Exterior Inspections May Not be Enough—Demolition as a Last Resort

In a recent decision, the Pennsylvania Commonwealth Court in City of Philadelphia v. A Kensington Joint, cautioned that local governments in Pennsylvania desiring to demolish an allegedly unsafe building structure may need to rely on more than just an inspection of the exterior of the building structure before having it demolished by way of court order.

In a recent decision, the Pennsylvania Commonwealth Court in City of Philadelphia v. A Kensington Joint, 2023 Pa. Commw. LEXIS 128 (Pa. Commw. Ct. 2023), cautioned that local governments in Pennsylvania desiring to demolish an allegedly unsafe building structure may need to rely on more than just an inspection of the exterior of the building structure before having it demolished by way of court order.

The property at issue in A Kensington Joint is located in the Kensington section of Philadelphia.

A Kensington Joint, LLC, which is owned by Adam Ehrlich, owns a property with a three-story building structure situated on it, the opinion said.

In the summer of 2023, the city of Philadelphia filed a complaint in the Philadelphia County Common Pleas Court against the property owner, together with an emergency petition seeking the demolition of that building structure, the opinion said.

In the complaint, the city alleged that there were uncured, unappealed violations of the Philadelphia Code pertaining to the property and its building structure and, due to the alleged unsafe condition of the property, the city sought

court authorization to demolish it, the opinion said.

The trial court then held a hearing on the petition.

At the hearing, the city offered the testimony of representatives of Department of Licenses and Inspections (L&I) who discussed the property's then current condition.

One of the representatives of L&I, Thomas Rybakowski, a construction compliance supervisor for L&I, testified that he inspected the property and that L&I declared its building structure unsafe, the opinion said.

During his testimony, Rybakowski noted that the building structure had a vertical fracture along the side wall, that the front wall at the corner bulged out toward the walkway, that there was bulging and deterioration of the exterior walls and foundational elements, and that there was fire damage to the interior joists of part of the building and, since he did not know how extensive the fire damage was on the remainder of the building structure, he feared that the building structure might collapse.

Notably, Rybakowski, at the hearing, conceded that a structural engineer was necessary to confirm that the defects with the building structure would lead to a collapse and that he was not one, the opinion said.

Moreover, according to the opinion, he clarified that there was no inspection of the interior of the building structure as of the date of the hearing had taken place.

Afterwards, the city presented the testimony of Tameka Blair, a code enforcement inspector at L&I, at the hearing in support of its petition, the opinion said.

During the hearing, Blair stated representatives at L&I did not inspect the interior of the building structure because they deemed it unsafe at the time.

The trial court found the city's witnesses credible and emphasized the building structure's structural deterioration, as recounted by representatives of L&I.

Furthermore, the trial court agreed that the city could not perform an inspection of the interior of the building structure due to these unsafe conditions.

Consequently, the trial court not only ordered that the property owner allow representatives of L&I to enter the building structure to conduct an inspection of the interior of the building structure, but also authorized the city to abate the governmental violations plaguing the property, including through the demolition of its building structure without further inspection.

Thereafter, the property owner, among others, appealed the trial court's ruling to the Commonwealth Court.

At the same time, the property owner also filed a motion with the trial court requesting a stay of the trial court order pending the appeal. The trial court denied that motion.

The property owner then immediately filed an emergency application with the Commonwealth Court, seeking a stay of the trial court order that allowed for the demolition of the building structure without further inspection.

The Commonwealth Court granted a temporary stay of the trial court order pending oral argument before the Commonwealth Court.

After oral argument occurred, the Commonwealth Court granted the emergency application and directed an expedited consideration of the remedies levied by way of the trial court order.

The property owner argued that, under King v. Township of Leacock, 552 A.2d 741 (Pa. Commw. Ct. 1989), the trial court

should have applied strict scrutiny to the remedy of demolition and, in doing so, the Commonwealth Court should only uphold the trial court order if, by substantial evidence, demolition is necessary to protect public health, welfare, and safety.

In making this argument, the property owner reasoned that the trial court erred by not considering other less drastic remedies and by ordering demolition without an inspection of the interior of the building structure and without reliance of a structural engineer or other professional's expert report.

In response to that argument, the city emphasized that, by failing to appeal the governmental violations of public record against the property, the property owner conceded that the building structure was unsafe and unfit considering the nature of these governmental violations.

The city also posited via citations to numerous decisions rendered by the Commonwealth Court that a code enforcement official's testimony can provide substantial evidence to support a demolition order and a structural engineer's testimony is not required under the circumstances.

In the opinion penned by Judge Christine Fizzano Cannon, the Commonwealth Court first highlighted the steps required to uphold a demolition order—the proponent of demolition must first amass the evidence necessary to support that remedy and the trial court orders preliminary relief where necessary, and then only after the trial court reviews the evidence and finds it sufficient, it issues a separate demolition order.

Citing to King, the Commonwealth Court noted that the local government must support its findings with substantial evidence to justify a demolition order.

After performing a thorough review of the record to determine whether the trial court order was legally justified, the Commonwealth Court in A Kensington Joint concluded that trial

court order of demolition was issued in error due to the lack of substantial evidence presented by the city in the petition and at the resulting hearing.

The Commonwealth Court in A Kensington Joint pointed out that the city relied upon Rybakowski's testimony alone for its findings of structural instability of the building structure and that he even admitted at the hearing that a structural engineering analysis was necessary to understand the building's structural condition.

Furthermore, the Commonwealth Court in A Kensington Joint acknowledged that the city did not offer Rybakowski as an expert witness despite references to his so-called expertise during the hearing.

In other words, the Commonwealth Court in A Kensington Joint determined that his conclusions about the condition of the building structure were conclusory and speculative.

