

**REPORT FROM COUNSEL**

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*SAHN WARD & BAKER, PLLC, is a full service law firm concentrating in the areas of zoning and land-use planning; real estate law and transactions; civil litigation in state and federal trial and appellate courts; corporate/business law and commercial transactions; environmental law; municipal law and legislative practice; estate planning and administration; and real estate tax certiorari and condemnation. The Firm is committed to providing its clients with the highest quality legal representation, counsel and advice and to using our expertise to achieve our clients' goals. The Firm has an extensive client base that includes Fortune 500 companies, prominent regional businesses, government agencies and authorities and individuals. Our offices are centrally located to serve clients on Long Island and in New York City.*

**W**elcome to the Fall/Winter 2007 edition of "*Report from Counsel*," a Newsletter for the Firm's clients and the other professionals who consult with the Firm, updating them on our practice as well as important new developments in the law.

**NEW DEVELOPMENTS AT THE FIRM**

The Firm was uniquely honored and privileged that Hon. Sol Wachtler, former Chief Judge of the New York Court of Appeals, visited our offices on Thursday, October 25. Judge Wachtler met with the Firm's attorneys for most of the morning, discussing the procedures for filing appeals in the Court of Appeals, the nature of the issues confronted by the Court in appeals, and important cases decided by the Court. Judge Wachtler also shared his experiences as the Chief Judge of the highest court in the State. His visit was a fascinating opportunity for our attorneys to meet one of New York's leading jurists. As Chief Judge, Sol Wachtler was responsible for writing ground-breaking legal opinions, establishing binding legal principles in New York, many of which have also been followed in other states.

We are very pleased that Jason Horowitz and John Christopher have become associated with the Firm. Both have passed the New York State Bar Exam and are awaiting formal admission to the Bar. They join Ralph Branciforte and Jeffrey Greenblatt as valued associates with the Firm. Sahn Ward & Baker continues to grow because of the support of our clients, and we thank you for allowing us to be of counsel and advice.

In recent weeks several major developments have been posted on the "In the News" section on the Firm's Home Page on our newly redesigned website. These cases and matters have resulted in media coverage, which also is available on our website. We encourage you to visit [www.sahnwardbaker.com](http://www.sahnwardbaker.com) on a regular basis to learn more about the Firm's ongoing activities.

**NEW DEVELOPMENTS IN THE LAW**  
**THE VESTED RIGHTS DOCTRINE**

Municipal zoning regulations are constantly amended, and very often, those amendments create a more restrictive and complicated zoning scheme. The doctrine of vested rights is a legal concept that can afford landowners protection against zoning changes affecting their properties. The term "vested rights" refers to a landowner's acquisition of a constitutionally protected property interest to either develop, build upon, or maintain structures upon a parcel of land. The question of whether a landowner has acquired vested rights generally arises under circumstances where a landowner receives a permit or approval to develop property, but before the landowner commences or completes the project, the municipality amends the zoning regulations governing that property, thereby making the permit or approval no longer valid or permitted as a matter of right.

New York's standard for whether a landowner has acquired constitutionally vested rights in a permit or approval was stated by the Court of Appeals in the case of *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996). The Court held that a vested right can only be acquired when, pursuant to a validly issued permit, the landowner acts in reliance on that permit, completes substantial construction, and incurs substantial expenses in furthering the development. *Id.* at p. 47. Additionally, the Court stated that a legal permit, substantial expenditures, and improvements alone will not suffice.

Instead, “[t]he landowner's actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless.” Id. at pp. 47-48.

In two recent cases, the Appellate Division, Second Judicial Department, analyzed whether the right of a landowner to act pursuant to a previous land use approval had become constitutionally vested, thereby allowing the landowner to proceed with construction notwithstanding a change in zoning. These decisions illustrate the application of the vested rights doctrine in New York.

