

Testimony Submitted by
Judy F. Berkman, Senior Counsel
Regional Housing Legal Services
to the Pennsylvania Senate and House Democratic Policy Committees

Hearing on Abandoned and Blighted Property Conservatorship
March 26, 2021

Thank you, Senator Muth and the Members of the Pennsylvania and House Democratic Policy Committees. This hearing is a welcome opportunity to acknowledge the success of Act 135, the Pennsylvania law governing the process known as conservatorship of blighted and abandoned property.

I am Judy Berkman, Senior Counsel at Regional Housing Legal Services (“RHLS”). RHLS is a nonprofit law firm with unique expertise in affordable, sustainable housing and its related components — community and economic development, utility matters and preservation of home ownership. RHLS provides innovative project and policy solutions that help create sustainable communities offering decent, safe and affordable housing for lower-income Pennsylvanians.

The legislative purpose of Pennsylvania’s new Abandoned and Blighted Property Conservatorship Act, which took effect on February 1, 2009 and which was amended in 2014, is to “[p]rovid[e] a mechanism to transform abandoned and blighted buildings into productive reuse [which] is an opportunity for communities to modernize, revitalize, grow, and improve the quality of life for the neighbors.” The statute uses police power language to justify the creation of a mechanism to combat blight by providing further that “[i]f the owner of a residential, commercial or industrial building fails to maintain the property in accordance with applicable municipal codes or standards of public welfare or safety, it is in the best interest of the Commonwealth, the municipality and the community for the court, . . . to appoint a conservator to make the necessary improvements before the building deteriorates further.” Succinctly stated, the law provides that the conservator is responsible for bringing buildings into municipal code compliance when owners fail to do so.

Since the enactment of the law, conservatorship under Court supervision has become an important tool to eliminate blight in Philadelphia. The numbers of conservatorship cases filed in the Philadelphia First Judicial District is growing exponentially. The law is comprehensive, as it can be used to revitalize property in a residential neighborhood, commercial corridors and industrial areas. Entering the process is flexible, since many different interested parties, including non-profits and adjacent homeowners and businesses, can petition the Court to establish a Conservatorship. Petitioners with development capacity may seek to be appointed as Conservator, and others may recommend a neighborhood non-profit Community

Development Corporation or a for-profit developer. It is important to recognize that Conservatorship is only one tool that is available to remove blight from neighborhoods and that more traditional tools for returning properties to productive use (including condemnation, tax sales, and code enforcement actions) may be more appropriate in some circumstances.

Regional Housing Legal Services is in the process of revising its Implementation and Best Practices Manual on how to use the Conservatorship Act. I will provide a link to the new manual when it is completed. The original Manual is available on the RHLS website: <http://www.rhls.org/2011/12/conservatorship-law-manual/> The Manual includes extensive guidance on how to use the law. The Appendix contains a copy of the current law, as well as the First Judicial District of Pennsylvania Court of Common Pleas of Philadelphia County General Court Regulation No. 2009-01 (as amended October 18, 2010) (with Model Forms) that was the result of a working group of attorneys that met with Court personnel to develop the procedures. I am currently working with the First Judicial District to update the General Court Regulation, as well as the Manual. I have also participated in numerous trainings for attorneys, and for-profit and non-profit developers, on how to use the law, and have worked with Licenses and Inspections to identify sample properties for Conservatorships.

As a result of the RHLS Implementation and Best Practices Manual and our involvement in trainings on the Conservatorship law, I am contacted on a regular basis by attorneys, individuals, and non-profit and for-profit developers with questions about whether the blighted property in their neighborhood is a good candidate for a Conservatorship. I have also represented a non-profit community group that intervened in one conservatorship case and I have been observing another case.

I have also observed some issues that are potential obstacles to Conservatorships for many of the blighted properties I have been consulted on. Some of these issues may have Pennsylvania legislative solutions.

Service of Process. When Act 135 was new, Philadelphia's First Judicial District convened a group of stakeholders to establish local Court rules governing Conservatorship petitions. Title insurance company underwriting attorneys were key members of the group. While Act 135 provides for service of process by certified mail, return receipt requested, the title company attorneys insisted that they would not insure title after a conservatorship case unless the Petition was served in accordance with Pennsylvania Rules of Civil Procedure.

Service of process is also imperative for out-sales after conservatorships when the record owner is a trust, a defunct non-profit, or a decedent's estate. The Orphans' Court will want to be assured that all parties were served with the Petition at the beginning of the case.

Notice.

Cover Page. In addition, the notice required by the Philadelphia Court's local rules provide that the cover page for the Petition include language notifying the

Respondent that property rights could be lost. This language heightens the importance of the notice to a property owner.

Posting Notice on the Property. Also, in Philadelphia, the local Court rules require posting of this Notice on the property at the outset of the case. This posting on the property alerts any occupants who may have legal rights to reside in the property an opportunity to obtain legal counsel and appear in Court to present evidence that they are legally occupying the property, for example that they are heirs of the record owner. It also alerts the neighbors and local community groups that they may want to follow the case, and possibly petition to intervene.

Notice to Others with Recorded Interests in the Property. The Act should also require notice to those with other recorded interests in the property, such as easements and long-term leases. While this should be obvious to petitioners, it should be added to the law to require notice to those with other recorded interests in the property.

