

An aerial photograph of two people walking on a large, light-colored stone floor. The person on the left is wearing a dark suit, and the person on the right is wearing a dark dress. They are walking away from the camera towards the right side of the frame. The floor is composed of large, rectangular stone tiles.

# 2013 Spring Land Use Seminar

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# Purchasing/Financing Partially Approved Land Development Projects



# Purchasing/Financing Partially Approved Land Development Projects



- Reasons behind projects not being fully approved and developed
- Due diligence is of paramount importance
- Retain competent professionals early in process
- Obtain as much information as possible
- Identify the roles of the individuals with whom you are negotiating the deal (landowner, equitable owner/developer, broker, mortgagee, etc.)

# Purchasing/Financing Partially Approved Land Development Projects



## Information Gathering/Due Diligence

- Information sources include:
  - Current landowner, developer, broker, engineer – Verify Everything
  - Municipality and municipal authorities – Right to Know Law
  - State Agencies – Right to Know Law
  - Ordinances and Zoning Maps – Current as well as historical (date of submission)
  - Title search
  - Internet search (local newspaper website)
  - Informal discussions with local professionals and municipal officials

# Purchasing/Financing Partially Approved Land Development Projects



## Determining the Status of the Approval Process

- The project could be in any stage of the approval process, including the following, or anywhere in between:
  - Final plan approved and recorded
  - One or more phased final plans approved and recorded
  - Final plan approval with conditions, some or all of which have not yet been met (i.e., financial security for improvements, third party agency approvals)
  - Preliminary plan approval
  - Sketch plan approval
  - Zoning relief approval
  - Rezoning or text amendment approval
  - Some lesser or non-binding approval

# Purchasing/Financing Partially Approved Land Development Projects



## Expiration of Approvals, §508 and the Permit Extension Act

- Carefully review all documents to determine if and when any approvals or permits expire
- Five-year rule under §508 of the Pennsylvania Municipalities Planning Code (the “MPC”) – protection against amendments to land use ordinances
- Permit Extension Act, as amended (January 1, 2009 to July 1, 2016)

# Purchasing/Financing Partially Approved Land Development Projects



## Who Owns the Approvals and Plans?

- Approvals and permits generally run with the land
- Carefully review mortgages and other loan documents – the bank/mortgagee may have an assignment of the approvals, especially if an event of default has occurred
- CADD versions of plans and surveys?

# Purchasing/Financing Partially Approved Land Development Projects



## Mortgages, Liens, Taxes and Judgments

- Carefully review the title search to identify mortgagees, lien and judgment holders and status of tax payments
- Ask seller/landowner for payoff letters for all monetary encumbrances
- Ask seller/landowner for loan closing binders from any loans that are secured by a mortgage on the property
- Have any events of default occurred? Has the loan been modified in any way?
- Take the lead in negotiating with mortgagees and judgment holders to discount payoff amounts

# Purchasing/Financing Partially Approved Land Development Projects



## Other Costs to Consider

- Brokers – Broker's Lien Law
- Transfer Tax
  - Assignment of Agreement of Sale
  - Building Contractor as Seller

# Purchasing/Financing Partially Approved Land Development Projects



## Modifications and Revisions to Approved Plans

- Be mindful of changes in ordinances, laws and regulations
- If a preliminary plan is approved, the final plan must be substantially similar to receive approval
- Modifications to an approved plan may cause a loss of protection from changes in ordinances under §508 of the MPC
- Private rights may be violated based on a declaration of condominium or CCR

# Non-Conforming Lots, Structures and Uses



# Nonconforming Lots, Structures and Uses

## DEFINITIONS (MPC §107):

“Nonconforming use,” a use, whether of land or of structure, which does not comply with the applicable use provisions in a zoning ordinance or amendment heretofore or hereafter enacted, where such use was lawfully in existence prior to the enactment of such ordinance or amendment, or prior to the application of such ordinance or amendment to its location by reason of annexation.

“Nonconforming structure,” a structure or part of a structure manifestly not designed to comply with the applicable use or extent of use provisions in a zoning ordinance or amendment heretofore or hereafter enacted, where such structure lawfully existed prior to the enactment of such ordinance or amendment or prior to the application of such ordinance or amendment to its location by reason of annexation. Such nonconforming structures include, but are not limited to, nonconforming signs.

“Nonconforming lot,” a lot the area or dimension of which was lawful prior to the adoption or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption or amendment.