The Commonwealth Court in A Kensington Joint also addressed the city's argument that it did not perform an inspection of the interior of the building structure because of its dangerous conditions.

The Commonwealth Court explained that it could not lessen or excuse the city's burden of proof for demolition and to find otherwise would empower the city to secure a demolition order for any property it viewed from the outside as structurally unsafe without substantial evidence.

The Commonwealth Court ultimately attacked the incongruency between the remedies prescribed by the trial court order.

Although the trial court in A Kensington Joint authorized the city to enter the property to inspect it, it also permitted the city to abate the governmental violations through demolition.

The Commonwealth Court in A Kensington Joint emphasized that the results of an inspection of the interior of the building structure was necessary to determine whether the governmental violations were abatable or whether demolition of the building structure was necessary, concluded that authorizing demolition of the building structure without first evaluating the results of an inspection of the interior of the building structure was erroneous.

—Dylan Beltrami, a third-year law student at the Drexel University Thomas R. Kline School of Law, who is interning at the firm, assisted in the preparation of this article.

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Vertical Position 100%

The Deadline to Apply for a Real Estate Tax Abatement for Property Renovation Projects

is Rapidly Approaching

If you obtained a building permit this year for your property renovation project in Philadelphia, you must apply for the associated real estate tax abatement by December 31, 2023 or forever risk your right to do so in the future.

As a reminder, Ordinance 961, as amended, offers a real estate tax abatement for 10 years due to improvements made to residential properties with *existing building structures* that will either be sold upon completion of the property renovations or occupied by the property owner after the property renovations occur.

The significance of this tax abatement program lies not only in its duration but also in its role as a catalyst for encouraging property owners to invest in the enhancement of their residential properties. Whether it's a comprehensive renovation, the addition of new structures, or other qualifying improvements, the program aims to stimulate real estate development and elevate the overall quality of housing in the city.

For those seeking more comprehensive information on the various real estate tax abatement programs available in Philadelphia, a detailed guide is accessible at click here. This resource provides valuable insights into the eligibility criteria, application process, and potential benefits associated with each program.

Please feel free to contact Alan Nochumson at either (215) 600-2851 or alan.nochumson@nochumson.com if you wish to learn if a property in Philadelphia is subject to a pending ordinance.

Vertical Position 100%

Commonwealth Court Rejects Attempt to Strike Down Ordinance Due to Alleged Spot Zoning

In a recently published opinion, the Pennsylvania Commonwealth Court in *Burd v. Borough of Brentwood Zoning Hearing Board*, 2023 Pa. Commw. LEXIS 92 (April. 18, 2023) rejected an appeal brought by neighboring property owners alleging that a local ordinance constituted impermissible spot zoning. In its analysis, the Commonwealth Court emphasized the heavy burden a challenger must meet to overcome the presumptive validity of a zoning ordinance.

The property at issue in *Burd* is located in the borough of Brentwood, Pennsylvania, the opinion said.

In late 2020, the borough enacted an ordinance, changing the zoning classification of the property from low-density residential (R-1) to mixed residential and neighborhood commercial (MUN).

The borough passed the zoning ordinance at the request of Agile Development which, on immediately adjacent lots, operated a funeral home and an event planning center, the opinion said.

At the time of change of the zoning classification, the property contained a single-family home, the opinion said.

According to the opinion, Agile Development requested the change in the zoning of that property to allow it to create

additional parking spaces for its funeral home business.

In *Burd*, the Commonwealth Court explained that the rezoned property is 6,225 square feet in area and is bordered on two sides by property zoned R-1, the remaining boundaries of the rezoning property abut land zoned MUN, and the immediate vicinity of the rezoned property also includes land zoned as a commercial redevelopment district (CRD) that allows for more intensive, regional attraction uses, including a Giant Eagle supermarket and a McDonald's.

After enactment of the zoning ordinance, neighboring residents living in the R-1 residential areas adjacent to the property filed a notice of substantive validity challenge to the zoning ordinance.

The borough's zoning hearing board thereafter held hearings about the notice of substantive validity challenge.

At the hearing, the neighboring residents argued that the change to the zoning classification of the property constituted illegal spot zoning because it created a "peninsula" of MUN use jutting into an area zoned for R-1 use without justification, the opinion said.

The borough's zoning hearing board, in a 3-2 decision, rejected the neighboring residents' challenge, finding that the ordinance rezoning the property did not constitute impermissible spot zoning.

The neighboring residents then appealed to the borough's zoning hearing board's ruling to the Allegheny County Common Pleas Court, which ultimately upheld it.

The trial court held that the neighboring residents failed to rebut the presumption of validity and that the rezoned property is a natural extension of adjoining MUN uses.

Subsequently, the neighboring residents appealed the trial

court’s ruling to the Commonwealth Court.

On appeal, the neighboring residents raised the following primary issues—that the borough’s zoning hearing board failed to view the ordinance in light of the borough’s comprehensive plan; that the ordinance was invalid because it was not supported by substantial evidence and because it constituted impermissible spot zoning; and because the ordinance was unreasonable and arbitrary.

The Commonwealth Court quickly dispensed with the neighboring residents’ first argument, finding that the borough’s zoning hearing board did not ignore the comprehensive plan and found that contrary to their characterization, the proposed use of the property, as additional parking, was consistent with the purposes of the MUN classification, which include providing for adequate off-street parking.

The remainder of the Commonwealth Court’s memorandum opinion is devoted to the claim of the neighboring residents that rezoning the property constitutes illegal spot zoning.

First, the neighboring residents argued that the borough’s zoning hearing board’s decision was not supported by “substantial evidence.”