In Matter of Vecce v. Town of Babylon, 32 A.D. 3d. 1038 (2d Dept. 2006), the Court held that the landowner had a vested right to maintain a detached garage at his premises. The facts of that case show that the landowner built the garage pursuant to a validly issued building permit, and that one year later, after the construction was complete, the Town revoked his building permit, due to amendments in the zoning code. The Court, applying the standards set forth in Town of Orangetown, held that the landowner had acquired the vested right to maintain his garage and that the failure of the Town to renew his building permit and issue him a certificate of occupancy was arbitrary and capricious.

In Matter of RC Enterprises v. Town of Patterson, 42 A.D. 3d 542 (2d Dept. 2007), the landowner brought an action to establish vested rights in the development of its property. In the early 1970s, although the landowner's predecessor obtained permission from the Town to construct 330 multi-family rental units on two parcels of property, it only developed the first parcel. Over 30 years later, the landowner claimed its predecessor's site plan gave it the “vested right” to construct multi-family residences in a district now zoned for single-family homes on four acre lots instead of multi-family rental units. The Court held that the landowner failed to establish vested rights to the multi-family development. In support of this holding, the Court stated that the landowner failed to show that it had undertaken and incurred substantial construction and expenditures. Additionally, the Court stated that the petitioner abandoned its plan by failing to develop its property for several decades before seeking to build based on the original approvals.

The holdings in Vecce and RC Enterprises both reaffirm the New York standard for the acquisition of vested rights, as set forth in Town of Orangetown. Thus, in order for a New York landowner to acquire vested rights in a permit or approval, it must demonstrate that it incurred substantial expenses and made substantial improvements, pursuant to a valid building permit or approval. In addition, the Courts have defined the term “substantial improvements” to mean actual construction, and not mere preparatory work or approval on paper, regardless of the expense incurred by the landowner.

Accordingly, it is important for landowners to remain vigilant regarding any amendments being made to local zoning regulations and building moratoriums which affect their property, so that, if necessary, action may be taken to satisfy the requirements of the vested rights doctrine, thereby protecting the right to develop land pursuant to the then existing code.

Given the strict limits on acquiring vested rights, we advise our clients not to “sit on” a permit or approval, but, to the extent feasible, commence and complete construction immediately, so that the rights in the permit or approval “vest.”

### **MATTERS BEING HANDLED BY THE FIRM**

The Firm continues to represent its clients in significant matters in all of our practice areas.

In the area of commercial real estate transactions, Michael Sahn is representing one of the region's most prominent real estate owners and developers in the sale of a 65 acre parcel of land to a Fortune 500 company. The land is located adjacent to the Long Island Expressway in the Town of Brookhaven. The sale is being negotiated to allow the purchaser to develop the parcel as a warehouse and distribution facility. This is a project that will have great regional significance. We will keep you posted as the transaction and the approval process proceeds.

Michael Sahn and Richard Weinberg are representing Knoll Packaging in the acquisition of a commercial property in Syosset, which will serve as its new headquarters. Knoll Packaging is a fast-growing international company that specializes in designing and manufacturing packaging for many consumer goods and items such as cosmetics products.

In the commercial litigation practice area, Jon Ward is leading the Firm's litigation team in our representation of a tenant in a large shopping mall in an action against the owner of the mall. The tenant commenced the action to protect it from damages caused by the mall's inadequate infrastructure and sewer facilities.

In our municipal law practice area, our special counsel, Thomas McKeivitt, has negotiated agreements between a client and several telecommunications companies. The agreement will allow the companies to place cell phone towers on the roof of our client's building, located in Queens. Thomas McKeivitt also continues to serve as Special Counsel to the Town of Smithtown Board of Ethics regarding a complaint filed against a member of the Town Board concerning a mailing by the member who used Township postage.

In our role as counsel to the Board of Zoning Appeals and Planning Board of the City of Glen Cove, the Firm is closely working with the Mayor, the city administration and outside planning consultants to develop and enact a new master plan and zoning ordinance that will guide the City's future development. We are also representing the Planning Board and Board of Zoning Appeals in Article 78 proceedings challenging the determinations of the respective Boards.

