Sidebar

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Highlands Council Officials Make Presentation at Courter, Kobert & Cohen and Testify Before Senate Environment Committee

By Murray E. Bevan, Esq.

Highlands Council Executive Director Adam Zellner, Chief Council Thomas Borden and Council Member Janice Kovach presented an overview of Council activities and answered questions from clients and firm attorneys at the offices of Courter, Kobert & Cohen, P.C. on Monday, October 3, 2005. They discussed important developments related to the Highlands Region.

Zellner began his presentation by discussing the Department of Environmental Protection ("DEP") new Highlands regulations which will supplement the Department's sweeping interim rules which went into effect on May 9 without a public comment period. (See Courter, Kobert & Cohen communication from May 11, 2005 reviewing the DEP Interim Regulations). Zellner urged those in attendance at the firm to review the new DEP Highlands Rules "carefully" and supply comments to the DEP.

Zellner and Council Member Janice Kovach discussed the active agenda of the Council since it began its work in December, 2004. Zellner stated that the Council was charged by the Legislature with the task of producing the Highlands Master Plan by June, 2006 and he hopes a draft plan will be available for public review and comment in March or April, 2006. The Council also established 19 Technical Advisory Committees which provided their expertise to the Council in preparing the Regional Master Plan.

Highlands Chief Council Tom Borden explained there are three broad exemption categories where the Highlands regulations may be waived:

1. For public health and safety;
2. In certain redevelopment situations including brownfields; and
3. To avoid a taking of property.

Borden noted that there were seven or eight taking suits including a successful suit filed by Courter, Kobert & Cohen.

In response to questions on the legislatively drawn Highlands boundaries, Zellner repeated Chairman of the Senate Environment Committee and Highlands Legislative sponsor Bob Smith's comments that the boundary lines would not be altered "legislatively" until the regulatory process had a chance to work. However, Zellner suggested that the boundary lines between planning and preservation areas might be "harmonized" through regulatory modifications.

Land acquisition funding for land preservation in the Highlands Region is a continuing challenge according to Zellner. In response to questions, he explained that funding in addition to Green Acres could come from the Transfer of Development Rights (TDR) bank; SADC funds, and an increase in the state water tax if that is approved by the Legislature.

Additionally, on September 22, 2005, the Senate Environment Committee took testimony on implementing the Highlands Act. DEP Commissioner Campbell provided substantial testimony on the Highlands Act and his plans for its future throughout the state. He informed the Committee that the Highlands Council would need more funding to appropriately shape growth, maximize efficiency and appropriate land use within both the planning and preservation areas. He considers the DEP regulations and the Act itself to be a success, with the only failure on the part of the DEP and the Highlands Council being communication failures with land owners and municipalities regarding the legal and appropriate use of land. With regard to pending litigation pertaining to the scientific criteria within the Highlands Act, Campbell asserted that the science behind the criteria was not suspect and the right decisions were made by the DEP with regard to the criteria. Mr. Campbell strongly asserted that the DEP had no intention of suggesting any legislative changes to the Highlands Act before the adoption of the Regional Master Plan in June, 2006.

In addition to Mr. Campbell, Adam Zellner and Council Chairman John Weingart also testified. Mr. Weingart, like Mr. Campbell, emphasized that there was no need to amend the Highlands Act until the Regional Master Plan had been adopted. He stated that the Council was on schedule with regard to the Master Plan and that it would be ready for comment in February, 2006. He likewise stated that the Council was in need of a stable source of

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The U.S. Supreme Court Authorizes the Taking of Private Property for "Revitalization" Projects

By John J. Abromitis, Esq.

The Fifth Amendment to the United States Constitution grants the government the power of Eminent Domain. Essentially, the "Takings Clause" of this Amendment permits the government to take private property for a "public use." What constitutes a public use has been the subject of many United States Supreme Court decisions, including the recent decision in *Kelo v. City of New London*.

Nationwide, more than 10,000 properties were threatened or condemned between 1990 and 2002, according to the Institute for Justice, which is a Washington public interest law firm that represented the New London homeowners. In *Kelo*, the City of New London approved a development plan that was projected to create in excess of 1,000 jobs, increase tax and other revenues, and revitalize the economically distressed City, including the downtown and waterfront areas. The City determined that the area at issue was sufficiently distressed to justify a program of economic rejuvenation. To effectuate this plan, the City invoked a state statute that specifically authorized the use of Eminent Domain to promote economic development. Accordingly, the City purchased properties located in the distressed areas from willing sellers, and proposed to use the power of Eminent Domain to acquire the remainder of the properties from unwilling owners in exchange for just compensation.

The neighborhood affected included Victorian-era houses and small businesses. Among the homeowners in the area was a couple in their 80's who had lived in the same home for more than 50 years. Certain homeowners in the affected area, led by Mrs. Kelo, challenged the attempted taking, alleging it to be in violation of the Takings Clause of the Fifth Amendment. The *Kelo* plaintiffs argued that the taking of the properties was not for "public use," as the plan would essentially transfer ownership of the properties to other private landowners. That is, the City intended to transfer the properties taken to private developers to "revitalize" the area. The *Kelo* plaintiffs asked the Court to adopt a "bright line rule" that economic development does not qualify as a public use, and therefore the taking of their properties violated the "public use" restriction of the Fifth Amendment.

