

## THE LOCAL CODE ENFORCEMENT PROCESS MAY NOW BE USED AGAINST DEVELOPERS LONG AFTER THE COMPLETION OF CONSTRUCTION AND CONVEYANCE OF OWNERSHIP

By Howard A. Vex, Esq.

The New Jersey Supreme Court has concluded that the Uniform Construction Code Act does grant local officials general authority to cite developers for code violations discovered long after sale of the subject properties. On January 24, 2005, the Court rendered a landmark holding in *DKM Residential Properties Corp. v. Township of Montgomery*, fully reversing a 2003 Appellate Division determination that local officials lacked such authority after the subject properties had been conveyed to the new owners.

DKM Residential Properties Corporation had developed and constructed the Cherry Valley Country Club residential development in the Township of Montgomery. Between 1995 and 1998, as certificates of occupancy were obtained from the Township, the Developer sold the homes. Thereafter, commencing in May of 2000, the Township's Construction Department began receiving letters from Cherry Valley homeowners complaining about improper installation of the synthetic stucco-like exterior finish that was applied to their new homes. The homeowners enclosed engineering reports concluding, after inspection, that the exterior finish had not been installed according to manufacturer's specifications and moisture had penetrated exterior walls, causing decay, rotting, and mold.

Upon reviewing the submissions of the homeowners, the Construction Official determined that the installation on some of the

homes had failed to comply with the manufacturer's specifications, in violation of the Uniform Construction Code. The Construction Official consulted a representative of the Department of Community Affairs and was advised of the Department's position that local officials were permitted to bring enforcement actions against the Developer even though the subject properties had been sold to the new homeowners. Accordingly, five Notices of Violations were issued to DKM Residential Properties, identifying sixty-two individual instances of violations. The Notices further provided that DKM's failure to correct the violations within a specified timeframe would result in the imposition of fines in the amount of \$500 per week.

It is fairly common for new homeowners, who find common construction flaws throughout their development, to press their local officials to pursue remedies on their behalf against the developer. The alternative of individual homeowner lawsuits for damages can

be daunting in terms of time and cost. Thus, local officials are often sympathetic to the homeowners plight in these situations. Nevertheless, developers have traditionally opposed such efforts with vigor, arguing that such disputes should be resolved by the developer and the individual homeowners, without involvement or pressure from local officials.

In the Cherry Valley dispute, DKM immediately challenged the Township's attempt to invoke the local code enforcement process, arguing that the subject homes had been sold and the certificates for occupancy had been issued years earlier. DKM's legal challenge floundered before the local Construction Board of Appeals and the Superior Court, Law Division, but found sympathetic ears in the Appellate Division. The Appellate Division vacated the summary judgment previously entered in favor of the Township and the Board and, instead, granted summary judgment to DKM. The Appellate Division held that

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### CKC NAMED TOP TEN LAWYER-LOBBYISTS

Courter, Kobert & Cohen's Government Affairs Department was named by the New Jersey Law Journal as one of the top ten lawyer-lobbyists for 2004. This was the 7th year in a row that Courter, Kobert & Cohen was named to the top ten list.

Murray Bevan, who heads the firm's Government Affairs Group, said, "The key to our continuing success in the Government Affairs arena is our ability to offer not only government relations services but also legal and regulatory solutions for our clients."

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# IS TENANT INSURANCE ENOUGH?

By Edward S. Nagorsky, Esq.

Most leases spell out the kind of insurance that a tenant must maintain in order to be in compliance with the lease. However, most leases fail to provide what insurance a tenant's contractor should have when doing a build-out or alteration in the space. If a tenant is required to construct tenant improvements or alterations, there is a risk that the contractor the tenant hires will not have adequate insurance. If the tenant's contractor damages the Landlord's building or injures someone, a Landlord may get sued and stuck with a bill. Even if the Landlord's insurance will cover that liability (which it should), the Landlord's insurance rates will most likely increase.

To make sure that a tenant's contractor is adequately insured, the lease should require the tenant to make its contractor carry specific types of insurance. To give a Landlord maximum control and flexibility, the lease should permit the Landlord to decide which insurer is acceptable and set the coverage amounts for each policy. In that way, a Landlord can require the proper amount of insurance coverage depending on the type of work that the tenant is undertaking.

Generally, a Landlord would want a contractor to carry any or all of the following types of insurance:

- Liability insurance covering any property damage or bodily injury. This policy should name both the Landlord and the tenant as additional insureds.
- Workers' Compensation in the amount

required by New Jersey law. Such insurance covers injuries to the contractor's employees that occur at the work site. Please note that the State of New Jersey sets the Workers' Compensation amount.

