

Message from the Co-Chairs

NOT JUST THE NUTS AND BOLTS



Benjamin Weinstock



Eric C. Rubenstein

The successful handling of a diverse real estate portfolio on behalf of our clients requires not only the unrelenting attention to detail, but foresight and creativity in structuring and closing complex transactions. In this issue we discuss the recent \$200 million sale of EAB Plaza handled by this firm. Articles also analyze key recent New York court decisions applying new standards in granting or rejecting zoning variance applications. We also explain the ins and outs of buying properties in foreclosure or bankruptcy (a burgeoning area).

Whether it's efficiently closing a basic purchase, sale, lease or financing, or structuring a complicated transaction involving hundreds of millions of dollars, we are prepared to vigorously represent our clients. Contact either one of us if we can be of assistance.

OBTAINING ZONING VARIANCES IN A CHANGING LEGAL LANDSCAPE

By David P. Leno

The standard of proof required to obtain an area variance has changed dramatically over the past fifteen years. Striving to give zoning boards maximum discretion, early case law held that a homeowner must prove conclusively that extreme circumstances or practical difficulties exist that warrant variance relief. Looking to allow landowners more control, the 1991 revision of the Village Law introduced a balancing test that weighs equally the discretion of the zoning board and the right of the individual landowner. Now, the courts are interpreting the 1991 amendment of Village Law Section 7-712-b as an attempt by the legislature to standardize the variance review process by imposing statewide criteria, regardless of local zoning ordinances.

The recent cases of *Cohen v. Board of Appeals of the Village of Saddle Rock*¹ and *Russo v. Board of Appeals of the Village of North Hills*² establish the boundaries of a local zoning board's authority. These cases confirm that in light of Village Law §7-712-b, applicants need not demonstrate "practical difficulty" in order to obtain area variances even if required by the local zoning code.

In *Cohen*, the landowner submitted an application to construct a single-family home on an unimproved oceanfront lot. Because of lot coverage and set-back requirements, the application was rejected and the landowner appealed to the local board of zoning appeals for relief. The board denied the appeal on the grounds that the applicant did not demonstrate "practical difficulties" or "undue hardship" in complying with the existing zoning requirements as set forth in the zoning code. The applicant commenced a CPLR Article 78 proceeding questioning the validity of the "practical difficulty" and "undue hardship" standards found in the village code and arguing that these standards had been preempted by the revised New York State Village Law §7-712-b. The Appellate Division affirmed the decision of the Supreme Court, which ruled to invalidate the section of the local zoning code utilizing the now out-of-date standards and remanded the matter for reconsideration consistent with Village Law § 7-712-b.

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¹ In the Matter of Jack Cohen v. Board of Appeals of the Village of Saddle Rock, 100 N.Y.2d 395, 764 N.Y.S.2d 64 (July 2, 2003).

² In the Matter of Frank Russo v. Irving Black et al., constituting the Board of Appeals of the Village of North Hills, 100 N.Y.2d 395, 764 N.Y.S.2d 64 (July 2, 2003).

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EXCELLENCE. PERIOD.

BUYING PROPERTIES OUT OF FORECLOSURE OR BANKRUPTCY

By Jeffrey A. Wurst, Shalini Vohra and Moshe Jacobowitz

Buying properties out of foreclosure and bankruptcy may present profitable opportunities for real estate professionals. However, purchasers should be aware of various statutory requirements and unique business risks prior to investing in distressed properties.

A foreclosure sale is effectuated by an auction or public sale so as to produce the best possible sale price. Generally, prior to the foreclosure auction, a prospective purchaser does not have the opportunity to conduct a thorough inspection of the property. The property is sold "as is" and the purchaser does not have the opportunity to negotiate the terms of sale.

The property is sold at foreclosure "free and clear of liens" which are junior in priority and which were subject to proper notice. Thus, a prospective purchaser should undertake a thorough review of public records prior to bidding at a foreclosure sale. This will allow the prospective purchaser to determine whether the sale is being properly conducted and whether any liens will remain against the property after its purchase out of foreclosure.

The prospective purchaser should also review court documents to ensure that all parties with an interest in the property have been named and have been served proper notice. For example, in the event that the property being foreclosed is occupied by a tenant or subtenants, the buyer should review the court documents to see if the tenant and all subtenants have been named as parties. If the plaintiff/mortgagee failed to join anyone in possession of any portion of the property, the successful bidder may need to start additional lawsuits to obtain possession.

A prospective bidder at a foreclosure sale should also be aware that liens in favor of governmental entities, such as federal income tax liens, real estate tax liens, and certain environmental liens are "super-priority" liens and must be satisfied either out of the purchase price or otherwise borne by the purchaser. Taxes and assessments that were liens on the property at the time of sale are often satisfied out of the purchase price. The successful bidder should ensure that the referee conducting the auction allocated sufficient funds for the satisfaction of the liens from the purchase price. Additional tax liens placed on the property subsequent to the auction sale but prior to the delivery of the deed are also borne by the purchaser.

If property is acquired through a foreclosure of the first mortgage, all junior mortgages on the property are deemed removed as of record from the property provided that the junior mortgages are properly named and served in the foreclosure action.

However, if the purchase is accomplished through a sale conducted by a second mortgagee, the first mortgage lien continues as against the property and must be satisfied (or otherwise dealt with) by the purchaser.

Often on the eve of the foreclosure sale, the property owner will file a petition for relief under the Bankruptcy Code, effectively staying the foreclosure sale. Speculators who bid at foreclosure sales on a regular basis are aware of this possibility, which explains why they often do not invest the time or resources for proper due diligence prior to appearing at the foreclosure auction.