The Supreme Court recognized that the government cannot take land from a private owner solely to confer a private benefit on a different private party, because this would serve no legitimate purpose of the government. Similarly, the Court recognized that the government cannot take property under the mere pretext of a public purpose, if the actual purpose is solely to bestow a private benefit.

Notwithstanding the above, the Supreme Court refused to adopt a bright line rule that economic development cannot qualify as a public use. The Court held, in part, that the government may transfer taken property from one private party to another if future "use by the public" is the purpose of the taking. The Court recognized that the government's pursuit of a public purpose will often benefit individual private parties, but this fact alone does not render a taking unconstitutional. The issue thus became whether the City of New London's development plan served a "public purpose" within the meaning of the Takings Clause of the Fifth Amendment to the United States Constitution.

In upholding the *Kelo* taking, the Court held that the City of New London's condemnation was for a "public use" since it sought to revitalize the City. As such, the Court held that the City was justified in evicting the group of homeowners from their properties to make way for the private development proposed, which included a hotel and a Pfizer Corporation office.

According to the residents who filed suit in the *Kelo* case, seven states allow condemnations for private development, and eight states expressly forbid such condemnations. Certainly, the remaining states that have not yet addressed the issue will look to the *Kelo* decision in determining whether to allow for such condemnations in the future. ❖

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funding for land acquisition, and that it was in favor of a water fee of $0.4 per 10,000 gallons to fund land acquisitions. He anticipated that town master plans would be able to be adopted after the DEP Regional Master Plan in June, 2006.

He acknowledged that the Municipal Stabilization Board had received complaints regarding the impact of the Act on the values of certain property and that there had been a number of tax appeals in Passaic County with regard to the devaluation of properties located within the Highlands preservation area. Zellner noted that there were 37 projects currently in the acquisition process, and mentioned specifically that a 16 unit subdivision and another single family redevelopment project, both in Chester, were both under review.

Representatives from Hunterdon and Warren County also testified regarding their concerns and objections to the Highlands Act. They stated that the Act cannot be permitted to interfere with county and municipal obligations under Council on Affordable Housing ("COAH") laws. They also argued that the Act should not bifurcate planning and preservation areas and that the proposed water fee for land acquisition was totally inadequate and would only yield $11 or $12 million in revenue.

The Chairman of the Environment Committee, Senator Bob Smith, was clear in his support for the Act and his understanding that the success and effectiveness of the Act, and related regulations, and the Highlands Council itself were dependent upon adequate funding. ❖

Time of the Essence Cleans Up Its Act

By Edward S. Nagorsky, Esq.

Part I

Once again, our New Jersey Courts have addressed the use of Time of the Essence notices in a real estate closing transaction.

In *Marioni v. 94 Broadway, Inc.*, 374 N.J. Super. 588 (App. Div. 2005), the Court was called upon to decide whether a Time of the Essence notice sent by the owner of property would terminate the rights of the contract buyer and permit the owner to sell to a third party. This case is further complicated due to the length of time that the contract was pending and outstanding corrective issues.

In 1998, the Plaintiff entered into a contract to purchase residential property from the Defendant for $170,000. As many contracts provide, the property was to be vacant and in "broom-clean" condition at the time of closing. Apparently, the owner had considerable problems in evicting his tenant and was in no position to close for approximately two years. In October 2000, after the tenant had been removed, the parties' attorneys discussed the property's condition and the fact that it contained extensive amounts of debris. Despite the contract's requirement that the property be turned over at closing in broom-clean condition, the Seller stated that the property was available "as is," feeling that since the contract froze the price for over three years, necessitating the expenditure of thousands of dollars in obtaining possession of the property since that time, the Seller was unwilling to expend any further monies in the sale of the property. At the same time, the Seller attempted to make Time of the Essence by notifying the Buyer that if he did not close by the date set in the notice, the Seller would "take all appropriate action." The attorney for the Buyer responded by reiterating his client's position that the contract required the Seller to turn over the property at closing with all debris removed.

After the closing date passed without a closing, the Seller's attorney returned the Buyer's deposit, advising him that the Buyer had breached the contract by failing to close title pursuant to the notice. The attorney for the Buyer sent back the deposit check and again explained the Buyer's position that the contract required the premises to be conveyed in broom-clean condition. Subsequently, the attorneys reached an agreement on behalf of the parties to resolve the dilemma, agreeing that the closing would occur in January 2001 and that a credit would be given for the cleanup of the property.

Unknown to the Buyer, the Seller, through a different attorney, was negotiating to sell the property to a third party. Indeed, the property was sold to that third party in December 2000, a fact which the Buyer learned only when he appeared for closing on the agreed-upon date and time.