One property or adjacent property per petition. While the amended Act 135 allows a petitioner to include one or more adjacent properties in specific circumstances, the Philadelphia local rules otherwise require that a Petitioner file one petition per individual properties with separate tax ID numbers. The law should be amended to reflect this practice, which was confirmed by the Commonwealth Court in the Germantown Conservancy case.

Pre-Hearing Conference. The law should be amended to provide for a pre-hearing conference within 60 days of filing a petition, and a hearing on the merits within 90 days of the filing of the petition. This will enable the Court to determine whether there are any service of process issues. It will also afford the Petitioner and a Respondent who appears at the pre-hearing conference an opportunity to settle the case.

Intervention. The law currently allows intervenors by discretion of the Court. Non-profit community organizations that are eligible parties under the law should be provided with a right to intervene, subject to a Petitioner's burden of proof to persuade the Court why the intervention should be denied. Many non-profits that develop affordable housing have plans for their communities, and they should have the right to participate in these cases, unless there is a compelling reason to deny the intervention.

Petitioners Fees and Costs. In cases where the local municipality has filed a code enforcement action that is parallel to a pending Conservatorship case, there should be a presumption that the municipality's experts analyzing the blight and overseeing the remediation are sufficient. In those cases, where the code enforcement case and the conservatorship case are listed for hearing on the same date, and the owner is remediating the property under Court supervision, the Petitioner's duplicate expert reports and testimony should not be allowed as fees and costs, unless the Petitioner can prove compelling reasons why the duplicate efforts should be compensated.

Petitioners' and Conservators' Fees and Costs. For affordable housing development, the Pennsylvania Housing Finance Agency provides that any consultants'

fee and owners' representative fees should be paid from the developer fee, and not itemized as separate reimbursable costs. That same requirement should be specified in Act 135, as there are cases where conservators are claiming 20% of the sale price and submitting requests for cost reimbursements for the costs they incurred to pay owners' representatives to handle the hiring of contractors and to oversee the work. These fees should be paid from the developers' fee, and not as separately incurred costs.

Also, the current 20% developer fee in the amended Act 135 can result in unjust enrichment for the petitioner or the conservator. In one case in Philadelphia, the property was sold for over \$1,800,000. In such cases, the law does not require the petitioner or the conservator to justify the developer fee. The legislature should consider establishing a lower base developer fee with a framework of bonuses that can be earned by demonstrating extra work. This will enable the Courts to use discretion to approve a higher developer fee, where the facts merit such increases in accordance with criteria that should be established by statute. The developer fees allowed by PHFA in Low Income Housing Tax Credit developments can be used as a model, which was the original intent of Act 135.

Out-Sales. Act 135's provisions on the out-sales of properties should be expanded in light of the experience in many jurisdictions regarding these cases since the law was enacted. There is currently very little guidance in the law regarding how sales of property owned by trusts, decedents' estates, and defunct non-profits are handled. Another issue that arises is more clarity on how to handle existing state and local liens. More examples of how proceeds from the sale should be disbursed should now be included in the law.

Another issue regarding out-sales is adding a provision that the property can be sold to a non-profit to develop affordable housing at a price that is less than Fair Market Value. This should be added to the law, especially in cases where the record owner is a defunct non-profit, so that the original charitable purpose can be continued, as may be appropriate.

Funding. Since the owner retains ownership of the property during the Conservatorship, it is a challenge to secure funding to handle the costs of the remediation, as well as out-of-pocket costs and attorney fees. So far, commercial lenders in Philadelphia have not been willing to provide funding for these projects. If interested stakeholders would be willing to establish a fund for a pilot program for the costs of Conservatorship cases, examples of how other jurisdictions handle these matters could be instructive. This funding could be especially helpful to Respondents who would like to remediate the blight under conditional relief under Court supervision.

For example, in Massachusetts, lenders have been willing to fund Conservatorship projects, but with the caveat that the Conservator must borrow against a line of credit established with the bank and also must assign the right to the Conservator's lien to the bank, to the extent of the funds borrowed. In Pennsylvania, the law authorizes the Court to give a lender lien priority, but the lender's lien will not be in first position if there are any federal, state or local liens. So Conservators in Philadelphia seeking bank financing need to establish a line of credit with a bank or fund the costs itself.

Municipal Liens. Many of the properties I have been consulted about have municipal liens for real estate taxes, water/sewer service or nuisance remediation. Unless the amounts of the liens are modest, in most neighborhoods the Conservator will not be able to recoup its costs when there are municipal liens. The legislature should authorize local jurisdictions to establish criteria regarding when the municipal liens can be removed from Conservatorship properties in order to bring the properties back into productive, and taxable use.

“Public Nuisance” language. Some of the terms in the Conservatorship law regarding criteria for meeting the definitions of a blighted property are not in the City of Philadelphia’s Code, such as “public nuisance.” Act 135 should be amended to provide alternative language that would enable Petitioners to use existing provisions in local Codes to correspond to the terminology in Act 135. This will enable Petitioners to prove to the Court that the blighted properties meet the Act 135 criteria of “public nuisance.”

Thank you for the invitation to testify and for the opportunity to provide the Pennsylvania Senate and House Democratic Policy Committees with information about this important tool to eliminate blight in Pennsylvania.