# Nonconforming Lots, Structures and Uses

- Not specifically protected by the MPC, rather protection is case law derived from the courts finding a constitutionally protected right to continue in existence.
- The Haller Doctrine (*Haller Baking Company's Appeal*, 295 Pa. 257 (1928)) – case that established the right and the rules
  1. Is the use evident and more than “casual” or insubstantial
  2. Has the use been discontinued/abandoned

# Nonconforming Lots, Structures and Uses

- Examples of Use: Churches which used to be commonly allowed in residential districts are now being moved to commercial because of size and scope.
- Example of Dimension: Ordinance changes lot size from 1 acre to 2 acre zoning.

# Nonconforming Lots, Structures and Uses

## Expansion of Nonconforming Uses:

- Courts recognized a natural expansion right, a right to modernize - mainly for commercial uses
- No constitutional protection for expanding dimensions
- Expansion must be reasonable
- Municipality may put provisions in its ordinance limiting expansion (courts have upheld a 15% expansion limitation)
- Property must have been owned at time the nonconformity came into existence
  - When a property was owned but not used for the nonconformity a variance will be required

# Nonconforming Lots, Structures and Uses

## Abandonment of Nonconformity:

- Latrobe Speedway (*Latrobe Speedway, Inc. v. Zoning Hearing Board of Unity Township*, 686 A.2d 888 (1998)) is defining case
  - Township has the burden of proving abandonment
  - Two prong test confirmed:
    1. Intent to abandon
    2. Actual abandonment
- Time limit provisions in ordinance can play a key role in proving intent to abandon but the actual abandonment is fact specific. A period of disuse or nonuse at the time of an ordinance change is not necessarily proof of “actual abandonment”

# Nonconforming Lots, Structures and Uses

## Forced Abandonment/Reconstruction of Nonconformity

- Casualties can't be used as proof of intent to abandon even though they are "actual abandonment" (*Grace Building Co. v. Zoning Hearing Board of City of Allentown*, 302 A.2d 892 (1978))
- Significant destruction or dilapidation which renders the structure valueless can extinguish the nonconformity
- Condemnation can extinguish the nonconformity

# Nonconforming Lots, Structures and Uses

## Change of Use/Adding Uses:

- No constitutionally protected right to change one nonconforming use to another nonconforming use
- Additional non-conforming uses are permissible if related and not qualitatively different
  - Sandwich shop adding seating for restaurant (*Pappas v Zoning Board of Adjustment of City of Philadelphia*, 599 A.2d 675 (1991))
  - Private club serving food to members changing to a public restaurant (*Limley v. Zoning Hearing Board of Port Vue Borough*, 652 A.2d 1194 (1996))
  - But see, *Hager v. West Rockhill Township Zoning Hearing Board*, 795 A.2d 1404 (2009)) renting campsites for long term use was not similar or related to renting campsites for short term use.
- Fact specific and ordinance driven

# Nonconforming Lots, Structures and Uses

## Changes In Ordinance Extinguishing Nonconformity

- *8131 Roosevelt Corporation v. Zoning Board of Adjustment of City of Philadelphia*, 794 A.2d 963 (2002)
  - Zoning Code had provision that a nonconformance ceases if a variance is granted for the nonconformance
  - ZBA granted three temporary variances over a period of years
  - Court finds the temporary variance removed the nonconformity and so the use could not continue without a variance

# Nonconforming Lots, Structures and Uses



If you have a nonconforming use/structure or lot what can you expect?

1. Can exist “as-is” BUT

- can't expand freely and in many cases, if expanding, expansion must meet the ordinance regulations
- might have to register the nonconformity with the governing municipality (See MPC §613) (But see, *DiMoJo, LLC v. McClain*, 41 A.3d 967 (Pa. Cmmw. 2012))

2. Can't be “amortized” away BUT

- can be abandoned
- can be extinguished by ordinance change or approval that extinguishes the nonconformity
- subject to the pending ordinance rule

# Nonconforming Lots, Structures and Uses



3. Only protects landowner from the zoning ordinance provision it violates - not from others or other ordinances.
4. Be prepared to establish/provide factual evidence of existence of nonconformity not just “intent” but once established burden shifts to municipality/challenger to prove abandonment.

# Dimensional and Use Variances



# Dimensional and Use Variances

## DEFINITION:

A permitted violation of the zoning ordinance that may be granted by the municipality's zoning hearing board following a public hearing.

# Dimensional and Use Variances



## Variance v. Variation

- Not like nonconforming lots, uses or structures. Variances didn't exist before the ordinance existed or changed. It's a new violation.
- Not like special exceptions or conditional uses. Although all require a hearing, variances are not contemplated by the governing body as a permitted use and not provided for in the ordinance provisions.