The Commonwealth Court, bound by the borough’s zoning hearing board’s findings of fact and credibility, rejected this line of argument, finding that the record demonstrated that the property is surrounded by various land uses, including other mixed use and intensive commercial uses.

The Commonwealth Court also concluded that the borough’s zoning hearing board’s finding that Agile Development required additional parking was supported by substantial evidence.

Turning its attention to the core of neighboring residents’ argument regarding spot zoning, the Commonwealth Court noted that zoning ordinances generally come with a presumption of

validity.

Citing to T*ownship of Plymouth v. County of Montgomery,* 531 A.2d 49 (Pa. Commw. Ct. 1987), the Commonwealth Court defined spot zoning as any zoning provision adopted without reference to the overall plan or general welfare of the community.

Relying upon *Takacs v. Indian Lake Borough Zoning Hearing Board*, 11 A.3d 587 (Pa. Commw. Ct. 2010), the Commonwealth Court stated that spot zoning is a "singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit or detriment of the owner of that lot."

According to the Commonwealth Court, the single most determinative factor in identifying a spot zone is whether the property is being treated unjustifiably different from surrounding land, rendering it an "island" with respect to its neighbors, and that a party challenging a spot zone must prove that the zoning provision is arbitrary and unreasonable, with no relation to public health, safety, morals and general welfare.

The Commonwealth Court observed that, under *Knight v. Lynn Township Zoning Hearing Board,* 568 A.2d 1372 (Pa. Commw. Ct. 1990), when considering whether a property is receiving unjustifiably different treatment from surrounding land, courts should consider the size of the property, along with its topography, location and other characteristics.

Importantly, the Commonwealth Court also noted that the Pennsylvania Supreme Court in *Shubach v. Silver*, 336 A.2d 328 (Pa. 1975) cautioned that "a reviewing court cannot take too constrained a view" of the surrounding neighborhood.

The Commonwealth Court went on to clarify that spot zoning does not occur simply because the rezoning occurs at a property owner's request or because the property owner will

benefit from the rezoning.

Additionally, in the memorandum opinion, the Commonwealth Court stated that, even if the neighboring residents intended to argue that the borough had an improper rationale for enacting the ordinance, a municipality's state of mind when enacting an ordinance is irrelevant to the ordinance's validity under *Plaxton v. Lycoming County Zoning Hearing Board*, 986 A.2d 199 (Pa. Commw. Ct. 2009).

Furthermore, the Commonwealth Court emphasized that, contrary to the Supreme Court's guidance in *Schubach*, the neighboring residents took "too constrained a view" of the property, noting that they construed the property to be a "peninsula of property that was being treated differently" solely based on its relationship to their own R-1 zoned properties, rather than within the context of all surrounding properties, which included other MUN and CRD uses.

Next, the Commonwealth Court observed that the property as rezoned continued to allow for residential dwellings, just as the adjacent R-1 district does.

The Commonwealth Court pointed out that the mere fact that a property can have a nonresidential use does not result in a peninsula of commercially zoned property in a sea of residentially zoned property.

In essence, the Commonwealth Court reasoned that, by improperly focusing solely on the property's relationship to the neighboring R-1 parcels, the neighboring residents' argument failed to appreciate the purpose of the MUN zoning classification.

The rezoned property, the Commonwealth Court concluded, could continue to be used for residential purposes in addition to now permitted commercial uses.

Additionally, the Commonwealth Court noted the importance of

permitting the “natural extension of an already-existing, adjacent zoning district” even where the extension allows for different uses.

Finally, the Commonwealth Court addressed the neighboring residents’ argument that the ordinance was arbitrary and unreasonable.

The Commonwealth Court stressed that even though a significant number of neighboring residents opposed rezoning the property, this opposition alone does not signify that the ordinance bears no relation to the public health, safety, morals and general welfare.

The Commonwealth Court then stated that the rezoned property is consistent with the purpose of the MUN district as it created a buffer area between commercial and residential uses.

Additionally, the Commonwealth Court explained that the ordinance is consistent with the comprehensive plan as it ensures sufficient off-street parking for existing and new development, thus protecting the public health, safety, and welfare by freeing the streets of motor vehicles.

Accordingly, the Commonwealth Court ruled that their argument that the ordinance is invalid because it is unreasonable, arbitrary, and not substantially related to the borough’s police power, must fail.

—Dylan Beltrami, a third-year law student at the Drexel University Thomas R. Kline School of Law, who is interning at the firm, assisted in the preparation of this article.

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Vertical Position 100%

Variance Requests, Aggrieved Parties and the Open Market Fueled by Friendly Competition

In a recent opinion, the Pennsylvania Supreme Court in *South Bethlehem Associates v. Zoning Hearing Board of Bethlehem Township*, 294 A.3d 441 (Pa. 2023) established that a party appearing before a local zoning board cannot subsequently seek judicial review of a variance request granted by the local zoning board unless that party is deemed an aggrieved party. Specifically, the Supreme Court in *South Bethlehem Associates* clarified that a party will not qualify as aggrieved solely because their business will someday compete with the future business of the party requesting a zoning variance.

In *South Bethlehem Associates*, the appellee, Central PA Equities 30, owned a 3.5-acre parcel and sought to construct a four-story, 107-room hotel on their property, the opinion said.

According to the opinion, the proposed hotel would be approximately a couple of blocks away from an existing hotel owned by the appellant, South Bethlehem Associates.

Finding itself in the light industrial/office campus (phased) zoning district and neighboring a residential neighborhood, the Bethlehem Township Zoning Code required that the proposed hotel have a 150-foot setback and construct an earth berm within the setback, the opinion said.

However, adhering to these limitations, the subject property would have a buildable area too small to house a hotel, the opinion said.

