-2 judgment are as follows:

- Act 13's limitations on local zoning authority, which were intended to promote statewide uniformity and certainty, are void and so are the sections of the law that enforce those limitations;
- The law's setback waiver provision is also void, and the majority further enjoined the entirety of the setback regime set forth in Act 13 from taking effect on the grounds that the remaining setback provisions were not severable from the waiver provision;
- The delegation of certain roles under the Act to the Public Utilities Commission for review of local ordinances and proposed local ordinances was upheld;
- Other aspects of the petitioners' claims are headed back to the Commonwealth Court for further proceedings consistent with the Supreme Court's opinion, most notably a challenge to Act 13's healthcare confidentiality provisions, a challenge to Section 3241 of the law on grounds that it would allow the unconstitutional taking of property for private purposes, and the issue of severability of the remaining valid provisions of Act 13 from those the Supreme Court declared invalid.

Some quick background and context: Act 13 created a comprehensive new statutory and regulatory regime to govern Marcellus Shale and other unconventional oil and gas development in Pennsylvania. Among its provisions, the law (a) imposed consistent setback requirements for

drilling activities from buildings, water supply wells and water bodies, but allowed developers to seek variances from the Department of Environmental Protection; (b) sought to promote statewide uniformity and certainty by restricting the scope of municipal zoning authority as it applied to oil and gas development activities; and (c) provided that health professionals could obtain information about trade secret or proprietary chemical constituents used in drilling operations in order to treat patients, so long as they agreed to keep that trade secret or proprietary information confidential.

A group of municipalities, two local officials, an environmental group and its chief executive and a physician challenged these and related provisions of the law, and sought to have Act 13 declared unconstitutional under both the Pennsylvania and US Constitutions. They brought their claims first to the Commonwealth Court, which granted a preliminary injunction against the setback waiver and the municipal zoning limitations and then decided that those provisions were unconstitutional. On cross-appeals to the Supreme Court, only six of the seven justices participated in the consideration of the case (neither Justice Orié Melvin nor her successor, Justice Stevens, took part).

The Supreme Court split 4-2 on the results, and in most respects on the reasoning on which the judgment was based. But the centerpiece of the lead opinion, authored by Chief Justice Castille, only had the support of two other justices who decided the case, and therefore did not constitute a majority of the Court. In his opinion, designated as the Opinion Announcing the Judgment of the Court, the Chief Justice extensively discussed the Environmental Rights Amendment to the Pennsylvania Constitution. That provision states that the people have a constitutional right to clean air, water and preservation of natural resources, and that the Commonwealth holds the public natural resources of the state in public trust "for

the benefit of all of the people." Chief Justice Castille drew parallels between fracking and early coal industry practices. He stated that the municipal zoning restrictions and the setback waiver were in direct conflict with the Environmental Rights Amendment.

Justice Max Baer, in his concurring opinion, agreed to invalidate the provisions at issue only on the narrower grounds of substantive due process. Together with Chief Judge Ronald D. Castille's group, which created a majority of justices determining that certain provisions were unconstitutional.

Given the divided grounds upon which the decision of the Court was constructed, reports that the Environmental Rights Amendment has been imbued with new vigor may be premature. The 1971 Environmental Rights Amendment has only infrequently been interpreted and then not in the context of private individuals and municipalities seeking to invalidate legislation. However, the extensive discussion contained in the Chief Justice's opinion, which concludes that the Environmental Rights Amendment authorizes the Court to conduct its own evaluation of whether legislation 1) unreasonably impinges on rights to clean air and pure water or 2) breaches the Commonwealth's trustee obligations with regard to the conservation of public natural resources, is likely to be raised in future litigation.

Another important takeaway: The *Robinson Township* decision does not have any impact on existing drilling activities in Pennsylvania. The decision does clearly alter the playing field in Pennsylvania going forward, most particularly in terms of the role municipalities will play in shale development.