# Dimensional and Use Variances

## Types of Variances: Use and Dimensional

- A use variance is one in which a landowner is permitted to use a property in a manner contrary to the permitted use requirements of a zoning ordinance
- A dimensional variance is one in which the dimensions of the lot or structures existing or to be constructed on the lot are permitted to exist in a manner contrary to the area and bulk requirements of the zoning ordinance
- What is parking?

# Dimensional and Use Variances



## Standards for the Grant of a Variance (MPC §910.2)

1. A zoning hearing board "may grant a variance, provided that all of the following findings are made where relevant in a given case:
2. That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.
3. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable reasonable use of the property.
4. That such unnecessary hardship has not been created by the appellant.
5. 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.
6. 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."

# Dimensional and Use Variances



- In granting any variance, the Board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of [the MPC] and the zoning ordinance.
- Don't forget to check the municipality's ordinance for additional standards.

# Dimensional and Use Variances



## First Standard: Establishment of Unnecessary Hardship

- unique physical circumstances or conditions of the property causes “unnecessary hardship” (examples given in definition- irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions)
- hardest to prove and easiest to appeal
- cost, profits, financial hardship and economic detriment generally not considered valid circumstances or conditions to establish hardship

# Dimensional and Use Variances

## *Dimensional Variances -- Relaxed standard of hardship?*

- *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 721 A.2d 43 (Pa. 1998), a less stringent standard for the granting of dimensional variances, which include relief from setback, minimum lot size, and building height requirements. In *Hertzberg*, the court stated:

[W]e now hold that in determining whether unnecessary hardship has been established, courts should examine whether the variance sought is use or dimensional. To justify the grant of a dimensional variance, courts may consider multiple factors, including the economic detriment to the applicant if the variance is denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood. To hold otherwise would prohibit the rehabilitation of neighborhoods by precluding an applicant who wishes to renovate a building in a blighted area from obtaining the necessary variances.

# Dimensional and Use Variances

## *Use Variances— Economic Hardship now a factor?*

- *South of South Street Neighborhood Association et al. v. Philadelphia Zoning Board of Adjustment*, 54 A.3d 115 (PA Cmmw. 2012), Court affirmed the notion that an applicant for a use variance may establish an unnecessary hardship by demonstrating a sustained, but unsuccessful attempt to sell the subject property.

# Dimensional and Use Variances

## Second Standard: Reasonable Use of Property

- because of physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the variance is necessary to enable reasonable use of the property.
- How much evidence do you need for no possibility to use in conformity?

# Dimensional and Use Variances



Third Standard: Not Created by Appellant

Fourth Standard: No Material Impact on Surroundings:

- The variance will not:
  1. alter the essential character of the neighborhood or district in which the property is located,
  2. substantially or permanently impair the appropriate use or development of adjacent property,
  3. be detrimental to the public welfare.

# Dimensional and Use Variances



## Fifth Standard: Minimum Necessary for Relief

- 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.
- What is minimum?

# Dimensional and Use Variances



## DEMINIMUS VARIANCES:

- Not statutorily authorized by the MPC.
- Very minor deviations from the dimensional provisions of a zoning ordinance may be granted where rigid compliance is not necessary to protect the public concerns inherent in the zoning ordinance.
- No set of criteria upon which *de minimis* variances are granted; instead, they are evaluated according to the particular circumstances of each request for relief.

# 2013 Legislative and Case Law Update



# Legislative Changes

## MPC Amendment (effective 12/23/2012)

- Act 154 (HB 1718) amended MPC to:
  1. Prohibit municipalities from holding 10% of funds being released from escrows in addition to the original 10% held for contingencies.
  2. Clarify the 15% maintenance bond requirement-only applies to dedicated improvements.
  3. Increase time property owner has to dispute invoices from municipal consultants. Now 100 days after submission of “final bill” (previously 45 days for land development review fees and 30 days for inspection fees).
  4. Change payment of arbitrator fees:
    - a. Applicant pays the arbitrator fees if disputed invoice is upheld
    - b. Applicant and charging party split fees if under \$2500 is deemed unreasonable
    - c. Charging party pays fee if \$2,500 or more is deemed unreasonable
    - d. Charging party pays fees and is assessed 4% surcharge on amount of overcharge if more than \$10,000 is deemed unreasonable

