

Keeping You Informed

Kaplin Stewart
Attorneys at Law

kaplaw.com
610.260.6000

TO THE POINT

Spring
2016

Do Pennsylvania Judicial Zoning Decisions Deny Communities Access to Important Public and Private Services?

Having just successfully completed a rather lengthy and complex use variance application for approval of a memory care facility in New Jersey, I had to wonder whether the same application would have been met with success in Pennsylvania. I concluded that at least with regard to the use variance, New Jersey is ahead of Pennsylvania on the zoning curve.

In my case, the property was split zoned, i.e., a portion being in a residential zoning district and the remainder in a commercial district. Of course, a memory impairment facility, despite being more residential in nature than commercial, was permitted only in the commercial zone. Therefore, a use variance and a whole host of dimensional variances were required from the township's land use board. Thankfully, the property was in New Jersey, a distinct advantage. If a proposed use qualifies as an "inherently beneficial" use, the burden of proof for a use variance is "significantly lessened." While a land use board must still balance positive and negative criteria, an inherently beneficial use presumptively satisfies the positive criteria and lessens the burden to demonstrate that the use "will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." The effect is that the applicant gets to wear the white hat for a change.

So what is an "inherently beneficial use"? Section 40:55D-4 of the New Jersey Municipal Land Use Law, defines such a use

to be one of universal value to the community because it fundamentally serves the public good and promotes the general welfare. Such use include by way of example, hospitals, schools, child care centers, group homes, and wind, solar or photovoltaic energy facilities. The opponents to my application conceded that a memory impairment facility or nursing home fell squarely within this definition of inherently beneficial use. Therefore, when the board granted the use variance, it concluded that all of the dimensional variances were deemed to be subsumed within the inherently beneficial use and all of the bulk variances were approved as well. Nice.

In Pennsylvania, a use variance remains a creature of judicial authority and requires a stringent showing of unnecessary hardship. In this context, an unnecessary hardship is

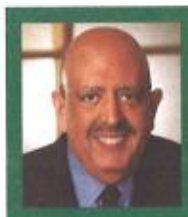
established by evidence that the physical features of the property are such that it cannot reasonably be used for a permitted purpose, or that the property can be conformed for a permitted use only at a prohibitive expense, or that the property has no value for any purpose permitted under the zoning code. Although an applicant is not required to show that the property at issue is valueless without the variance or that the property cannot be used for any permitted purpose, or that the property cannot be sold, the standard for a use variance is nonetheless very high.

In the context of a hospital, nursing home, domestic abuse shelter or child care center, New Jersey's legislature has formally recognized the value of these uses to the community and has legislatively addressed the burden of proof

in a manner much friendlier to the applicant. This legislative "assist" puts many use variances within the realm of possibility. Pennsylvania's judicially created standard provides no such help. In an environment where properties perfectly suited for their permitted uses are evaporating, and where zoning changes are either impractical or politically infeasible, many "inherently beneficial" uses find themselves with an uphill climb through the rolling hills of Pennsylvania. This impediment makes it far more difficult for important public and private services to find suitable locations near the communities they are intended to serve.

Nonetheless, the New Jersey rules certainly cannot be described as making a use variance a "cake walk", even if the use is inherently beneficial. An applicant must still prove that the use

Continued on page two



Neil Stein

Neil Stein is a principle of the Land Use and Zoning Group. Mr. Stein has represented landowners, developers, institutions and non-profit groups for over twenty-five (25) years. He can be reached at (610) 941-2469 or by email to nstein@kaplaw.com.

Welcome Taylor A. Smith

Taylor A. Smith is an associate in the transactional department. Mr. Smith's practice focuses on tax planning, wealth preservation, estate planning and administration. Taylor was previously an associate at Dilworth Paxson in Center City, Philadelphia. She is greatly enjoying the commute to Blue Bell and the wildlife outside of her



office window. In her free time, she is always on the lookout for delicious food, especially really unhealthy things like mac and cheese and ice cream. Taylor resides in Drexel Hill with her three pet rabbits. We are very excited to have Taylor join our team!

Congratulations!

We are pleased to announce that six Kaplin Stewart attorneys have been selected as 2016 Pennsylvania Super Lawyers – Gregg I. Adelman for Land Use/Zoning, Andrew B. Cohn for Construction Litigation, Marc B. Kaplin for Land Use/Zoning, Robert A. Korn for Construction Litigation, William J. Levant for Creditor Debtor Rights and Joshua C. Quinter for Construction Litigation. In addition, Jessica A. Kubisiak has been named a Super Lawyer Rising Star for 2016.

