In the Zone

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Registered Community Organizations in Philadelphia, Evolving Regulations

By William F. Martin

When the City of Philadelphia approved its new Zoning Code in August 2012, it codified the role of neighborhood organizations. For many years, there was a practical expectation that property owners seeking zoning variances or comparable land use relief would present their plans to the neighborhood organization, which addressed items in the local neighborhood, and seek its support or nonopposition. This approach was necessitated by the practical requirement of securing approval from the local district city council person, and the consistent policy of city council members to confirm that a property owner had informed its neighbors of any new proposed project.

In the new Zoning Code of 2012, the role of neighborhood groups was confirmed in Section 14-303(11A) in a section that defined "Registered Community Organizations" (RCO), provided for their registration with the city's Planning Commission and specified requirements of meetings before RCOs in connection with seeking a special exception, a zoning variance or a review by the Planning Commission's Civic Design Review Committee. The provision included specific requirements for notifying neighboring property owners of RCO meetings and imposed limited requirements on the RCOs as to how meetings were to be conducted and when they were to be scheduled.

In the intervening years, the legal structure set forth in the 2012 Zoning Code have generally been effective, with certain exceptions. Some property owners have faced confusion dealing with competing and conflicting RCOs, resulting in difficulty scheduling meetings and occasional requirements for duplicative meetings. Some RCOs have operated less like traditional neighborhood organizations and more like fiefdoms, mainly serving the interest of a narrow slice of leadership. Most significantly, accusations have been raised within the last year regarding racial exclusion by at least one RCO in connection with how public meetings were conducted and how public participation was accommodated.

In response to these issues, the City of Philadelphia Planning Commission has promulgated and preliminarily approved a revised set of regulations relating to RCOs. The central changes in the regulations relate to the required meetings and the administration of RCOs, providing, for the first time, a process for the suspension of an organization's role as an RCO when the specified practices are not followed.

First, the regulations make explicit a requirement that RCOs may not discriminate against any class protected under the Philadelphia Fair Practices Ordinance. RCOs and any committees that preside over public RCO meetings are required to acknowledge the regulation's standards of conduct and to agree to operate incompliance with them.

One challenging issue that has arisen for property owners is confusion regarding the identity of the coordinating RCO in instances where more than one RCO asserts jurisdiction over a particular neighborhood. The regulations make clear that the responsibility to designate a coordinating RCO rests with the district city council member, but in an instance where such a selection is not made within four days of request, the executive director of the Planning Commission may so designate.

The regulations confirm the obligation of an RCO to complete a meeting summary form along with a written statement regarding actions taken at a meeting. The form and statement are required to be submitted at least two days prior to any scheduled hearing with the ZBA or the Civic Design Review Board. The regulations loosened the deadline for submission on these materials, but emphasized the need for RCOs to comply. From time to time, RCOs have failed to comply with this formality, resulting in confusion and disagreement before the ZBA regarding whether or not a meeting was held and the results of such meeting.

An important issue addressed in the new regulations is "Community Benefit Agreements." The new regulations clarify that an RCO may not refuse to schedule and conduct the meeting based upon a property owner's refusal to enter into a Community Development Agreement. However, such agreements remain permissible, though they now will require disclosure to the city's Office of the

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Inspector General upon request of the commission.

Finally, RCOs that fail to follow the procedure set forth by the commission three times within a two-year registration period shall be subject to potential suspension for one year at the discretion of the executive director.

While the regulations have been preliminary approved by the commission, the approval is subject to a public hearing which is scheduled for June 6, 2016. Following the hearing, commission staff will prepare a report to the full commission, which will then decide whether or not to confirm adoption of the new regulations. Adoption is the most likely scenario at this point.

New regulations represent a first step in the efforts by the city government to ensure that RCOs operate in a nondiscriminatory and fair fashion, providing an appropriate vehicle for communication of neighborhood concerns on land use matters.

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Commonwealth Court Holds Standard for a Temporary Variance Is the Same as That of a Permanent Variance

By Clair E. Wischusen

In *Coyle v. City of Lebanon Zoning Hearing Bd.*, — A.3d —, 2016 WL 1128292 (Pa. Commw. Mar. 23, 2016), the Pennsylvania Commonwealth Court rejected the argument that the standard for a temporary variance differs from that of a permanent variance and also reaffirmed that the *de minimis* doctrine does not apply to use variances.