## Case Law Update

- *South of South Street Neighborhood Association v. Philadelphia Zoning Board of Adjustment*, Commonwealth Court, September 13, 2012
  - Dung Phat LLC owned property improved with a large vacant industrial building in South Philadelphia located in the G-2 Industrial Zoning District. The rest of the block was zoned R-10A and residential uses occupied those areas.
  - Following several years of attempting to sell or develop the property, Dung Phat submitted an application to L&I to use the property for a variety of retail and wholesale uses. L&I denied the application, but the ZBA granted the use variances necessary for the development.
  - Protestants appealed to the trial court, which affirmed, as did the Commonwealth Court.
  - Commonwealth Court reaffirmed its holding that “a sustained, but unsuccessful attempt to sell property constitutes evidence that the property lacks value for any permitted use,” and as such supports a hardship finding for a use variance

## *Case Law Update*

- *Salahuddin v. Zoning Hearing Board of West Chester*, Commonwealth Court, November 14, 2012
  - In 1992, owner used the first floor of building as residence and rest as rooming house (nonconforming).
  - Lender foreclosed on property and in 1996, Salahuddin purchased the property (after being advised the multi-family use was abandoned). She lived in first floor but didn't use rest of house.
  - In 2011, Salahuddin applies for a variance for multi-family use. ZHB denies variance. Denial affirmed by trial court. Salahuddin appeals this time asserting a pre-existing nonconforming use.
  - Commonwealth Court affirmed denial on very narrow grounds, finding that a nonconforming use of "rooming house" was never abandoned but a request for "multi-family use" was new and variance properly denied.

## *Case Law Update*

- *Streck v. Lower Macungie Township Board of Commissioners*, Commonwealth Court, December 14, 2012
  - Township and developer entered into an “understanding” whereby developer agreed to withdraw applications to quarry on its 700-acre property while township agreed to amend the zoning ordinance and zoning map to allow for commercial and industrial uses on developer’s property.
  - Following adoption of amendment, objectors challenged based on procedural and “contract zoning” grounds.
  - Trial court ruled in favor of objectors, Commonwealth Court reversed.
  - Procedural challenges, under 2008 amendments to the MPC and the Judicial Code, must be brought within 30 days of the effective date of the ordinance.
  - The summary of the ordinance was proper and did not give rise to a procedural challenge.
  - Township did not engage in contract zoning.

## Case Law Update

- *DeSantis v. Zoning Hearing Board of City of Aliquippa*, Commonwealth Court, September 12, 2012
  - City applied for dimensional variances to use property to construct a police substation on the property. ZHB did not issue timely decision and deemed approval issued. DeSantis (neighboring property owner) appealed.
  - Trial court remanded solely for the purpose of having ZHB prepare findings of fact and conclusions of law. Trial court otherwise affirmed deemed approval.
  - Commonwealth Court finds that CCP needed to make its own factual findings and not rely on ZHB. Relying on *Nectar Partners, Inc. v. Clarks Summit Borough Council*, 958 A.2d 507 (Pa. Cmmw. 2008), holding a board's findings of fact are nullified when a deemed approval occurs.

## Case Law Update

- *Rice Family Trust v. City of St. Mary*, Commonwealth Court, September 7, 2012
  - In 2010, Trust became the owner of a property improved with a large home. At the time of its ownership, the house was divided into three or four apartment units and an office.
  - Prior to Trust's ownership, the property was used as (1) a single-family dwelling with a home medical office (permitted); (2) a single-family dwelling and an accounting office (not permitted); and (3) apartments and an accounting office (not permitted).
  - Under current zoning ordinance, property is located in the Residential Urban District, which permits only single-family detached homes and duplexes – no professional offices or apartments.
  - Trust filed petition for curative amendment, no hearing scheduled by governing body, deemed denied. Denial affirmed by the trial court and the Commonwealth Court.
  - The Commonwealth Court rejected Trust's arguments that the zoning ordinance was arbitrary and unreasonable because it excluded uses currently and historically conducted at the property and was confiscatory.

## *Case Law Update*

- *Smith v. Township of Richmond*  
Commonwealth Court, July 31, 2012
  - Township held four separate meetings with different parties involved in a dispute concerning a limestone quarry use. Purpose of the meetings was to bring new supervisors up to date on litigation proceedings. All supervisors attended all meetings.
  - At next public meeting, solicitor read a statement into record about what the informational nature of the meetings. No one objected. Hours before the next public meeting, landowner delivers a settlement agreement which ultimately is approved by Township.
  - Smith, a resident and lawyer, files declaratory judgment motion claiming Sunshine Act violations occurred in the four informational meetings. Trial court finds in favor of Township. Commonwealth Court affirms.