Super Lawyers selected attorneys for this honor using a patented multiphase process. Peer nominations and evaluations are combined with third party research. Each candidate is evaluated on 12 indicators of peer recognition and professional achievement. The objective of Super Lawyers is to create a credible, comprehensive and diverse listing of outstanding attorneys that can be used as a resource for attorneys and consumers searching for legal counsel.



KS News

Neil Stein was a moderator for Alternative Financing Solutions for Real Estate Deals session at the Philadelphia Real Estate Capital Markets Summit that was held on April 13, 2016. The event brought together more than 200 of the region's top professionals, along with four panels of industry leaders representing the Pennsylvania Capital markets industry.

"We're Freezin' for a Reason"! In honor of our friend, Jax Utain, Kaplin Stewart sponsored the Camp Sunshine's 2016 AJ's New Jersey Polar Dip held on Saturday, March 26, 2016. Kaplin Stewart's plungers were Dan Utain, Janet Flood, Jennifer Leister and Lynn Sturdivant. We hope to send many more children with life-threatening illnesses and their families to a one-of-a-kind retreat in Casco, Maine. Camp Sunshine's 2016 goal is to raise in excess of \$50,000.00, which will send 20 families to Camp Sunshine!



George W. Broseman, a partner in our land use, zoning and development department recently obtained development approvals for various projects including:

- Bentley Homes' 311-unit luxury apartment complex located at 751 Vandenberg Boulevard in the King of Prussia Mixed Use District in Upper Merion Township.
- Bentley Homes' Paoli Walk, a 30-unit townhouse community to be located in Paoli, Willistown Township.
- A 22-unit condominium project near the St. David's train station in Radnor Township.
- The new Valley Forge Flowers' Cottage to complement the Barn at Valley Forge Flowers in the Eagle Village Shops in Radnor Township.

Karin Corbett, Esquire has been elected to serve on the Board of Directors of the Northeast Chapter of the Metal Building Contractors and Erectors Association. In May, 2016 Karin presented "Contract Clauses that Kill" at the Annual MBCEA National Conference in Clearwater, Florida.

"Thank you" to all of our clients and new professional acquaintances that attended our seminars making our Spring Series Construction Seminars a great success!!

Continued from page one Pennsylvania Judicial Zoning

will not substantially impair the zoning plan of a community. While some boards and judges may have only a slight interest in the negative criteria once a use is established to be inherently beneficial. However, my experience is that most New Jersey boards very carefully weigh the positive and negative criteria and determine whether on balance, the grant of the variance would cause a substantial detriment to the good.

Therefore, I would like to see the Pennsylvania legislature follow New Jersey's lead. Uses such as drug treatment facilities, assisted living facilities and shelters are often unpopular and could well use protection from local prejudices that may oppose their location in a community. To ignore the benefits of these uses, may result in a denial of necessary services to some of our most vulnerable citizens. Pennsylvania, like New Jersey, has a

responsibility to ensure that any application to provide services in the public interest is given fair and balanced consideration.

I intend to "pitch" this concept to our legislature so that no one is denied access to an inherently beneficial use. I could use your support.

Big Victory in Property Rights Case Sends Message to Pennsylvania Municipalities:

Your Authority in Reviewing Development Plans is Not Unlimited

A recent Commonwealth Court decision reaffirmed the principle that municipalities must act in good faith when processing land development applications. Property rights are protected by the Pennsylvania Constitution. Our state courts have long held that property rights are natural, inherent rights that cannot be infringed upon. But for many developers going through the municipal review process in Pennsylvania, it can seem like those rights are subject to the whims and desires of the municipality. Certainly, this was the case in Honey Brook Township. After deciding to down-zone properties to prevent development in a certain area, the Township engaged in a systemic course of conduct specifically designed to prevent property owners from vesting their development rights while the zoning amendment was pending.

The Township intentionally kept its pending zoning amendment secret to prevent submissions of land development applications before the zoning could be officially changed. Further, the Township Manager unilaterally instituted a new stringent review policy, without the approval of the Board of Supervisors, designed to prevent land development applications from being accepted into the review cycle. The Township used this new policy to reject applications out of hand as "incomplete" and then refused to meet with the applicants to

discuss the plan or make revisions.

On appeal to the Commonwealth Court, Attorney Marc Kaplin took on the Township of Honey Brook, arguing that the Township's bad faith actions and improper course of conduct violated its legal obligation to proceed in good faith in reviewing and processing land development plans. The Commonwealth Court agreed, and remanded the application back to the Township, instructing the Township to process and review the land development plans under the zoning in effect on the date the land development plans were originally submitted.