Additionally, constructing earth berms would be impractical because of a utility easement for power lines on that side, the opinion said.

Resultantly, the appellee requested a dimensional variance to utilize a 74-foot setback, a 76-foot variance from the original requirement, and a waiver of the earth-berm requirement, the opinion said.

Eventually, the Bethlehem Zoning Board (hereinafter the board) held a hearing on the variance request, the opinion said.

At this hearing, the appellant appeared and entered their appearance at the hearing on the appropriate form as an objector, the opinion said.

In opposition to the appellant’s appearance at the hearing, the appellee argued that the appellant did not have standing to challenge the variance request as the appellant was only there as a business competitor to contest the hotel’s construction, the opinion said.

In response to the stated opposition, the appellant argued that it had standing to challenge the variance request as it held an interest in the construction of a future hotel that

would be mere blocks away from its hotel, the opinion said.

Citing to Section 10908(3) of the municipalities planning code (hereinafter the MPC), the board ruled that the appellant had such standing because by entering his appearance on the objector sheet, it became a party of record, the opinion said.

Nonetheless, the board unanimously granted the appellee's requested variances, the opinion said.

Afterwards, the appellant appealed this administrative ruling to the Northampton County Court of Common Pleas.

Again, the appellee argued that the appellant did not possess standing to challenge the variance request.

The trial court in *South Bethlehem Associates* ruled that, since the appellant timely appeared before the Board as an objector and was presumed to be affected by the variance request because it owned a nearby property, it possessed standing to appeal the administrative ruling.

In addition, the trial court in *South Bethlehem Associates* affirmed the board's decision to grant the underlying variance request.

Following the trial court's ruling, the appellant appealed it to the Pennsylvania Commonwealth Court.

The Commonwealth Court ultimately affirmed the trial court's ruling, but ruled that the appellant lacked standing in challenging the variance request.

In doing so, the Commonwealth Court, citing to *In re Farmland Industries*, 531 A.2d 79, 84 (Pa. Commw. 1987), declared that one cannot challenge a variance request by way of judicial review solely to deter free competition. The Commonwealth Court explained that the appellant did not show aggrievement here because the impact upon their interest stemmed from the competition that would arise from the new hotel, not from the

actual variance request itself.

Afterwards, the Supreme Court granted allocatur limited to whether the Commonwealth Court erred in holding that the appellant did not have standing to seek judicial review.

More precisely, the Supreme Court analyzed whether the Commonwealth Court incorrectly applied an aggrieved person standard even though the legislature had repealed that standard.

In the majority opinion penned by Justice Sallie Updyke Mundy, the Supreme Court first explained that traditionally, standing to initiate judicial proceedings depends on the litigant suffering an adverse effect.

According to Mundy, this is determined by a court evaluating the following factors: whether the complaining party's interest in conformity with the law is greater than that of the general public; whether the party's harm was actually caused by the issue being complained of; and whether the harm is remote or speculative.

Mundy emphasized the distinction between what is required to appear as an adverse party at a hearing before a local zoning board as compared to subsequent judicial proceedings.

To compare the two, Mundy cited to the liberal standard for standing at a hearing before a local zoning board laid out in Section 908(3) of the MPC: "The parties to the zoning board hearing shall be the municipality, any person affected by the application who has made timely appearance of record before the board, and any other person including civic or community organizations permitted to appear by the board. The board shall have power to require that all persons who wish to be considered parties enter appearances in writing on forms provided by the board for that purpose."

Distinguishing this standing requirement from standing during

subsequent judicial proceedings, Mundy expressed that the legislature's intent may have been to avoid delays at local zoning boards by avoiding arguments over whether parties were aggrieved, but that there is no indication that the legislature likewise meant to eliminate the aggrievement standard as a predicate to an appeal to a court of law.

Next, explaining the purpose of standing, Mundy highlighted that it aims to protect the court system and the public from improper plaintiffs.

Mundy then elaborated that an improper plaintiff has no legally enforceable interest affected by the matter complained of, stressing that, even if there is a harmed interest, the key language is that the interest must be a "legally enforceable" one, as this alone is what the law protects.

Hinging on this distinction, Mundy clarified that, being free from market competition may very well be in the interest of the already-established hotel, but it is not a legally enforceable interest that courts will protect.

Mundy framed this argument in public policy, noting that courts protect market competition but not market competitors from competition by pointing out that such an interest in avoiding competition cannot be the basis for a claim to aggrievement for purposes of judicial standing.

Accordingly, the Supreme Court affirmed the Commonwealth Court's ruling and simultaneously confirmed the principle that an appellant will lack standing as an aggrieved person if their only affected interest is the desire to suppress competition in the open market.

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Vertical Position 100%

Court Upholds School District's Ability to File Tax Assessment Appeals on Recently Sold, Underassessed Properties

In a published opinion issued by the Pennsylvania Supreme Court in *GM Berkshire Hills v. Berks County Board of Assessment*, 290 A.3d 238 (Pa. 2023), a split court upheld the ability of school districts to file real estate tax assessment appeals on recently sold, underassessed properties.

In GM Berkshire Hills, *GM Berkshire Hills*, LLC and GM Oberlin Berkshire Hills, LLC purchased 47 residential buildings containing 408 rental units for a combined sales price of $54,250,000 in 2017, the opinion said.

The last countywide assessment of the property was in 1994 and placed the property value at $10,448,700.

Meanwhile, the Wilson School District (hereinafter the district) filed an appeal pursuant to their 2018 resolution to select specific property assessments to appeal.

According to the opinion, the district's 2018 resolution established that a property would be selected for an appeal if: there was a recent sale of the property as shown by data obtained from the State Taxation Equalization Board; and there was an underassessment by at least $150,000.