> *Unknown to the Buyer, the Seller, through a different attorney, was negotiating to sell the property to a third party.*

The Court first examined whether a closing date had legitimately been set by the Seller so that a failure on the part of the Buyer to appear and close at that time would constitute a forfeiture of his contractual rights. It was clear that the contract itself did not contain a Time of the Essence closing date. Instead, the contract language contained the usual provision that "the closing date cannot be made final at this time," but the parties agree to "make the estimated date for closing" for 45 days from the date of execution of the contract. With respect to the actual notice given, the Court held that, to be valid, a Time of the Essence notice should use the phrase "Time of the Essence" and unequivocally state the date for closing as well as a time and place for closing. The Court did, however, note that when a specific time is also included with a valid notice of a Time of the Essence closing, performance at that precise time will be required and even a minor delay will cause a forfeiture of a party's right to obtain its benefit of the bargain. Since the Seller made no attempt to perform at any time on the Time of the Essence closing date, the rule was not satisfied by the Seller.

The Court also addressed the fact that a contracting party must give reasonable notice of the closing date, "which must bear a reasonable relation to the time already passed." In other words, the Court must assess the delay that preceded the Time of the Essence notice as well as the prejudice to the noticing party of any further delay beyond the date for closing contained in the notice. Here, the Seller gave no indication that he would be prejudiced by a reasonable delay beyond the November closing date which the Seller unilaterally chose; in fact, the Seller's later willingness to postpone the closing date to January 2001 suggested that a later date would have been equally reasonable. More importantly, the Court held that the fact that approximately two years had elapsed from the execution of the contract until the point in time when the Seller secured the removal of the holdover tenant and was finally prepared to perform the contract made it "highly questionable" whether it was reasonable for the Seller to compel a closing date at the expense of the Buyer's forfeiture of his contract rights for failing to comply. In any event, the Court found that it was unnecessary to determine the reasonableness of the notice since it concluded that the Seller was unwilling, at the time of the noticed closing date, to perform as he had promised in the contract and that, even if the November closing date was reasonably noticed and reasonably fixed, the Seller waived the Buyer's failure to perform at that time by negotiating a resolution of the dispute about the Seller's performance and accepting a new closing date.

In our next issue of Sidebar, we will continue with the Court's analysis of how "clean" is "broom" clean.

Please visit us at our website, ckclaw.com, for further updates on recent New Jersey law, especially the ever-changing role that the new Highlands Act will have on Northwest New Jersey development. ❖

Firm Directory

John J. Abromitis
Murray E. Bevan
Charles Alex Castle
Lawrence P. Cohen
Jim Courter
Richard A. Giuditta, Jr.
Jason P. Gratt
Kevin M. Hahn
Joel A. Kobert
James F. Moscagiuri
Amanda L. Mulvaney
Edward S. Nagorsky
Michael S. Selvaggi
Marysol Rosado Thomas
Howard A. Vex
Anthony J. Zarillo, Jr.

Of Counsel
Christine V. Bator
Peter J. Cossman
Kimarie Rahill McDonald
Hon. Harry K. Seybolt, J.S.C. (Ret.)

1001 Route 517
Hackettstown, NJ 07840
Tel. (908) 852-2600 • Fax (908) 852-8225

172 West State Street
Trenton, NJ 08608
Tel. (609) 656-1330 • Fax (609) 393-1990

23 Cattano Ave.
at Chancery Square
Morristown, NJ 07960
Tel. (973) 285-1281

48 Trinity Street
Newton, NJ 07860
Tel. (973) 875-0046

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People in the News

Lawrence P. Cohen recently addressed the combined Land Use and Municipal Law Sections of the Morris County Bar Association on updates and recent litigation involving the landmark Highlands Protection Act, which affects substantial lands in Morris, Warren and Hunterdon Counties. Mr. Cohen received a favorable decision from the Court involving a challenge to the constitutionality of a provision of the Highland's Act.

Murray E. Bevan, Richard A. Giuditta, Jr. and Anthony J. Zarillo, Jr. successfully represented SBC Communications in their acquisition of A T & T. The New Jersey Board of Public Utilities approved the $16 Billion merger without condition on August 17, 2005.

John J. Abromitis was inducted into the Hackettstown Rotary Club on October 4, 2005.

Amanda L. Mulvaney has joined the firm's Labor and Employment Department as an associate. Mrs. Mulvaney graduated from Rutgers Law School - Newark in May 2005 and passed the July 2005 Pennsylvania and New Jersey bar exams. Mrs. Mulvaney received her Bachelor's Degree in Business Administration from William Paterson University in 2000. Prior to attending law school, Mrs. Mulvaney worked as a Human Resources Manager for several years at the CPA firm Rothstein, Kass & Company, P.C.

Murray E. Bevan is serving on the Morris and Sussex County Committee for the American Heart Association Annual Gala for April 2006.

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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Courter, Kobert & Cohen, P.C.
1001 Route 517
Hackettstown, New Jersey 07840