- Automobile insurance may be required if the Landlord has parking areas and roadways on his property where a contractor or its employees will drive or park trucks and cars.

Lastly, the Landlord should require the tenant to furnish it with proof of the contractor's insurance so that the Landlord can verify that they are named on the policy.

## NEW YEAR REMINDER

With the start of the New Year, it is important to recall that last year New Jersey enacted a non-resident income tax on homes being sold by "non-residents" of the State of New Jersey. Non-resident sellers (limited by the statute to individuals, estates or trusts) have two options. They can prepay the tax or pay the tax at the time of closing. Sellers prepaying the tax must complete and sign the Non-Resident Seller's Tax Prepayment Receipt Form (Form #GIT/REP-2) along with Form NJ-1040ES and file them with the Division of Taxation. Upon payment of the tax, they will receive a Receipt which must be provided at closing to be recorded with the Deed. Alternatively, non-resident sellers can pay the tax at the time of closing by completing and signing the Non-Resident Seller's Tax

Declaration (Form #GIT/REP-1) and provide it, along with payment of the estimated tax, to the settlement agent at closing. The form, along with a check payable to the State of New Jersey—Division of Taxation, must accompany the Deed when it is sent for recording.

A question has arisen among settlement agents as to what the tax is that is required to be submitted. The estimated payment is determined by the seller by multiplying the seller's gain, as computed for tax purposes, times 8.97%. In no event, however, may the estimated payment be less than 2% of the consideration paid. Thus, if the non-resident seller's payment at closing is 2% of the consideration or greater, and the forms are properly completed and signed, this should be accepted and sent in for recording. However, you cannot assume that so long as 2% of the consideration is submitted to the County Clerk, the seller has met his obligation. That is not the case. Sellers who fail to accurately compute the estimated tax based on the gain on the sale of their property may subject themselves to an underpayment of estimated tax and incur interest on the amount ultimately calculated to have been due. Accordingly, non-resident sellers should be sure to furnish the settlement agent with an accurate estimate of the gain on the sale of their home for tax purposes so that the proper estimated tax may be withheld at closing. A failure to do so could subject those unaware sellers to interest and possibly penalties imposed by the State. ❖

## THE LOCAL CODE ENFORCEMENT PROCESS

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neither the Uniform Construction Code Act nor its regulations authorized the Township to bring an enforcement proceeding against DKM concerning property that DKM no longer owned. The municipal enforcing agency was, thus, only authorized to bring an enforcement proceeding against a developer during the construction process.

The New Jersey Supreme Court granted the Township's request for review of the Appellate Division's ruling and issued its final determination on January 24, 2005. The Supreme Court rejected the Appellate Divisions reason-

ing and upheld the Township's general right to invoke the local code enforcement process against DKM on the new homeowners behalf. The Court stated that the Uniform Construction Code Act's provisions specifically include a legislative direction to be generous when in doubt about its powers. Thus, absent any express or clearly implied limitation on the municipal enforcing agency's authority, the Court refused to find that a municipal enforcing agency lacked the power to issue a Notice of Violation to a developer after the certificate of occupancy has been issued.

Unfortunately, the Court refused to set parameters on the breadth of local code enforcement authority permitted under its ruling. The Court only went so far as to say that, "at the very least it certainly would seem to encompass Code violations of the sort that would have supported the withholding of the certificate of occupancy in the first instance had they been known." As a result, more litigation to clarify the breadth of this newly confirmed general code enforcement authority is likely to follow. ❖

# HIGHLANDS LITIGATION

By Richard A. Giuditta, Jr., Esq.

On December 22, 2004, Courter, Kobert & Cohen, P.C. filed a Complaint in the Superior Court of Warren County challenging the retroactive provisions of the Highlands Act. Those provisions prohibit development in the Highland's "Preservation Area" unless the developer had received major preliminary subdivision approval on or before March 29, 2004. On behalf of our client, we argue in the Complaint that the retroactive application of the Act violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and the parallel provisions of the New Jersey Constitution. To the best of our knowledge, this Complaint is the first legal challenge to the Highlands Act.

Former Governor McGreevey signed the Highlands Act into law on August 10, 2004, which became the effective date of the law. New legislation usually has a prospective application, (in this case after August 10, 2004) unless there is a clear legislative necessity to apply the law retroactively. Our Complaint argues there is no such legislative necessity and the retroactive provision of the Act will result in "a manifest injustice" to our client who received all necessary approvals prior to August 10, 2004.

## HIGHLANDS COUNCIL ACTIVITIES

The New Jersey Highlands Council held its initial meeting on Thursday, December 16, 2004, in Chester Township. As one of its first acts, the Council approved Adam Zellner as its Executive Director. Mr. Zellner has been the Executive Director of the State's Office of Smart Growth for over two years.