In doing so, to determine if there was an underassessment, the district claimed it took the recent sales price times the common-level ratio (hereinafter the CLR) minus the current assessed value, the opinion said.

Furthermore, the district stated that its selection criteria did not consider the type of use of the property in determining whether to file a real estate tax assessment appeal.

After filing its appeal to have the apartment complex assessment in *GM Berkshire Hills* raised, the county assessment office increased the assessed value to $37 million, the opinion said.

Subsequently, the property owners appealed that ruling to the trial court, arguing that the district's policy improperly created a subclassification of properties that violated the uniformity clause that is set forth in Article VIII, Section 1 of the Pennsylvania Constitution.

The uniformity clause declares that "all taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." In essence, the uniformity clause constrains taxing districts in their selection of properties for appeal by prohibiting any discriminatory methodology.

In *GM Berkshire Hills*, the district's financial officer argued that the district selected the $150,000 threshold because it was high enough to allow recovery of appeal costs while simultaneously being low enough to encompass properties of varying types.

The district then supplied the trial court with evidence showing that its recent appeals comprised properties of different types, and that they did not select properties based on their type of classification, the opinion said.

The trial court ultimately ruled in the district's favor.

Subsequently, the property owners appealed the trial court's ruling to the Pennsylvania Commonwealth Court.

In rendering its decision, the Commonwealth Court relied upon the Supreme Court's ruling in *Valley Forge Towers Apartments N v. Upper Merion Area School District*, 163 A.3d 962 (Pa. 2017).

In *Valley Forge Towers*, a school district only appealed assessments of commercial properties, arguing that this was because of the increased prospect of recovering appeal costs through enhanced tax revenue from commercial properties.

The Supreme Court in *Valley Forge Towers* held that such targeting of properties created a subclass subjected to differential treatment, thus, the appeal violating the uniformity clause.

The Commonwealth Court in *GM Berkshire Hills* then ruled in favor of the district, finding that that the district's resolution rested on financial considerations rather than property types which is entirely permissible under the uniformity clause.

The property owners in *GM Berkshire Hills* then appealed the Commonwealth Court's ruling to the Supreme Court and the Supreme Court elected to hear the merits of the appeal.

Ultimately, the Supreme Court in *GM Berkshire Hills* decided to hear the appeal but limited it to the following issue: "do a school district's selective real estate tax assessment appeals violate the uniformity clause of the Pennsylvania Constitution when the school district chooses only recently sold properties for appeal, leaving most properties in the district at outdated base-year values?; and "do a school district's selective real estate tax assessment appeals violate the uniformity clause of the Pennsylvania Constitution when the school district chooses only recently sold properties that would generate a minimum amount of additional tax revenue for appeal, leaving most properties in the district at outdated base-year values?"

In the opinion in support of affirmance penned by Justice Sallie Updyke Mundy, the Supreme Court started by noting the general principle that all properties in a taxing district lie within a single class that requires uniform treatment. In other words, placing properties in subclasses and treating them differently is expressly prohibited.

Mundy noted that there are two ways that one can undermine tax uniformity when a taxing district appeals the assessment of an individual property. The first arises when one property's assessment is subject to review and adjustment while other properties in the taxing district are not. The second stems from a taxing district's selection policy.

Regarding selection policies, Mundy pointed out that the district's methodology is not prohibited because the district's policy does not create a prohibited subclass of properties barred by an impermissible characteristic, such as the type or use of the property, but rather it enhances uniformity by selecting the most nonuniform properties in light of assessment and sales price disparities for appeal.

Mundy emphasized that, unless there is a scenario where the CLR does not represent the average assessment ratio of the

properties in the district, then the subject property's assessment has been adjusted to become as uniform as possible with all the properties in the district.

Mundy concluded her opinion by stating that, although one does not appeal every assessment and not all real property appreciates at the same rate, some variance in assessment ratios will occur every year. However, Mundy held that the uniformity clause only requires rough uniformity. Nevertheless, Mundy stressed that, if inequalities ever become prevalent, then the court may order a countywide reassessment.

To present the other side of the court split, Justice Christine Donohue in her opinion in support of reversal of the Commonwealth Court's ruling, stressed that the district's policy constituted a subclassification of property for real estate tax assessment appeal purposes and thus violated the uniformity clause given its discriminatory impact.

Succinctly put, Donohue explains that the district first categorizes properties based on their newly purchased status. Next, the district further subdivides properties based on their sale price, appealing assessments only if they appear to be underassessed by at least $150,000. Thus, in Donohue's eyes, the district's policy creates an unconstitutional subclass of properties based on their sale prices, and he would reverse the Commonwealth Court's ruling.

Finally, Justice Kevin Dougherty wrote a separate opinion in support of reversal of the Commonwealth Court's ruling.

Dougherty similarly noted that the CLR does not represent uniformity, and the selection process identifies properties with the highest disparities between assessed and reassessed value. As such, Dougherty also believed that such a selection process violated the uniformity clause.

However, Dougherty went a step further than Donohue and concluded that frequent countywide assessments of properties

in each taxing district could solve future dilemmas such as this one, stating that Pennsylvania is one of two states that lacks statutorily mandated reassessments on a fixed interval. As such, Dougherty urged the legislature to repeal its indefinite use scheme and instead enact a mandatory reassessment period every few years.

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Vertical Position 100%

The City Government in Philadelphia Increases Funding for Building Code Enforcement

This past June, the city government in Philadelphia passed its budget for the upcoming fiscal year which begins on July 1, 2023.