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Philadelphia Amends Its Zoning Code To Implement New Regulations Regarding Recognized Community Organizations

By Carrie B. Nase-Poust

Under the Philadelphia Zoning Code, zoning applicants proposing a project that requires a special exception or variance from the Zoning Board of Adjustment or Civic Design Review are required to give notice to the surrounding neighbors and meet with the Recognized Community Organization (RCO). On March 1, 2014, new regulations will go into effect regarding RCOs. The Philadelphia Zoning Code has been amended to implement new requirements for RCOs and new regulations for zoning applicants to notify neighbors of the proposed development. The amendment changes the qualifying

criteria for RCOs and requires existing RCOs to re-register by March 1, 2014. The notice requirements for zoning applicants have also been amended.

Within seven calendar days after the applicant has filed the appeal to the Zoning Board of Adjustment or have been notified that the project requires Civic Design Review, the Philadelphia County Planning Commission will provide the zoning applicant with the contact information for all parties that they must notify. The zoning applicant must send written notice to those parties identified within ten days of receiving the contact

information. The Zoning Code sets forth the required contents of the notice. Lastly, the Zoning Code was amended by creating the concept of a “Coordinating RCO” and changes the procedures for RCOs to convene a neighborhood meeting with zoning applicants.

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Commonwealth Court Addresses Validity of Non-Conforming Use During a Period of Discontinuance

By Stephen H. Kalis

In the recent Pennsylvania Commonwealth Court decision of *TKO Realty, LLC v. Zoning Hearing Board of the City of Scranton*, 78 A.3d 732, the court addresses whether the use of a property as a multi-unit dwelling was a lawful non-conforming use and whether such use was abandoned based upon a period of discontinuance.

In this case, shortly after purchasing a property, TKO Realty, LLC (TKO) applied for a permit from the City of Scranton (the City) to use the building as a five-unit dwelling. The City zoning officer denied the application on the basis that a five-unit dwelling did not comply with the existing Zoning Ordinance (the 1993 Ordinance). Further, the zoning officer asserted that the prior owner's use of the building as a five-unit dwelling had been abandoned.

TKO appealed the zoning officer's determination to the Zoning Hearing Board (the ZHB) and, in the alternative, applied for a variance to use the property as a four-unit dwelling. The ZHB denied the appeal and variance, concluding

that “there was no legal [five-unit] non-conforming use which had not been abandoned.” TKO appealed to the trial court, which affirmed. Specifically, the trial court found that TKO did not prove that the property was used as a lawful five-unit dwelling before the enactment of the 1993 Ordinance, which prohibits such use. Therefore, the non-conforming use as a five-unit building was not lawfully established.

Following the trial court ruling, TKO applied for a building permit to rehabilitate the building into a three-unit dwelling and to register the structure as a three-unit dwelling under the City Rental Registration Ordinance. In support of its application, TKO presented an assessment card from the Lackawanna County Assessor's Office, dating back to 1960, which showed the property was assessed as three units. In 1965, the new Zoning Ordinance (the 1965 Ordinance) rendered the apartment building as a non-conforming use. The ZHB found that the legal non-confirming use of the property had been abandoned by the previous property owner, as the building

was vacant and condemned for more than six months. On appeal, the trial court affirmed. TKO appealed.

Commonwealth Court Decision

The Commonwealth Court found that the building qualified as a legal non-conforming use. In non-conforming use cases, the burden is on a property owner to establish the existence of a prior non-conforming use. At the hearing, TKO presented evidence showing that the property was listed on the 1918 City Atlas as a multi-unit structure. The 1924 City zoning map placed the property in the “A” district, which permitted apartments. An assessment card from the Lackawanna County Assessor's Office in 1960 showed the property was assessed as a “three family” dwelling. Thereafter, as a result of the 1965 Ordinance, the building became a legal non-conforming use. Evidence also showed that the City collected garbage fees on five units, the property had five electric meters and telephone lines, and also had three gas meters. Moreover, the property has been assessed and taxed as a three-

unit dwelling since at least 1960 and continued to be assessed and taxed as a three-unit dwelling to the date of the hearing. The court was not persuaded by the City's argument that TKO and its predecessors did not register the units under the Rental Registration Ordinance and did not seek a written statement of non-conformity from the zoning officer.