In Coyle, the applicant sought a variance to rent out two bedrooms of her home as part-time offices for two attorneys to be used two days a week. The property was already being used by the applicant to operate a part-time law practice as a lawful home occupation. In applying for the temporary variance, the applicant claimed that the unique physical circumstances and unnecessary hardship requirements for a variance under the Pennsylvania Municipalities Planning Code (MPC), 53 P.S. § 10910.2, "did not apply." The applicant further claimed that because the two other attorneys would only use the property two days a week, granting the variance would not alter the neighborhood's essential character and the requested variance was the minimum to afford relief. At the zoning hearing, a neighboring objector appeared through counsel and objected to the variance application.

The zoning hearing board unanimously granted the variance, subject to three conditions: (1) limited to two part-time attorneys each renting one room; (2) each attorney is limited to two days of practice a week; and (3) the conditional variance would be reviewed by the board every four years to determine continuance of the variance. The objector appealed the board's decision to the trial court. The trial court denied the objector's land use appeal and upheld the board's decision granting the applicant a temporary variance. The objector appealed to the Commonwealth Court, which reversed the trial court order.

The Commonwealth Court held that the board erred by granting the applicant a temporary variance without proof by substantial evidence that all of the requirements for a variance under Section 910.2(a) of the MPC were met. The court rejected any contention that a temporary use variance should be granted under a more relaxed hardship standard because a temporary variance is less harmful to the overall zoning scheme than a permanent variance. The court found that while a time limited variance is a viable form of relief, it does not excuse an applicant from establishing all of the traditional variance criteria. The court made clear that a zoning board must make specific findings of fact and conclusions of law regarding each of the key variance requirements.

The court further noted that where there is a hardship and it is temporary, a temporary variance is preferable to a permanent one. The court cited with approval Robert S. Ryan, Pennsylvania Zoning Law & Practice, § 6.2.15 (1997), which provides that "temporary variances can be a suitable remedy if used to reduce hardships of a temporary nature or as an aid in transitional situations. But regardless of whether a party is seeking a temporary or permanent variance, all of the criteria set forth in Section 910.2(a) of the MPC must be met. The court held that in this case the board abused its discretion by granting a temporary variance because it failed to make findings based upon substantial evidence supporting all of the variance criteria.

In addition, the court held that the trial court erred by declaring the variance granted by the board *de minimis*. The *de minimis* doctrine is a narrow exception to the heavy burden of proof generally placed on a party seeking a variance. The court noted that the *de minimis* doctrine has exclusively been applied in cases where only minor deviations from dimensional zoning are sought. The court found no precedent for approving a use variance based on the *de minmis* approach and was unwilling to create any such precedent in this case.

In sum, the *Coyle* decision demonstrates the difficulty of establishing entitlement to a variance and the courts' unwillingness to create judicially recognized exceptions.

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More Clarity on Conditional Use Variances From NJ Appellate Division

By Daniel V. Madrid and Ilana Rozentsvayg

In *Bacharach Institute for Rehabilitation, Inc. v. Galloway Township Zoning Board of Adjustment*, the New Jersey Superior Court Appellate Division continued to add to the body of precedent establishing the standard by which applications for a conditional use variance should be evaluated. Expanding upon the Supreme Court's decision in *TSI East Brunswick, LLC v. Zoning Bd. of Adjustment of Twp. of East Brunswick*, the court considered the trial court's affirmance of the zoning board's grant of a conditional use variance and corresponding relief in the underlying action in lieu of prerogative writs, which challenged the development of a three-story nursing home in Galloway Township, NJ. The Appellate Division held that an applicant's inability to comply with a standard for conditional use does not automatically convert such an application into a standard use variance under *N.J.S.A.* 40:55D-70(d)(1). Rather, the court determined that a relaxed standard should be applied based on the materiality of the unmet condition.

The applicant, Health Resources of New Jersey, LLC, applied to the Galloway Township Zoning Board of Adjustment for minor subdivision approval, preliminary and final site plan approval and a conditional use variance for the construction of a three-story nursing home facility in Galloway Township. The appellant, Bacharach Institute for Rehabilitation, Inc. is a nursing home and rehabilitation center and, as noted by the court, a prospective competitor of the applicant. In challenging the zoning board's approval of the application, the appellant initially argued that the proposed "nursing home" use is not listed as a permitted use under Galloway Township's planned commercial recreation zoning district (PCR), which envisioned a "resort-oriented development." In contrast, the zoning board found that the newly subdivided lot, on which the nursing home would be constructed, no longer fronted on Jimmie Leeds Road. As such, the "nursing home" was governed by the planned neighborhood residential district (NR) regulations, which permitted a nursing home use as a conditional use.

