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COMMERCIAL REAL ESTATE NEWSLETTER

TIMING IS EVERYTHING WHEN FILING A LIEN

a Law Division decision Mansion Supply Company v. Bapat, 293 N.J. Super. 253 (Law Div. 1996) holding that potential lien claimants had a total of 130 days in which to file a Construction Lien in the residential construction context.

In all residential construction contracts, New Jersey's Construction Lien Law mandates that a demand for arbitration must be filed simultaneously with a NUB; that the arbitrator has thirty days to determine the validity of the claim; and that the claimant has another 10 days in which to file its actual Construction Lien.

The plaintiff in the *Mansion Supply* case was a supplier of windows and other building products. The plaintiff delivered approximately \$30,000.00 in materials to a contractor

that was building defendants' single family residence. The plaintiff, seeking to perfect a lien claim against defendants' property, filed a NUB and a Construction Lien simultaneously with a demand for arbitration with the American Arbitration Association. The arbitrator found that the plaintiff's time to file a lien had expired under the 90-day time limit mandated by the Lien Law. After the arbitrator's ruling, the plaintiff appealed to the Superior Court of New Jersey, Law Division.

The trial court, because of the statutory delay in time between the accrual of a lien claimant's potential claim and the time in which it may file its actual Construction Lien, held that all liens need to be filed within the ninety day window stated in N.J.S.A. § 2A:44A-6, *except those stemming from residential construction contracts.*"

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In a recently published decision, New Jersey's Appellate Division held that the filing of a Notice of Unpaid Balance and Right to File Lien ("NUB") does not extend the time in which a contractor may file a Construction Lien on a residential construction project under New Jersey's Construction Lien Law (the "Lien Law").

In Mansion Supply Company v. Bapat, 305 N.J. Super. 313 (App. Div. 1997) Judge Kimmelman wrote the opinion for a unanimous panel, reversing

COURT ENCOURAGES AFFORDABLE HOUSING CONSTRUCTION

In *Livingston Builders, Inc. v. Township of Livingston*, 309 N.J. Super. 370 (App.Div. 1998) the facts of the case are as follows. Short Hills West is the owner of a 9.9 acre parcel in the township, currently zoned R-1, and was one of several developers that instituted *Mount Laurel* exclusionary zoning suits and sought builders remedies that would entitle them

to rezoning to build their proposed developments.

The township negotiated a tentative settlement. The township's "fair share plan" contemplates construction of 193 units of moderate- and low-cost residential housing. The Short Hills parcel is one of the properties to be rezoned in conformity with the amended plan to create "realistic development po-

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Housing

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tential.” The site is adjacent to a medical center, and the plan contemplates its use for 125 assisted living units for senior citizens and a 60,000-square-foot office building.

The trial court scheduled a “fairness hearing” at which an expert witness testified in favor of the proposed settlement and recommended that the Short Hills developer set aside 19, rather than 11, assisted living units for low- and moderate-income residents and pay a development fee of one percent of the assessed valuation of the office building.

An association of area residents presented the testimony of an expert who approved of the assisted living housing units and the set-aside, but felt there was no rationale for including the office building, although the fee paid by the developer could contribute to satisfying the municipality’s fair share obligations.

The court entered an order approving the township’s calculation of its fair share obligation and the settlements with other developers, conditioned on certain modifications and on adoption of appropriate ordinances, and stated that final judgement would be entered after the conditions are met and after resolution of issues concerning the Short Hills site.

Later, however, the court entered an order rejecting the Short Hills proposal because of the office

building. The court invited the Short Hills owner to present an agreement providing only for the residential development, not contingent on the rezoning for the office building, essentially stating that the subdivision of the lot and rezoning for commercial use could be decided in separate proceedings. Short Hills appealed.