The Court also found that the non-conforming use was not abandoned. In Pennsylvania, the right to continue a non-conforming use invokes certain constitutional protections. Specifically, continuation of a legal non-conforming use runs with the land, until abandoned. The party asserting abandonment has the burden to prove both that the landowner

intended to abandon the use and that the use was actually abandoned. *Zitelli v. Zoning Hearing Board of the Borough of Munhall*, 850 A.2d 769, 771 (Pa. Cmwlth.2004).

Although the property was vacant from at least October 6, 2008, when it was condemned, until TKO purchased the property on May 28, 2009, the City failed to show actual abandonment.

The court found that, where discontinuance of a use occurs because of events beyond the owner's control, such as financial inability, there is no actual abandonment. *Metzger v. Bensalem Township Zoning Hearing Board*, 165 Pa.Cmwlth. 351, 645 A.2d 369, 371 (1994). Moreover, failure to

register a non-conforming use does not constitute an abandonment of that use. *Appeal of Suburban General Hospital*, 48 Pa.Cmwlth. 273, 410 A.2d 85, 87-88 (1980).

As TKO established a legal three-unit non-conforming use, which was not actually abandoned by the prior owner, the Court reversed the order of the trial court.

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Commonwealth Court Supports a Waiver to a Requirement Under SALDO

By Robert W. Gundlach, Jr.

In an unreported case titled, *Cornell Homes v. Upper Darby Township*, the Pennsylvania Commonwealth Court upheld the decision of the Delaware County Court of Common Pleas to reverse a decision of the Upper Darby Township Town Council to deny a waiver under SALDO, to the minimum horizontal curve radius and the subdivision plans based thereon.

In *Cornell Homes*, the applicant submitted preliminary subdivision and land development plans seeking to subdivide the subject property into 24 attached single-family dwelling lots. As part of this application, the applicant requested, pursuant to Section 512.1 of the MPC, a modification under SALDO which required a minimum horizontal curve radius of 100 feet.

Before the Town Council, the applicant submitted detailed testimony to support its argument that the "literal enforcement" of this horizontal curve radius requirement would exact undue

hardship because of peculiar conditions pertaining to the subject property and that the grant of such a waiver would not be contrary to the public interest and that the purpose and intent of the ordinance requirement at issue. Town Council provided testimony for the record, primarily from its Fire Chief, as to safety concerns with the proposed horizontal curve radius.

In upholding the trial court's order to reverse the decision, the Commonwealth Court found that the record did not support the Town Council's decision; thereby specifically finding that the Fire Chief's safety concerns were based upon speculation and did not constitute competent evidence to support the Town Council's decision. The Fire Chief did not offer any concrete examples to support his testimony and acknowledged that some of his concerns could be addressed by a parking ordinance.

In addition, the Commonwealth Court noted that, in order to construct a

horizontal curve radius in compliance with SALDO, a variance from a separate requirement in the Zoning Ordinance would need to be obtained by the applicant. The Commonwealth Court found that, without sufficient evidence to support a finding that granting the proposed modification would actually create or result in safety issues, the Town Council erred in concluding that granting the requested waiver would not be in the public interest.

In summary, this case shows how important it is to put detailed evidence into the record to support any requests for waiver. In addition, to the extent that an applicant can prove that the failure to grant a requested waiver will result in the need for one or more variances under the zoning ordinance, then all the better.

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IRS Issues Safe Harbor Guidance for Allocating Rehabilitation Tax Credits to Investors

By Jerald David August

In Rev. Proc. 2014-12, 2014-3 IRB 1 (12/30/2013), the Internal Revenue Service (IRS) issued guidance setting forth a set of circumstances, primarily based on the contractual provisions entered into by the developer and investor, under which it will not challenge a partnership's allocation of rehabilitation tax credits under §47 of the Code to the investor-partner.