In the alternative, the appellant argued that even if permitted as a conditional use in the NR zone, the applicant failed to meet all of the NR zone's conditions required for a conditional use to be permitted. In furtherance of this argument, the appellant contended that the trial court incorrectly applied the rule that "specific provisions in an ordinance or statute will take precedence over general provisions," in determining that the PCR controlled with respect to the requirements for landscape buffering. The appellant specially questioned the court's determination that the PCR standards apply as they directly addressed the buffering requirements between adjacent lots, while the NR standards only provide general buffering requirements. The appellant averred that because "the nursing home is permitted in the PCR district only in accordance with the NR regulation, and such NR regulation does not address buffer requirements, the trial court should have found that the ordinances' general buffering provision should control." In rejecting this argument, the Appellate Division determined that the appellant did not meet the burden of showing that the board's decision was arbitrary and capricious or unreasonable, and thus affirmed the trial court's finding on the issue.

The appellant also argued that the applicant's failure to meet the building height standard applicable to nursing homes converted the application to a use variance under *N.J.S.A.* 40:55D-70(d)(1). The Appellate Division rejected the appellant's claim based on New Jersey case law, which clearly negated this argument.

The Appellate Division cited the trial court's opinion, which stated:

> "New Jersey courts have consistently deemed conditional uses a form of permitted use and not a prohibited use, even when the conditional use fails to meet all of the conditions pertaining to the use. . . . The court has consistently required conditional uses that failed to meet a condition of that use to be subject only to the (d)(3) variance in conjunction with the lower level of judicially construed proofs required for that type of variance."

The Appellate Division cited to *Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment*, 138 N.J. 285, 297-98 (1994) and *TSI East Brunswick, LLC v. Zoning Bd. of Adjustment of Tp. of East Brunswick*, 215 N.J. 26 (2013) as cases that expressly distinguish the standards applicable to a use variance under N.J.S.A. 40:55D-70(d)(1) and a conditional use variance under *N.J.S.A.* 40:55D-70(d)(3). Under a conditional use variance, the applicant's must substantially meet the conditional use standards. In the current case, the applicant's deviation from the height standard was *de minimis* with no negative impacts.

As precedent on conditional use variances develops, the key issue will be what conditions are material and how materiality should be defined. In *Bacharach*, the applicant presented unrefuted expert testimony from a planner that the height deviation was not material. *Bacharach* may have been a closer case if there was competing testimony or if the objector could demonstrate that the failure to meet the condition resulted in some adverse impact to the surrounding neighborhood.

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Legislative Reactions to Mount Laurel IV

By Bridget A. Sykes

On March 10, 2015, the Supreme Court of New Jersey issued the decision formally known as *In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Housing*, 221 N.J. 1 (2015), now commonly referred to as *Mount Laurel IV*. This decision brought about drastic changes in the procedural process for municipalities to achieve compliance with their affordable housing obligations. In short, the court determined that, after many opportunities, the Council on Affordable Housing (COAH) had failed to meet its legislative obligation to promulgate rules establishing municipal affordable housing obligations and compliance mechanisms for meeting those obligations. The court proceeded to transfer municipalities that had availed themselves of COAH's jurisdiction to the trial courts for a determination on their respective obligations as well as approval of a Housing Element and Fair Share Plan setting forth the municipality's strategy for meeting that obligation.

What has resulted is extensive litigation in the Superior Court. Now more than 14 months from the Supreme Court's decision, there has not been a definitive declaration throughout the state as to the proper methodology and calculation of affordable housing obligations. The legislative response to the court's decision regarding the inefficacy of COAH and the transfer of municipalities from COAH's jurisdiction to the trial courts has been relatively silent. However, the Legislature has attempted to initiate legislation on at least one point – clarifying the timeline for when municipalities would be required to submit their Housing Element and Fair Share Plan.

Two identical bills have been introduced in the Senate and Assembly, S162 and A369. Both bills were introduced in January 2016 as carryover bills from the previous session, initially introduced in June and July of 2015. The bills seek to clarify the court's determination as to when municipalities would have to develop and complete compliant Housing Element and Fair Share Plans. In rendering its decision, the Supreme Court established a five-month window for municipalities to submit Housing Element and Fair Share Plans, during which the trial court could provide temporary immunity from exclusionary zoning or "builder's remedy" lawsuits. The bill clarifies this to state that the five-month window would not begin until the "the date that the trial judge determines the criteria and guidelines with which the municipality must comply."

The bill triggers one question: how will this impact trial courts' decisions on extending temporary immunity from builder's remedy lawsuits? The trial courts have generally taken a liberal view to extending municipalities' immunity as the process slowly progresses with one caveat. To date several municipalities have been stripped of immunity from builder's remedy lawsuits despite the fact that the trial court had not yet decided the methodology and obligations for those municipalities. Those decisions have rested on case law regarding whether the municipalities have been acting in bad faith. Whether or not the proposed legislation could have any impact on this case law remains to be seen.