More than one hundred people attended the December 16, 2004 meeting, with a number of environmental activists celebrating the establishment of the new Highlands Council. In addition, Hunterdon County Counsel, Guy DeSapio, representing the Freeholders of Hunterdon and Warren Counties, urged the Highlands Council to investigate the boundaries of the over 800,000 acre Highlands Region. Specifically, DeSapio alleged that the boundaries, which were initially drawn based on environmental considerations, were altered as a result of political influence. By a vote of thirteen to one, the Council voted against the Freeholders' request for an investigation.

DEP Commissioner Brad Campbell also spoke at the meeting distinguishing the

Council's role from that of the DEP. He stated the Council is charged with creating a Regional Plan, while DEP is charged with overseeing regulation, enforcement and land acquisition. He also confirmed that the DEP has already considered more than 100 Highlands exemption requests through mid-December, 2004. (DEP documents indicate, as of December 17, 2004, the Department has reached a decision on 39 of the 126 exemption applications).

The Highlands Council has already established their new headquarters on North Road in Chester Township and at their initial meeting adopted temporary By-Laws. The Council scheduled future meeting dates for the first and third Thursday of each month at 10:00 a.m.

Courter, Kobert & Cohen, P.C. will continue to report on significant developments related to the Highlands Act and on Highlands Council meetings. Please feel free to contact us should you have additional questions or need assistance in DEP permit filings or other land use issues. ❖

# FINAL RULES ON CAPITAL GAINS

By Jason P. Gratt, Esq.

The Internal Revenue Service has issued its final rules on the capital gains tax exclusion that is available on the sale of a taxpayer's principal residence. A taxpayer may exclude up to \$250,000 from the sale of a principal residence, and the exclusion doubles to \$500,000 for married taxpayers. However, the taxpayer must have owned and used the property as a principal residence for a total of at least two of the five years before the residence is sold.

The final rules focus on the part of the Internal Revenue Code that allows a taxpayer who fails to meet the above condition to still have an exclusion in a reduced amount. There are three grounds for claiming a reduced exclusion: change in employment, health, and

unforeseen circumstances. For each of these grounds, the regulations provide a general definition and one or more "safe harbors"—specific reasons for the sale of the residence. If the safe harbor for a particular ground applies, a sale (or exchange) is deemed to be "by reason of" that ground. If no safe harbor applies, the taxpayer still can claim one of the grounds on the basis of all of the surrounding facts and circumstances.

For example, the safe harbor for claiming a reduced exclusion because of a change in employment applies when the new place of employment is at least 50 miles farther from the residence that was sold than was the former place of employment. As for health, the

safe harbor that smooths the way for the reduced exclusion is a physician's recommendation of a change of residence for reasons of health. A sale or exchange of a residence due to unforeseen circumstances refers to the occurrence of an event that the taxpayer could not reasonably have anticipated before purchasing and occupying the residence. Simply wanting to move to a preferred home or moving due to improved financial circumstances does not qualify. The specific events that make up the safe harbor for this ground include, among other things, such circumstances as death, divorce, natural or man-made disasters affecting the house, and even multiple births from a single pregnancy. ❖

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## PEOPLE IN THE NEWS

**CHARLES A. CASTLE** has joined the firm's Litigation Department. Mr. Castle was admitted to the New Jersey bar in 2003. Mr. Castle received his law degree from Wake Forest University School of Law in 2003, and his Bachelor's degree in History from Franklin & Marshall College in 2000. Prior to joining the firm, he focused his practice on medical malpractice defense litigation at the firm of Ruprecht, Hart & Weeks, LLP.

**LAWRENCE P. COHEN** was honored by receiving a designation as a "New Jersey Super Lawyer." This designation was made after a statewide survey and will be published in the May edition of New Jersey Monthly. Only five percent (5%) of all lawyers in New Jersey have been awarded this honor. Mr. Cohen's designation was awarded as a result of his many years of experience in civil litigation and his designation by the New Jersey Supreme Court as a Certified Civil Trial Attorney. The firm congratulates Mr. Cohen for an honor well deserved.

**KEVIN M. HAHN**, a member of the St. Columcille United Gaelic Pipe Band drum corps of Kearny, New Jersey marched by invitation with the Port Authority Police Pipes and Drums in the 244th Annual St. Patrick's Day Parade in New York City on March 17, 2005. Mr. Hahn was joined by other members of the St. Columcille drum corps and the outing was a huge success.

**MURRAY BEVAN** was recently elected as a member of the Board of Trustees of the Camp Nejeda Foundation, Inc. Camp Nejeda which is located in Stillwater, New Jersey was founded in 1958 and is New Jersey's only residential camp for children with diabetes.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

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