## Case Law Update

- *Watts Residential Associates v. Board of Supervisors of Watts Township*, Commonwealth Court, January 8, 2013
  - Developer submitted preliminary plans showing 5,500 foot extension of public road, and adjacent development (different owner) planned further extension of the public road to make it a through street.
  - SALDO prohibited cul-de-sacs and dead end streets longer than 500 feet.
  - Township approved developer's preliminary plan subject to condition: adjacent plan must receive final approval and the street must be completed or financial security posted before final plan approval.
  - Developer did not accept condition and filed land use appeal.
  - Trial court dismissed the land use appeal and Commonwealth Court approved.
  - Court ruled that the plan, without the condition, violates the SALDO. The condition creates certainty that the extended public street becomes a through road instead of an impermissibly long cul-de-sac or dead end street.

## *Case Law Update*

- *Appeal of Chester County Outdoor, LLC*  
Commonwealth Court, March 27, 2013
  - CCO filed validity challenge to zoning ordinance pursuant to 916.1 of the MPC for unlawful exclusion of billboards. CCO also filed a proposed plan for site-specific relief with the challenge.
  - During ZHB hearing, CCO withdrew its plan. ZHB grants validity challenge. Board notes in its written decision that the validity challenge was upheld, but no site-specific relief was requested or granted.
  - CCO appeals stating abuse of discretion because no site-specific relief was granted. Court finds that CCO has no standing to appeal since it was no longer aggrieved because it was granted the only thing it asked for – a determination that the ordinance excluded billboards.

## *Case Law Update*

- *Hunt et. al v Zoning Hearing Board of Conewago Township*  
Commonwealth Court, February 1, 2013
  - Variance request to build a dwelling on a nonconforming parcel of land existing since the 1800s. The parcel did not front on a public road but did have a recorded access easement to a public road.
  - ZHB denied variance finding the property “landlocked” and determining that similar “landlocked” parcel owners solved their problem by acquiring frontage.
  - Court ultimately reverses ZHB decision. Case has a detailed analysis of validity variance requirements vs. normal variance requirements.

## *Case Law Update*

- *Latimore Township v. Latimore Township Zoning Hearing Board*  
Commonwealth Court, January 4, 2013
  - Landowner owned property improved with chicken houses built in the 1960s, predating a 2008 ordinance change. Owners stop operating chicken houses in 2009 but apply to subdivide the property into two smaller parcels to sell off parcels. After approving the subdivision plan in 2010, Township issues a revocation of nonconforming use claiming the use had been abandoned (per the 12 month discontinuance provision in the ordinance).
  - Property owner appeals stating that intent not abandoned and, in the alternative, permitted use. ZHB finds use actually permitted under ZHB's reading of ordinance. Township appeals.
  - Trial court upholds ZHB decision and Commonwealth Court affirms. Decision provides a good roadmap on how to interpret an ordinance to give validity to all provisions.

## *Case Law Update*

- *Northampton Area School District et. al v. Zoning Hearing Board of Lehigh Township*  
Commonwealth Court, April 9, 2013
  - School district wanted to install a solar energy field on a property that already was improved with a school building. Zoning officer denies permit on grounds that the solar field was a second commercial principal use of the property even though the zoning ordinance defined solar energy units as accessory uses.
  - ZHB finds no second principal use but also finds that the solar energy units were not accessory uses because solar fields are not usually associated with a school use and are not customarily incidental to the school.
  - Trial court affirmed ZHB decision. Commonwealth Court reverses finding the use an accessory use.

## *Case Law Update*

- *Miravich v. Township of Exeter*, Commonwealth Court, September 7, 2012
  - In 2005, Township enacted new zoning ordinance affecting the allowed residential density on developer's property. Admitted procedural defects in the adoption.
  - Developer asserted a procedural challenge to the new ordinance before the ZHB and submitted a preliminary plan based on the old ordinance.
  - Township and developer entered into a settlement agreement whereby developer would withdraw the procedural challenge and the Township would review the plan under the old ordinance.
  - Objectors filed land use appeal challenging the settlement agreement, trial court dismissed appeal, Commonwealth Court reversed.
  - Township lacked the authority to determine which ordinance (old or new) to apply to its review of the plan.
  - The settlement agreement constituted impermissible contract zoning.

## *Case Law Update*

- *Milliken v. Jaconos et. al.*  
Superior Court, December 26, 2012
  - Milliken buys home from Jaconos. Jaconos bought the home at real estate auction as a flip home.
  - Jaconos doesn't disclose that a murder/suicide had taken place in the home. Advised it wasn't considered a material defect under the Sellers Disclosure Law. Milliken sues for failure to disclose and psychological damage to property.
  - Court finds psychological damage to a property cannot be considered a material defect that must be disclosed.

# Questions & Answers





**For more information, visit  
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