The IRS' awaited response was due to the adverse decision rendered by the Third Circuit Court of Appeals in *Historic Boardwalk Hall v. Comm'r, LLC*, in which the Third Circuit, reversing the Tax Court, 136 T.C. 1 (2011), held that the sole "investor-member," which was a wholly owned subsidiary of Pitney-Bowes (PB), which was allocated 99 percent of the available rehabilitation tax credits, was not a partner in the venture for federal income tax purposes and therefore disallowed its claim for the credits as allocated by the "partnership."

The case had an immediate impact on the tax credit industry, as it was previously thought by some tax commentators and industry specialists that the facts in *Historic Boardwalk Hall*, including the attendant allocation of credits to the for-profit, corporate subsidiary investor, would not be challenged by the IRS, or if challenged, would still result in the allowance of the credits to the investor as was held by the Tax Court below.

Overview of Business Tax Credits: Rehabilitation Tax Credit

The general business credit provisions set forth a list of credits permitted under the Code if the underlying requirements for each particular credit are met. Included in this list of tax credits, which are applicable to certain investments in real property and/or their improvements, are:

- **New Markets Tax Credit (NMTC)**
The "new markets" credit, under §45D, is available for investors providing funds in making investments in certain projects benefitting low-income communities over a seven-year period. The aggregate amount of the NMTC credits is 39 percent of the eligible equity investment;
- **Low Income Housing Credit (LIHC)**
The low-income residential housing credit, under §42, is available for investors in low-income housing provided certain eligibility requirements are met. The amount of the credit may be claimed annually for 10 years, starting with the year in which the property is placed in service, or if the taxpayer elects, with the following year. The credit is the product of the credit percentage times the property's "qualified basis." The aggregate allowable LIHC can be 70 percent of the cost of new housing (non-federally subsidized) and 30 percent of the cost of housing that is either existing or federally subsidized.
- **Qualified Rehabilitation (and Certified Historic) Tax Credit**
Under §47, the owner of a qualified rehabilitated building is entitled to claim a tax credit of 10 percent of the "qualified rehabilitation expenditures starting in the year in which the property is placed in service." The amount of the credit increases to 20 percent of the qualified rehabilitation expenditures made with respect to a certified historic structure.¹

It is with respect to this last credit that the recent judicial decision of the Third Circuit and IRS' response relates, although the principles of tax law involved, including whether an investor in a partnership in form really holds "bona fide equity" as a partner, can extend well beyond the factual context of these recent developments.

Historic Boardwalk Hall, LLC v. Commissioner

In the *Historic Boardwalk Hall, LLC* case, the New Jersey Sports and Exposition Authority (NJSEA) had undertaken to restore "East Hall" or "Historic Boardwalk Hall," in which property it held a leasehold interest. Close to completing the renovations but before the project was "placed in service," the NJSEA learned that investors might help defray the capital costs by making a direct investment in the project, and in so doing, be allocated historic tax credits. A certified historic structure, the tax credits would be 20 percent of the qualified rehabilitation costs as properly allocated under the partnership agreement and in accordance with applicable tax regulations. See Treas. Regs. §§1.46-3(f)(2)(i), 1.704-1(b)(4)(ii).

In response to its consultant's recommendation, the NJSEA formed a New Jersey limited liability company and sold a 99 percent interest (in profit and loss) to a wholly owned subsidiary of Pitney Bowes, Inc. The contractual provisions entered into by the NJSEA and PB were designed to minimize all risk to PB, including an indemnification to PB for the amount of cash equivalent of the tax credits if such credits were disallowed. PB agreed that it would only be entitled to a "small portion" of the cash flow of the venture. In summary, and in conformity with an industry expert advising NJSEA, NJSEA provided PB with: (1) a construction completion guaranty; (2) an operating deficit guaranty; (3) a tax (credit) indemnity as mentioned; and (4) an environment guaranty. NJSEA was also given a purchase option to buy out PB's interest.