This victory is the third decision from the Commonwealth Court reversing the denial of a land development plan based on a municipality's refusal to



process the application in good faith. The Commonwealth Court decision reinforced the duty to review development plans in good faith, including the municipality's obligation to discuss technical requirements and ordinance interpretations with an applicant and to afford an applicant a reasonable opportunity to respond to objections by the municipality and/or to modify its plans to address concerns. The message the Commonwealth Court sent is clear: municipalities cannot act in bad faith to deprive property owners of their constitutionally-protected property rights.



JUNE SINGH

June Singh is an associate in both the Land Use and Construction Litigation practice departments. She can be reached at (610) 941-2532 or by email to jsingh@kaplaw.com

Kaplin Stewart
Attorneys at Law

KAPLIN STEWART LAND USE

Gregg I. Adelman
610-941-2552
gadelman@kaplaw.com

Barbara P. Anisko
610-941-2457
banisko@kaplaw.com

George W. Broseman
610-941-2459
gbroseman@kaplaw.com

Amee S. Farrell
610-941-2547
afarrell@kaplaw.com

Marc B. Kaplin
610-941-2666
mkaplin@kaplaw.com

Simi Kaplin Baer
610-941-2657
skbaer@kaplaw.com

C. Robert Lewis
610-941-2584
rlewis@kaplaw.com

June P. Singh
610-941-2532
jsingh@kaplaw.com

Neil A. Stein
610-941-2469
nstein@kaplaw.com

Pamela M. Tobin
610-941-2543
ptobin@kaplaw.com

Follow us on:



Kaplin Stewart
is a member of:



Legal Perspectives

Where You Should Never Sign Anything in Green Ink, Why You Should Never sign Anything Anywhere in Black Ink and What the difference is Between a Parcel ID and a Folio Number?

As Charlie Cowell (the anvil salesman in the 1962 film version of *The Music Man*) famously said, "you gotta know the territory." Our Commonwealth [1] has 67 counties, and each seems to have its own peculiar set of customs. The best lawyer in the universe isn't worth a nickel if she can't get her papers past the court clerk [2] and onto the judge's desk. At Kaplin Stewart, our lawyers know things that would get regular folks thrown out of nice cocktail parties. But that's what it takes to be an effective commercial lawyer in more than one county.

So, where is green ink *verboden*? Lebanon County. I used it; they accepted it, but I got a rather stern note back saying "please do not sign in green." Ouch.

What's wrong with black ink? In at least one county, they "test" submissions for original ink signatures by licking them. If the ink doesn't run, it's a copy. Yuck.

What's wrong with black ink?

And, Delaware County doesn't have Parcel IDs. They have "Folio Numbers". Say "Parcel ID" and you'll get run out of town on the Media Local. And, they'll instantly know that "you aren't from around here"[3].

[1] A "commonwealth" is exactly the same as a "state". It just sounds more important. There are four commonwealths in the United States. Pennsylvania is one of them. Can you name the other three?

[2] The court clerk is called a "prothonotary" in most counties, but in others is a "civil clerk", a "clerk of judicial records", or even a "director of the office of court records". With an apparently straight face, Pennsylvania has named this modern-day Byzantine empire the "Unified Judicial System."

[3] The four commonwealths in the United States are Pennsylvania, Massachusetts, Virginia, and ... Kentucky. This is a great bar bet.



William Levant is a member of the Business & Commercial Litigation, Real Estate & Title Litigation and Bankruptcy & Creditors Rights group. He can be reached at 610.941.2474 or by email to wlevant@kaplaw.com.



© 2016. *To The Point* is published by the Law Offices of Kaplin Stewart Meloff Reiter & Stein, P.C., Blue Bell, PA; Philadelphia, PA; Cherry Hill, NJ. Its purpose is to provide general information to clients and friends and is not intended as legal advice. Readers should seek professional counsel with regard to specific applications of the information contained in this publication.

Unless otherwise expressly stated herein, all discussions and opinions are based upon the law of the Commonwealth of Pennsylvania and the State of New Jersey. Your comments or suggestions are welcome... Phone: 610.260.6000 • Fax: 610.260.1240 • www.kaplaw.com
Editor: Adelaine Williams Photos: Paul Sirochman Design & Production: B Creative LLC



ADDRESS SERVICE REQUESTED

PRSR STD
U.S. POSTAGE
PAID
PITTSBURGH, PA
PERMIT NO. 283

Kaplin Stewart Meloff Reiter & Stein, P.C.
Union Meeting Corporate Center
910 Harvest Drive
P.O. Box 3037
Blue Bell, PA 19422-0765

Kaplin Stewart
ATTORNEYS AT LAW