Once a bankruptcy proceeding is commenced, the mortgagee has two options. The first is to file a motion to seek relief from the automatic stay. The second option is to commence a dialogue with the bankruptcy trustee or the debtor to conduct a sale of the property under the aegis of the Bankruptcy Court. If the debtor has no equity in the property, the automatic stay should be lifted and the mortgagee may recommence or continue the foreclosure process. However, if the debtor has equity in the property, then the sale (should one occur) is conducted pursuant to the Bankruptcy Code.

A sale conducted pursuant to the Bankruptcy Code has its own risks. In theory, under Section 363 of the Bankruptcy Code, the property is sold "free of liens, claims and encumbrances" with such liens, should they exist, attached to the proceeds of sale. As a result, the purchaser is deemed to have obtained the property with a clean financial bill of health. However, after placing a bid, the purchaser is deemed to have knowledge of the condition of the property, and cannot rescind the contract or obtain a refund because of unexpected conditions associated with the property.



Jeffrey A. Wurst



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The *Russo* case followed a similar course as *Cohen*. The homeowners submitted a building department application to construct an 11-foot iron gate in their driveway. As in *Cohen*, the permit was denied based upon the height restriction in the building code for the Village of North Hills and an appeal ensued. The variance request was denied based upon applicants' failure to prove "practical difficulties" and "undue hardship." After the Supreme Court found in favor of the applicants, the Appellate Division affirmed the decision, citing its contemporaneous decision rendered in *Cohen*.

The Court held in both *Cohen* and *Russo* that a balancing test for reviewing variance applications set forth in Village Law § 7-712-b superseded contradictory local laws. That balancing test set forth five factors that need to be considered for review. These factors include a review of (i) potential undesirable changes in the character of the neighborhood; (ii) whether the benefit sought can be achieved in another manner; (iii) whether the variance is substantial; (iv) whether an adverse effect on the environment will be created; and (v) whether the need for the variance was self-created.¹ This revision was intended to remove the requirement of proving "practical difficulties" as a prerequisite to variance approval.

In *Cohen* and *Russo*, the Court of Appeals confirmed that, with the revision of Village Law § 7-712-b, zoning boards were instructed to disregard the practical difficulties standard and apply the new five factor balancing test established by the legislature. These decisions are important because courts were slow to acknowledge or apply the new statutory framework and had largely confirmed the decisions of local boards utilizing the old standards, citing the lack of express preemption lan-

guage in the revised Village Law. Local Boards felt that the Village Law revision was simply a guide and not the rule and courts largely upheld the local zoning determinations. However, the decisions in *Cohen* and *Russo* courts have confirmed that the legislative intention of the revision of the Village Law was to bring a measure of consistency to the variance application and review process and to avoid confusing landowners and developers by creating patchwork regulations throughout the state.

On a practical level, the *Cohen* and *Russo* decisions eliminate the burden of an applicant having to prove that there is no other way to achieve the relief desired without significant cost or effort. An applicant need only demonstrate that the criteria set forth in Village Law 7-712-b are met in order to obtain an area variance.

Whether at the local administrative level or in the courts, applicants and opponents alike need to be made aware of fast changing developments in the zoning arena in order to maximize their chances of success.

¹Village Law § 7-712-b.

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RECENT NOTEWORTHY DEAL

Eric Rubenstein, Patricia Schaubek and Moshe Jacobowitz represented the owner of EAB Plaza in the recent sale of this landmark Long Island property for approximately \$200 million, reportedly the largest one-site real estate transaction in Long Island history. Ruskin Moscou successfully overcame numerous challenges to close this sophisticated sale and ground lease assignment, including the defeasance of an existing \$130 million securitized loan, negotiating with Nassau County and major corporate tenants involving consents and estoppel certificates, and preserving a \$30 million judgment in favor of the owner involving overpayment of real estate taxes. By focusing on key lead time issues early in the transaction and maintaining an unwavering focus on the client's interest, Ruskin Moscou succeeded in closing this complex transaction approximately ninety (90) days from contract.



BUYING PROPERTIES OUT OF FORECLOSURE OR BANKRUPTCY

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Therefore, a prospective purchaser of property conducted through a bankruptcy auction should be aware that "free and clear of liens" does not mean that the property will be free and clear of covenants or easements that run with the property or free of environmental contamination or municipal code violations.

In conclusion, investing in distressed properties has its own share of unique risks; however, if managed properly by a real estate professional and if attendant legal issues are resolved by competent counsel, those risks can be minimized and favorable outcomes achieved.

Abridged from New York Law Journal article, September 22, 2003

Mr. Wurst is the Chair of the Financial Services, Banking and Bankruptcy Department at Ruskin Moscou Faltischek, and Ms. Vohra is an associate in that department. Mr. Jacobowitz is an associate in the Real Estate Department.



ABOUT THE FIRM

Founded in 1968, Ruskin Moscou Faltischek, P.C. has grown into one of the most respected and largest multi-practice law firms in the New York metropolitan area and is headquartered in Uniondale, New York. With over 60 attorneys in 18 practice areas, the firm offers innovative legal services, keeping focus on the client's goals, in the areas of corporate & securities, corporate governance, employment, energy, environmental, financial services, banking & bankruptcy, health law, intellectual property, life sciences, litigation, municipal & regulatory affairs, real estate, construction, seniors' housing, technology, trusts & estates, and white collar crime & investigations. Clients include large and mid-sized corporations, privately held businesses, institutions and individuals.

The *Real Estate Law Update* is published to provide clients, colleagues and friends of Ruskin Moscou Faltischek, P.C. with information about developments in real estate law matters. It is not a substitute for legal advice and should not be construed as imparting legal advice generally or on specific matters.

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