Upon audit and review, the IRS challenged PB's claim of allocation of the §47 tax credits based on its assessment that PB was not a "partner" for federal income tax purposes in light

¹ The §47 rehabilitation credit was enacted into law by Congress over 35 years ago to provide incentives to the private sector to invest in the preservation of income-producing historic buildings. The §47 credit can only be claimed by the owner of the rehabilitated facility. Tax exempt municipalities, for example, cannot make use of the tax credits but can use such credits to attract outside funds.

of the various contractual provisions and warranties and indemnifications issued to PB. The Historic Boardwalk Hall, LLC then filed a petition with the Tax Court challenging the IRS' position and prevailed. On appeal to the Third Circuit by the IRS Commissioner, the appellate court reversed the Tax Court decision and held that the credits could not be allocated to PB since it was not a bona fide partner in Historic Boardwalk Hall, LLC.

Revenue Procedure 2014-12 Just Announced by the IRS

In an effort to provide clarity on its position and some degree of certainty of tax treatment to the tax credit industry and its advisors, the IRS, in Rev. Proc. 2014-12, announced under what set of circumstances it will not challenge a partnership allocation of §47 rehabilitation credits to its partners. In other words, the Revenue Procedure functions as a "safe harbor" set of "do's" and "don'ts." This pronouncement is similar to guidance pertaining to the wind energy production tax credit under §45 and is limited to §47 rehabilitation tax credits and does not apply to other credits under the Internal Revenue Code or to state credit transactions.

The safe harbor requirements include:

- **Principal's Minimum Partnership Interest**
The principal's (developer's) minimum partnership interest of one percent during the entire term of the partnership.
- **Investor's Partnership Interest**
The investor's (tax credit recipient) minimum partnership interest of five percent or more of each item of the partnership's tax items during each taxable year.
- **Bona Fide Equity Investment**
The investor's partnership interest must represent a "bona fide equity" investment, i.e., reasonably anticipated value is contingent upon income or loss from the venture and is not substantially fixed in amount. Moreover, the investment must not be substantially protected from loss and must participate in profits that are not limited to a preferred return on payment of capital.
- **Arrangement To Reduce the Value of the Investor's Partnership Interest**
The value of the investor's interest may not be reduced through fees, lease payments or other arrangements that are not reflective of arms' length charges.
- **Investor's Minimum Unconditional Contribution**
The investor must contribute 20 percent of its total expected capital contributions to be made to the partnership as of the date the building is placed in service which minimum level of contribution must be maintained throughout.
- **Contingent Consideration**
At least 75 percent of the investor's total expected capital contributions must be fixed in amount before the building is placed in service.
- **Guarantees and Loans**
 - o Permissible guarantees that are unfunded (as defined) may be provided to the investor for:
 - Guarantees for the performance of any acts required to claim the credits;
 - Guarantees for the avoidance of any act or omission that would cause the credits to be disallowed or subject to recapture event; and
 - Guarantees that are not "impermissible" under the Rev. Proc.
 - Examples: Unfunded guarantees for completion of construction, operating deficits, environmental indemnities and financial covenants.
 - o Impermissible guarantees. No person involved in the transaction, e.g., the developer, can:
 - Directly or indirectly, guarantee or insure the tax credits to the investor; the cash equivalent of the credits or the repayment of the investor's contribution if the credits are disallowed, in whole or in part.
 - Guarantee the investor will receive distributions in exchange for its ownership interest except attendant to a fair market value sale right set forth in the Rev. Proc.
 - Pay the investor's costs or indemnify the investor for its costs if the IRS challenges the investor's claim for the §47 rehabilitation credits; and
 - Offer a guarantee that is not an "unfunded guarantee" as defined.
- **Loans**
The partnership or party to the transaction cannot lend funds to the investor to acquire its interest in the partnership or guarantee or insure any debt incurred or created in connection with the investor's acquisition of its partnership interest.
- **Purchase Rights and Sale Rights**
The Rev. Proc. states that neither the "principal" as defined nor the partnership may have a call option or right to purchase or redeem the investor's interest (other than a right for a present sale as specifically provided in the notice). Similarly, the investor may not have a contractual right to require any person involved in the project to purchase or liquidate its interest in the partnership at a future date at a value greater than at the time of exercise of the contractual right to sell.