Of particular importance to those individuals who and companies which own investment properties in Philadelphia, the newly passed budget includes an additional $1 million to enable the city of Philadelphia's Department of Licenses and Inspections ("L&I") to increase its number of inspectors tasked with governmental enforcement of the zoning and building codes as well as an additional $560,000 to allow the City Law Department to hire an additional 8 new attorneys to assist L&I with such governmental enforcement.

Since the pandemic, we have witnessed first-hand that L&I has been increasingly levying governmental fines on property owners and tenants who allegedly do not properly maintain their properties. Some of these governmental fines equal $2,000 per day. In fact, in 2020, a real estate firm brought a class action lawsuit against the city government in Philadelphia, claiming that it is issuing excessive governmental fines as a revenue generating vehicle.

From our experience, however, many of these governmental fines may be reduced or avoided altogether when challenged through administrative or judicial proceedings.

If you have received a notice from L&I or other city agencies in Philadelphia threatening the imposition of such governmental fines, please feel free to contact Alan Nochumson at either (215) 600-2851 or alan.nochumson@nochumson.com to discuss how to best approach the situation under the circumstances.

Vertical Position 100%

The City Government in Philadelphia Increases Funding for Building Code Enforcement

This past June, the city government in Philadelphia passed its budget for the upcoming fiscal year which begins on July 1, 2023.

Of particular importance to those individuals who and companies which own investment properties in Philadelphia, the newly passed budget includes an additional $1 million to enable the city of Philadelphia's Department of Licenses and Inspections ("L&I") to increase its number of inspectors tasked with governmental enforcement of the zoning and building codes as well as an additional $560,000 to allow the City Law Department to hire an additional 8 new attorneys to assist L&I with such governmental enforcement.

Since the pandemic, we have witnessed first-hand that L&I has been increasingly levying governmental fines on property owners and tenants who allegedly do not properly maintain their properties. Some of these governmental fines equal $2,000 per day. In fact, in 2020, a real estate firm brought a class action lawsuit against the city government in Philadelphia, claiming that it is issuing excessive governmental fines as a revenue generating vehicle.

From our experience, however, many of these governmental fines may be reduced or avoided altogether when challenged through administrative or judicial proceedings.

If you have a received a notice from L&I or other city agencies in Philadelphia threatening the imposition of such governmental fines, please feel free to contact Alan Nochumson

at either (215) 600-2851 or alan.nochumson@nochumson.com to discuss how to best approach the situation under the circumstances.

Vertical Position 100%

Court Estops Township From Revoking Governmental Approval for Real Estate Development Project

The meaning of the phrase “communication is key” was demonstrated by the Pennsylvania Commonwealth Court’s recent ruling in *Mclogie Properties Inc. v. Kidder Township Zoning Hearing Board*, 2003 Pa. Commw. LEXIS 90 (June 30, 2023).

In an extensive opinion issued by Judge Christine Fizzano Cannon, the Commonwealth Court prevented a township from compelling a property developer to modify an already constructed building structure that technically ran afoul of local zoning ordinances based upon the doctrines of variance by estoppel and equitable estoppel due to the failure of township officials to provide the property developer with proper guidance during the real estate development project.

In 2019, the property developer in Mclogie Properties purchased an unimproved lot in Kidder Township, the opinion said.

A couple months later, the property developer in Mclogie

Properties applied for a zoning permit to construct a three-story single-family residence on the property, the opinion said.

At that time, in Mclogie Properties, the township's code enforcement officer coordinated with the property developer during preliminary inspections of the property, the opinion said.

After that code enforcement officer retired, he was replaced by individuals who separately served as a zoning officer and a building code enforcer, with no one in the township informing the property developer of this change in responsibilities, the opinion said.

Subsequently thereafter, the zoning and building permits for this real estate development project were issued, the opinion said.

After construction began, the zoning officer discovered that the foundation's front elevation for the building structure at the property was 11 feet lower than in the original plans and drawings which the zoning officer had approved, the opinion said.

As a result, the property developer halted construction and sought guidance from the building code enforcer, the opinion said.

The building code enforcer instructed the property developer to submit updated plans and drawings to the township that the building code enforcer approved, the opinion said.

According to the opinion, the building code enforcer did not notify the zoning officer or revoke the building permit that was already in place.

Construction then renewed at the property and township officials inspected the building structure multiple times and

ultimately issued a certificate of occupancy to the property developer.

Afterwards, the zoning officer learned of the revised plans and drawings in a phone call with the building code enforcer that ran afoul of the township's zoning ordinance.

Soon thereafter, the zoning officer sent an enforcement notice to the property developer, asserting that the building structure was more than the allowed three stories high (which included the basement) and taller than 35 feet in height allowed under the township's zoning ordinance, the opinion said.

The property developer appealed the enforcement notice to the Zoning Hearing Board (ZHB) and sought a variance for the building structure as constructed.

At the hearing before the ZHB, the property developer testified that bringing the building structure into compliance with the strict mandates of the township's zoning ordinance would cost more than $50,000.

Nonetheless, after the hearing, the ZHB denied the request for a variance, finding that the approval by the building code enforcer was "neither credible nor probative" and that the township only needed to provide sufficient reasons for issuing its enforcement notice.

The property developer appealed this administrative ruling to the trial court which affirmed the ZHB's decision.

The property developer then appealed the trial court's ruling to the Commonwealth Court.

Ultimately, the Commonwealth Court concluded that the property developer was entitled to a variance by estoppel and that the township was equitably estopped from enforcing the zoning ordinance against the property developer.