Holding. The appeals court held in favor of the developer that the lower court should have approved the agreement as submitted. Stating that the fairness hearing was not the proper forum for adjudicating the planning and zoning issues raised by the proposed office building, the court noted that if the agreement had been approved, the approval would have been conditioned on passage of ordinances to implement the agreement. Opponents could then challenge the proposed ordinances before the governing body.

Acknowledging the need for a fairness hearing because settlements affect the rights of parties not before the court, the court stated that a *Mount Laurel* settlement should be approved if it is shown at the hearing that the settlement adequately protects the interests of lower-income persons on whose behalf the affordable units are to be built.

The court noted that in this case there was no challenge to the township’s determination of its fair share, that the proposed development would create 19 units toward that obligation, that 19 units plus the development fee are an appropriate set-aside for the proposed development, and that there is a high probability that the units will actually be constructed.

How the township rezones property once it meets its fair share obligation is not at issue, according to the court, so it was improper for the trial court to veto the plan because it believed that the land could support more housing if the owner chose to build more housing. The court noted that neither a court nor a township can command construction of affordable housing and that it is up to the township to decide what inducements are necessary to motivate such construction.

Rejecting an argument that the proposed settlement would constitute illegal contract zoning, the court stated that contract zoning occurs when an owner contracts to make use of property in contravention of the zoning ordinance without complying with statutory procedures. This case involves revision of the master plan, public hearings, and rezoning.

Court should approve proposed settlement in *Mount Laurel* litigation when it includes conditions reasonably calculated to result in the construction of municipality’s fair share of affordable housing

LEGISLATIVE UPDATE

Great Swamp municipalities would be exempted from uniform residential site improvement standards in order to allow the exercise of “the necessary flexibility to respond to the unique needs of the watershed

when making land use decisions”, says the legislative statement accompanying A-2148. The exemption would apply to “any portion of a Great Swamp municipality lying within the Great Swamp watershed” (defined to include Bernards Township, Bernardsville Borough, Chatham

Township, Harding Township, Long Hill Township, Madison Borough, Mendham Borough, Mendham Township, Morris Township or Morristown Town). Each Great Swamp municipality would be required to adopt its own residential site standards within 180 days, which would then supersede all other such

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Lien*(Continued from page 1)*

The Appellate Division disagreed with the trial court's construction of the statute, opting instead for a stricter construction of the Lien Law's language. As the appellate court noted, N.J.S.A. § 2A:44A-20(e) "provides that the filing of a NUB 'shall not constitute the filing of a lien claim . . . nor does it extend the time for the filing of a lien claim in accordance with the provisions of this act.'"

In addition, the appellate panel stated that it interpreted the "plain language" of the Lien Law to be that: (1) All lien claims must be filed within ninety days after the last material was furnished; and (2) in the instance of residential construction contracts, the lien claimant *must also* comply with sections 20 and 21 of the Act

which set forth certain requirements concerning filing construction liens in residential construction contracts.

Although the appellate court stated that the language of the Lien Law was "not worded with the utmost clarity," it held that there was no indication in the statute of an "intent by the Legislature that the ninety-day window within which a lien claim may be filed should be extended when residential real estate is involved."

As the *Mansion Supply* court stated, "[a]ll conditions precedent to the filing of a lien claim on a residential project, as prescribed by N.J.S.A. § 2A:44A-21(b)(1), must be satisfied in a sufficient time to comply with the ninety-day window set by N.J.S.A. § 2A:44A-6." As such, the *Mansion Supply* court noted

that it would behoove a lien claimant in the residential construction context to have its NUB filed *not later* than 50 days after the last work performed or the last delivery of materials.

Whether analyzing a residential Construction Lien issue from the side of the lien claimant or the side of the property owner, the *Mansion Supply* case is important to remember. Because of the Lien Law's tight time frames, which are now made even tighter by the *Mansion Supply* court's interpretation of the Lien Law statute, there is very little room for error in the filing of a NUB on a residential construction project. Moreover, the residential property owner, or its counsel, must be aware of this important decision if a NUB or construction lien issue arises.