Ultimately the bill may become moot. It remains in the early stages and has languished since it was originally introduced in 2015, shortly after the Supreme Court's decision. The Legislature may simply be unwilling to interfere in the current process. Meanwhile, trial courts are slowly but surely moving forward with trials and immunity has been extended pending decisions on fair share obligations so long as municipalities have continued to act in good faith. However, as the process progresses it will be interesting to see if the Legislature decides to take a more active approach as the trial courts navigate unchartered territory.

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Legislative Update in Pennsylvania

By David H. Comer

The Medical Marijuana Act was approved on April 17, 2016, as Act 16 by Pennsylvania Governor Tom Wolf. The act, among other things, establishes a medical marijuana program, provides for patient and caregiver certification and for medical marijuana organization registration and imposes duties on the Department of Health.

Interestingly, the act includes language addressing zoning. Specifically, the act states the following:

1. A grower/processor shall meet the same municipal zoning and land use requirements as other manufacturing, processing and production facilities that are located in the same zoning district.
2. A dispensary shall meet the same municipal zoning and land use requirements as other commercial facilities that are located in the same zoning district.

The act was to take effect 30 days after its approval.

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Real Property Survey Updates

By Nissan Shah

The ALTA/ACS Survey is widely regarded as the benchmark for real property surveys and is relied on by real estate professionals. Generally, an ALTA/ACS Survey identifies the following matters related to the subject property: (i) boundaries; (ii) improvements; and (iii) title exceptions (e.g., easements and rights of way). In the past, the American Land Title Association (ALTA) and American Congress of Surveying and Mapping (ACS) have set forth the requirements for an ALTA/ACS survey. Over time, there have been periodic updates to the requirements to the ALTA/ACS Survey. The latest set of updates became effective as of February 23, 2016. Below is a summary of some of the key updates for the basic survey requirements:

1. The name of the survey is now the ALTA/NSPS Survey. It was formerly known as the ALTA/ACS Survey. The name change is a result of the National Society of Professional Surveyors, Inc. (NSPS) becoming the legal successor organization to ACS.
2. Section 5(B)(ii) provides that to the extent a property has direct access to a highway, road or street, the width and edges of all highways, roads and streets abutting the property are to be indicated on the survey.
3. Section 5(C)(iii) provides that trees, bushes and other vegetation need not be shown on a survey unless they evidence possession.
4. Section 5(E)(iv) provides that any evidence of utilities observed by a surveyor shall be indicated on the survey. This includes utilities, manholes, valves, meters, transformers and overhead wires. The foregoing requirement was previously an optional item but is now a basic requirement.
5. Section 5(G)(i) provides that all water features within the property boundary must be identified. Furthermore, all water features that are outside of the property boundary but within five feet of the property boundary should also be indicated on the survey.
6. Section 6(B)(xi) requires the surveyor to identify if there was restricted access to any property within five feet of the property boundary line.

Below is a summary of the key updates to ALTA/NSPS Table A optional items that may be included on the survey if negotiated with the surveyor:

1. Section 6 of Table A provides that the party ordering the title, not the title company, must provide a zoning report or zoning letter in order for the surveyor to depict zoning items.
2. Section 13 of Table A requires that surveyors name adjacent property owners based on property tax records.
3. Section 18 of Table A provides that any wetland markers placed by a qualified specialist be identified. If no markers were found, this should be stated on the survey.

In conclusion, the updates do not overhaul requirements but further clarify or redefine obligations with respect to the ALTA/NSPS survey. Those ordering surveys should be aware of the updates when reviewing surveys. Certain information may now be shown in a slightly different manner on ALTA/NSPS surveys compared to before the updates.

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Zoning Approvals

- Jack Plackter obtained approval on a 265-unit multifamily rental apartment in Northfield, NJ.
- Jack Plackter obtained Amended Site Plan approval to redevelop the approximately 120,000-square-foot Smithville Square Shopping Center in Galloway Township, NJ.
- Jack Plackter received approval from the Casino Reinvestment Development Authority in the Tourism District to convert the Borgata's Festival Park Area to an outdoor pool and lounge area.
- Kimberly Freimuth obtained approval from the Souderton Borough to subdivide a parcel into two lots to be developed with single family semidetached dwellings.
- Kimberly Freimuth obtained variances from the Uwchlan Township Zoning Hearing Board to permit additional retail signage for a new coffee shop.
- Kimberly Freimuth obtained a side yard variance from the Swarthmore Borough Zoning Hearing Board to permit a single family dwelling on a vacant undersized lot.