Citing to *Skarvelis v. Zoning Hearing Board of Dormont*, 679 A.2d 278, 281 (Pa. Cmwlth. 1996), the Commonwealth Court stated that, in order to establish a variance by estoppel, the party seeking a variance must establish the following: the municipality's failure to enforce the zoning ordinance for a long period when the municipality knew or should have known of the violation but acquiesced in the illegal use; good faith and innocent reliance by the property owner on the validity of the use throughout the proceedings; substantial expenditures by the property owner in reliance on the belief that the use was permitted; and unnecessary hardship from denial of the variance, such as the cost to demolish an existing building structure.

Regarding the first element, while there was only a single year of inaction by the township, the Commonwealth Court in Mclogie Properties found acquiescence by the ongoing construction, the township's knowledge regarding the construction, the express approval by the building code enforcer of the revised plans and drawings, the multiple inspections, and the issuance of the certificate of occupancy for the constructed building structure.

That only one year was sufficient in light of the actions and omissions of the township was telling in that the Commonwealth Court cited its other rulings where a variance by estoppel was granted for governmental inaction ranging in time from seven to 36 years.

Regarding the second element, the Commonwealth Court in Mclogie Properties found good faith reliance by the property developer because no one had informed the property developer that the former township's zoning and building code enforcement officer's work functions had been divided between separate township officials and that the property developer did not know that it should have received governmental approval from both of these township officials.

Regarding the third element, substantial expenditures in reliance on the validity of the use, the Commonwealth Court in Mclogie Properties pointed out that property developer built a basement with a 8.5 foot ceiling while relying upon the validity the building permit issued by the building code enforcer, which the Commonwealth Court determined as sufficient reliance.

Finally, regarding the fourth element, unnecessary hardship from denial of a variance, the Commonwealth Court in Mclogie Properties found that the cost of $50,000 in filling in the basement was a sufficient unnecessary hardship.

Quoting Walnutport Borough Zoning Hearing Board, 2009 Pa. Commw. Unpub. LEXIS 549, the Commonwealth Court in Mclogie Properties emphasized that Pennsylvanian courts have stated that unnecessary hardship must be more than "mere economic or personal hardship" and must be both "unique to the property" and that the "zoning restriction sought to be overcome must render the property practically valueless."

That the Commonwealth Court in Mclogie Properties found that $50,000 was unnecessary hardship perhaps highlighted that it was the township's lack of communication which made the expense "unnecessary," refusing to impose that cost unto the property developer.

Additionally, the Commonwealth Court in Mclogie Properties held that the township was equitably estopped from imposing what it determined to be an untimely zoning requirement.

Relying upon *In re Jackson*, 280 A.3d 1074, 1083 (Pa. Cmwlth. 2022), the Commonwealth Court stated that equitable estoppel may arise from an informal promise implied by one's words, deeds, or representations that induces reasonable reliance by another to the promisee's detriment.

The Commonwealth Court in Mclogie Properties found reliance from a number of pertinent facts—the property developer

relied, to its detriment, on the building code enforcer's approval of the revised plans and drawings; the building permit was not revoked upon revision of the plans and drawings; the property developer was not notified that additional zoning approval would need to be sought; multiple inspections occurred during the construction which seemed to indicate that there were no issues; and, lastly, a use and occupancy permit was issued when construction was complete.

It was also determined by the Commonwealth Court in Mclogie Properties that the ZHB's enforcement of the zoning ordinance would be to the property developer's detriment as the property developer would have to incur additional expenses if it was forced to comply.

As a result, the Commonwealth Court in in Mclogie Properties concluded, in the alternative, the township was estopped from enforcing the township's zoning ordinance against the property developer.

Cameron Cummins, *a second-year law student at Washington & Lee University School of Law, who is interning at the firm, assisted in the preparation of this article.*

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Vertical Position 100%

Short-Term Rental Properties in Philadelphia

The City of Philadelphia's Department of Licenses and Inspections (L&I) has embarked on a new phase of governmental enforcement aimed at addressing the issue of unlicensed short-term rental properties proliferating on popular marketing websites such as Airbnb and VRBO.

Commencing on July 12, 2023, property owners and booking agents were formally notified via email by L&I about their intention to issue notices to these online platforms. The notices will explicitly request the removal of any short-term rental properties lacking the proper governmental licensing.

L&I has established a strict timeline for property owners to rectify their licensing status. In the event that no action is taken within 5 business days after receiving the notice, the respective website will be obligated to deactivate the listing for the unlicensed short-term rental property. This decisive measure underscores the city's commitment to regulating the short-term rental market and ensuring compliance with licensing requirements.

Concerned property owners and hosts seeking clarification on the licensing status of their short-term rental properties can avail themselves of assistance from Alan Nochumson. He can be reached at (215) 600-2851 or alan.nochumson@nochumson.com, providing a valuable resource to confirm the necessary governmental licensing for advertising properties as short-term rentals without facing potential penalties.

Philadelphia's proactive approach to enforcing regulations surrounding short-term rental properties highlights the

significance of compliance with licensing requirements. Property owners are strongly encouraged to promptly address any licensing concerns to avoid disruptions in their ability to showcase their properties on popular online platforms. This initiative underscores the city’s dedication to maintaining a well-regulated and accountable short-term rental market, benefiting both property owners and visitors alike.

Vertical Position 100%

Tenant Not Entitled to Rent Abatement Stemming From Landlord’s Lead Paint Suit

Can a long-term tenant sue for rent abatement and reimbursement of legal fees and costs for their landlord’s failure to comply with the city of Philadelphia’s lead paint disclosure and certification laws in a renewal lease? For a long-term tenant living in an apartment unit in the Haddington neighborhood of West Philadelphia the answer is no.

The Pennsylvania Superior Court in *Hand v. Fuller*, 2023 Pa. Super. LEXIS 158 (Apr. 20, 2023) dealt with a number of important legal issues that long-term tenants and those living in older buildings may be unsure about. These issues included whether a tenant’s original lease from 17 years prior was still operative, or whether a new lease had been executed where the tenant’s rent increased, and what the corresponding landlord’s duties related to lead paint were based upon when the operative lease was effectuated.