Kurt Senesky has recently joined the firm of Schenck, Price, Smith & King.

SPS&K REAL ESTATE DEPARTMENT ON THE MOVE

Kurt Senesky has recently joined the firm of Schenck, Price, Smith & King. Kurt graduated from Amherst College in 1966 and obtained his Juris Doctor degree from Rutgers Law School (Newark) in 1969, after which he was the judicial clerk for the late Hon.

Arthur S. Meredith, Somerset County Assignment Judge. He was formerly a partner of the firm of Piton, Senesky, Selitto and Oller and the managing partner from 1990 through 1998, when the firm dissolved due to the sudden death of its senior partner, Ronald Pitman,

Esq. Kurt is the attorney for the Planning Board of Byram Township and for the Zoning Boards of Adjustment of Florham Park, Jefferson, and the Town of Dover. He also has an active residential real estate and matrimonial practice. We welcome Kurt.

Swamp*(Continued from page 2)*

standards. The bill was introduced on June 1, 1998, and was released by the Assembly Environment Committee on September 17, 1998. It is now on second reading in the Assembly and is identical to S-1278.

This bill, with certain exceptions, would hold appli-

cations for development harmless from changes in development regulations, whether adopted or implemented at the state, county, or municipal level, which requires development applications to be reviewed under rules and ordinances in effect upon certifications of applications as complete. The changes do not apply if the changes occur after a

development has been certified complete pursuant to section 5 of P.L. 1984, c. 20(C.40:55D-10.3) or if the changes occur after the date on which the hearing on the initial application begins before any municipal planning, board or zoning board of adjustment, whichever occurs earlier.

An application for
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Swamp

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development shall not be subject to the hold harmless provisions of the bill under certain enumerated circumstances, namely: the exemption of that project would violate a mandatory requirement of an applicable federal law, rule, or regulation, or would violate a State rule or regulation that requires federal approval; there would exist a clear and imminent danger to the health of the inhabitants rights for the development have expired; the developer elects, at the developer's sole option, to be subject to the rule, regulation, ordinance or resolution; or the development is a planned development for which general development approval is required.

A-2371, which was introduced on September 14, 1998, increases the period of validity of construction permits to five years. Construction permits which have already been issued would expire on the fifth anniversary of the adoption of the bill. The bill would require submission of evidence, on an annual basis, that work on the project

amounting to not less than 20% of the estimated cost of the improvement (as set forth on the construction permit) has been completed. The bill also requires that a certificate of occupancy be obtained within 180 days of the expiration of the construction permit. In the event sufficient work has not been performed, or a certificate of occupancy has not been obtained, the bill requires immediate notification to the municipal governing body, which may exercise its police powers to repair, demolish or close the building

*** A-511 (Zecker/Kelly)**

This bill establishes uniform administrative practices and procedures for MUA's in the management of developer's escrow accounts and performance guarantees. A-511 was unanimously released with amendments which were previously worked out and agreed to by the legislators, builders, engineers and the authorities.

The bill now goes to the full Assembly for consideration and will be forwarded to the Senate to be merged with the Senate counterpart, S-667 (Inverso).

*** A-2123 (DiGaetano) and S-936 (Clesia)**

This NJBA legislative initiative amends the MLUL to require the administrative officer of a municipality must act on a request for a zoning permit within 5 business days of receipt of such a request. It further provides that the failure of the zoning officer to respond within the time frame will result in automatic approval of the zoning permit. The bills were released from committee by a 4-0 vote (Assemblyman Arnone, Kelly, Biondi, and Luongo voted yes while Assemblyman Green and Tucker abstained). The bills will now go to the Assembly for a floor vote.

The members of the **Schenck, Price, Smith & King, LLP** commercial real estate section would be pleased to answer any questions regarding the matters presented in this issue of the **SPS&K Commercial Real Estate Letter**. Questions may be addressed to any of the following attorneys in the commercial real estate section:

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