

# A pig in a poke

In July of 1992, the Appellate Division in *Aldrich v. Schwartz* 258 N.J. Super 300 (App. Div. 1992) invited the New Jersey Legislature to address a dilemma that confronts purchasers of real estate in New Jersey. Nearly a year later, the Legislature has not replied.

The dilemma confronting purchasers that was at issue in *Aldrich* relates to variance conditions mandated by municipal zoning board of adjustment resolutions of approval. Although variance conditions may seriously curtail what owners can do with their property, such conditions are neither recorded nor readily discoverable in a reasonable or diligent title search.

As Judge Cohen observed in *Aldrich*: "[t]he root of the problem is the absence of any statutory duty for a municipality to maintain board resolutions in an indexed and readily accessible form, or for a board imposing a variance condition to see that it is recited in a deed or other recordable instrument." 258 N.J. Super at 310. Thus, despite diligent effort, a buyer of real estate may have neither actual nor constructive notice of variance conditions that "run with the land" until they attempt to improve their property.

Mr. Aldrich faced that very dilemma when he attempted to build a house on an ocean front lot in Long Beach Township that he purchased in 1989. The proposed plans complied with the 20-foot easement mandated by the zoning ordinance, but violated a 45-foot easement required by the variance condition previously imposed with the ocean front property was initially subdivided into three lots in 1969.

Mr. Aldrich was denied a building permit to construct the house that he proposed despite the fact that he had no notice of the setback restriction attached to the prior variance when he purchased the property. Although the variance condition presumably appeared in the board of adjustment or planning board minutes, no title agency could have discovered it by a reasonable or diligent search.

At trial, Mr. Aldrich sued the township for a building permit and sought to have the variance condition voided. The trial court granted Mr. Aldrich's motion for summary judgment on both counts because Mr. Aldrich did not have actual or constructive notice of the condition. However, because the variance conditions ran with the land, the Appellate Division reversed and determined that Mr. Aldrich was bound by the variance condition despite lack of notice.

The options faced by property owners confronting similar circumstances, which the Appellate Division addressed, are uniformly unappealing. An aggrieved property owner who is precluded from developing and-or improving his or her property because of undetected variance conditions can seek (i) rescission and fraud damages, (ii) invalidation of the condition asserting that it was unlawful, or (iii) relief from the board of adjustment asserting changed circumstances. Three grim prospects for an unwitting owner.

We urge the Legislature to accept the court's invitation to examine the options available and to take remedial action to rectify the current morass. We also endorse the court's suggestions to the bar and to the municipal authorities to explore additional avenues for relief. Our citizens should not be required to buy a pig in a poke. ■