The tenant originally sued her former landlord for over

$40,000 pursuant to Philadelphia's lead paint disclosure and certification ordinance (the ordinance) which is contained in Chapter 6-800 of the Philadelphia Code.

The tenant had already moved out and was hoping to recoup her rent for five years because, as she alleged, her landlord had failed to provide her with a valid lead paint certification prepared by a lead inspector stating the property was lead free or lead safe after she allegedly executed a new lease in 2013, the opinion said.

In *Hand*, the trial court granted the landlord's motion for a compulsory nonsuit and denied the tenant's motion to remove the nonsuit.

The tenant then appealed to the Pennsylvania Superior Court.

On appeal, the tenant argued the trial court erred in concluding that her lease was a "renewal lease" exempt from the current lead-based paint disclosure requirements, among other things.

The odinance was enacted in 1995 to assist the city of Philadelphia's Department of Public Health in identifying, reducing, and combating lead poisoning in Philadelphia's children, recognizing that the most significant remaining source of environmental lead is lead-based paint in residential dwellings built prior to 1978.

The ordinance requires sellers and landlords of properties built before 1978 in which a child age 6 or under will reside to disclose to buyers and tenants the absence or presence of lead-based paint or lead-based paint hazards.

Notably, the lawsuit in *Hand* highlights how much landlord disclosure duties regarding lead-based paint have changed since its enactment in 1995.

According to the Superior Court in *Hand*, while tenants in

operative long-term leases or renewal leases from the early to late 2000s and before may only be owed duties by landlords, tenants entering into leases today have greater rights and remedies available for failures to disclose the existence or nonexistence of lead-based paint.

Today, the Superior Court in *Hand* emphasized that neither new nor renewed leases (including automatic renewals) for properties built prior to 1978 can be entered into until the landlord has provided the tenant with a valid certification prepared by a certified lead inspector stating that the property is either lead free or lead safe; the tenant acknowledges receipt of the certification by signing a copy; and the landlord has provided to the city of Philadelphia's Department of Public Health a copy of such certification.

At their own expense, buyers have a 10-day period to obtain a comprehensive lead inspection or risk assessment from a certified lead inspector. If the inspection reveals lead-based paint or lead-based paint hazards on the property, the buyer has five days after receipt of the inspection to terminate the purchase contract. Failure to do so constitutes a waiver to terminate the written agreement upon these grounds. Tenants have the same right except that they only have two business after receipt to terminate the lease.

Where a landlord does not comply with the provision of the ordinance the tenant shall be entitled to bring an action in court and is entitled to remedies including exemplary damages up to $2,000, abatement and refund of rent for the period the tenant occupied the property without being provided the requisite certification, and reimbursement of the legal fees and costs so incurred. Of particular note is that a notice requirement, requiring tenants to notify their landlord in writing before filing suit, has been removed from the current version of the ordinance.

However, for the reasons that follow, the Superior Court in

Hand applied provisions of the ordinance which have since been amended or removed entirely, requiring it to put together a complex puzzle of duties and liabilities when interpreting the ordinance and the tenant's "leases."

During her 17 years of occupancy, the tenant in Hand alleged that she and her landlord executed a second and third lease agreement in 2006 and 2013, respectively, the latter of which included a rent increase, provided for an additional child occupant, and a lease term that would be month-to-month, the opinion said.

Concurrently with the tenant's occupancy at the property, the city of Philadelphia's lead paint disclosure requirements were amended several times, requiring the Superior Court in Hand to put together a complex puzzle of duties and liabilities when interpreting the ordinance and the tenant's "leases" in *Hand*.

At the outset, the Superior Court in *Hand* determined that the tenant had only renewed her original 2002 lease and that no new lease had been executed. In doing so, the Superior Court made this determination based on the language of the lease and the conduct of the parties– importantly, the 2002 lease stated that "in the event neither Landlord or the Tenant give notice of non-renewal to the other, the lease will continue for another term … with the rest of the lease remaining the same."

Additionally, the Superior Court in *Hand* pointed out that the lease stated that any changes must be written and signed by both the landlord and the tenant to be enforceable. In other words, even though her rent increased in 2006 and 2013, the tenant never executed a new lease and the lease literally stated it would automatically renew if neither side gave the requisite notice.

Next, the Superior Court determined that the ordinance only applied to an existing landlord-tenant relationship (i.e., tenants cannot sue after their lease term is already over). In

making this finding, the Superior Court adopted the holding of a trial court's ruling made in the Philadelphia County Court of Common Pleas in *Houston v. Analaris Homes*, No. 01449, 2019 Phila. Ct. Com. Pl. LEXIS 6 (Phila. Ct. Com. Pl. Jan. 30, 2019). This determination marked a threshold standing issue which would effectively bar tenants from suing their landlords retroactively.

Can holdover tenants sue under the ordinance? Where is the line drawn for who is a tenant? The language used by the Superior Court in *Hand* that the ordinance only covers parties in an "existing lease relationship" and that a tenant cannot bring a claim "after a lease agreement has been satisfactorily completed" may be grounds for further judicial interpretation in the Philadelphia Municipal Court and beyond in the coming years.

Lastly, the Superior Court in *Hand* concluded that a notice requirement, which has since been removed in the 2017 amendment to the ordinance, still applied to the tenant because her lawsuit was premised upon a new lease allegedly executed in 2013.

The Superior Court also determined that a list of repairs that mentioned paint but did not specifically express concern about lead paint did not satisfy the tenant's notice requirement.

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Vertical Position 100%