Two examples are provided in the Rev. Proc. to illustrate the application of the safe harbor provisions, including contractual rights and limitations.

The guidance is effective for allocations of rehabilitation tax credits under §47 made after December 29, 2013. However, if a building was placed in service before December 30, and at the time it was placed in service the safe harbor requirements were met, the IRS announced it will not challenge the related allocations.

The safe harbor announcement will undoubtedly be digested immediately by the tax credit industry, and, of course, the syndicators and developers involved in the rehabilitation tax credit sector. The principles and concepts contained in the Revenue Procedure may be expected to be evaluated by other tax credit transactions outside of the rehabilitation (and certified historic) tax credit arena.

The reader should be mindful, however, that the case law in this area, including the *Historic Boardwalk Hall, LLC* decision

by the Third Circuit, will continue to have precedential value on the issue of whether an investor's interest in a venture is truly that of a partner (or not).

If you have questions regarding this Alert, please contact Fox Rothschild's [Taxation and Wealth Planning Department](#) Co-Chair [Jerald David August](#) or [Craig Finger](#),

administrative partner of the [Real Estate Department](#).

Jerry recently posted a [more detailed explanation](#) of Revenue Procedure 2014-12 and the Historic Boardwalk Hall decision on [Federal Taxation Development Blog](#).

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Transactions

Robert W. Gundlach, Jr. and Kimberly A. Freimuth represented Carlino Commercial Development Group to obtain zoning ordinance and map amendments from Concord Township, PA for a proposed shopping center, to be anchored by Wegman's Markets, at Route 202 and Route 1, in Concord and Chadds Ford Townships, Delaware County, Pennsylvania.

Rob and Kim also represented this same client to obtain conditional use and preliminary/final land development approvals from the Concord Township Board of Supervisors, zoning relief from the from Chadds Ford Township Zoning

Hearing Board and land development approval from the Chadds Ford Township Board of Supervisors.

Robert W. Gundlach, Jr. and Carrie B. Nase-Poust represented Metropolitan Development Group in Plumstead Township in obtaining amended final subdivision/land development plan approval from the Plumstead Township, PA Board of Supervisors for a new residential community comprised of 28 single family detached homes. The homes in the community are being constructed by NVHomes.

Carrie B. Nase-Poust represented Hallman Retirement Neighbors in the Municipality of Norristown in obtaining final land development approval to construct a retirement community comprised of 208 dwelling units on East Johnson Highway in the Municipality of Norristown, PA.

Carrie B. Nase-Poust obtained approval from the Municipality of Norristown to vacate a portion of Logan Street.

Henry Kent Smith, Dan Madrid and Marissa Crespo represented CT Hankins LLC in securing amended development approvals to reposition an approved shopping center in Robbinsville Township, NJ. Originally, the site was approved for a 71,000 sq. ft. strip retail center. The amended approval created six pad sites, four of which are development ready as phase 1.

Henry Kent Smith and Matthew Jacobs successfully closed on a three party transaction involving a 15 lot residential subdivision. The team represented CN Development I LLC, which acquired the property and secured subdivision approvals, and subsequently conveyed lots to NVR, Inc.

Kim Freimuth obtained a text amendment to the Lansdale, PA Borough Zoning Ordinance to amend the Borough's Downtown Business Overlay District, as well as conditional use approval to permit multi-family dwellings containing more than six units within the Downtown Business Overlay District.

Kim Freimuth obtained preliminary/final land development plan approval from the Lansdale Borough Council for a mixed use development consisting of approximately 20,000 sq. ft. of retail space and approximately 250 residential units.

J. Breck Smith represented a governmental unit in the negotiation of a purchase and sale agreement and the eventual acquisition of lands in Kent County, DE for a planned new police barracks and training facility.

J. Breck Smith assisted an organization with operations in the Mid-Atlantic region with compliance with limited use zoning criteria and access requirements in New Castle County, DE in connection with the acquisition and development of a site for use as a retreat and meditation center.

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