In the Firm's land use and zoning practice area, Daniel Baker has successfully completed the Firm's representation of Walgreen's before the Town of Brookhaven in connection with the development of a new store in Centereach. Dan Baker and Michael Sahn also completed the approval process for a new Wild By Nature Supermarket in Oceanside. The Firm also continues to represent various franchise restaurants that have entered the Long Island marketplace, as well as those that are well established. Fatburger, a California based gourmet hamburger restaurant company, has retained the Firm to seek approvals for a proposed location in Carle Place. The Firm is also representing Panera Bread in an application to open a new location in Massapequa.

#### **MATTERS RECENTLY CONCLUDED BY THE FIRM**

In an appeal defended by Jon Ward and Michael Sahn, the Appellate Division, Second Department, affirmed a decision of the Supreme Court, Nassau County, to annul the Village of Great Neck's rezoning of 19 acres of waterfront property within the Village from an industrial zoning district to a residential zoning district. The Village did not comply with the requirements of SEQRA in adopting the rezoning. The Firm asserted – and the Second Department agreed – that the Village had not considered all of the potential environmental impacts of its rezoning decision. The Court found that the reports relied upon by the Village were “speculative, hypothetical, and not part of a larger unified plan.”

Led by Jon Ward and Ralph Branciforte, the Firm secured a decision from the Suffolk County Supreme Court to vacate the foreclosure sale of a residential home after finding that the plaintiff in the case, a residential homeowners association, had engaged in bad faith, oppressive and unconscionable conduct in allowing the sale to proceed. The Court set aside the foreclosure sale because the homeowners association pressed forward with the foreclosure action sale for unpaid common charges, even though it accepted two payments from the homeowner. The Court also noted that the home, worth between \$750,000 and \$1 million, had been sold for \$326,000 and had been acquired for that amount by a company owned by the homeowners association's lawyer. This complex case demonstrates how the foreclosure process in New York is capable of being abused. This case is particularly relevant in these times of adjustable rate mortgages, rising interest rates and increased foreclosure activity.

The Firm successfully negotiated a settlement agreement for commercial mortgage holders who became entangled in a federal civil forfeiture action. The clients sold a piece of commercial property in New Hyde Park, and agreed to hold a \$1,000,000 purchase money mortgage on the property from the new owner. Ultimately, the new owner was indicted by

a federal grand jury in Salt Lake City, Utah, for engaging in criminal activity related to the illegal sale of prescription drugs from the New Hyde Park property. In connection with the indictment, the United States commenced a civil forfeiture proceeding in Utah federal court to seize the property, making the mortgage essentially worthless. Under the leadership of Jon Ward, a settlement was reached in which the government recognized the validity and priority of the original owner's mortgage on the property, and agreed to promptly sell the property at auction to satisfy the outstanding balance owed on the mortgage (including principal, interest and all of the client's attorneys fees). Additionally, the client was granted the right to credit bid the amount owed to it at the same auction, guaranteeing that it would be paid in full on the mortgage, or regain ownership of the building.

As counsel to the City of Glen Cove, Thomas McKeivitt took the lead for the Firm in writing a comprehensive telecommunications ordinance that was unanimously adopted by the City Council. The ordinance includes several innovative requirements to give the City the highest degree of protection and control over the construction of telecommunications towers. Municipalities are accustomed to using zoning laws to shape and control the growth and development of the community, but the jurisdiction of zoning boards in the area of cell phone towers is limited because of the Telecommunications Act of 1996. It therefore becomes extremely important for a municipality to have a well-drafted ordinance to protect itself from inappropriate locations and, equally importantly, to try to forestall federal litigation over the tower sitings. We are very appreciative for this opportunity to assist Mayor Ralph Suozzi and the City Council on this matter, and applaud their decision to craft an ordinance that we believe is very beneficial to the City and its citizens.

### **OUT AND ABOUT**

Michael Sahn, a Trustee of the North Shore-LIJ Health System, served as Co-chair of the Journal Committee for the Health System's Tenth Anniversary Gala Ball. The event celebrated the tenth anniversary of the merger of North Shore and Long Island Jewish, creating one of the nation's most prominent healthcare systems. The gala was held at the Waldorf=Astoria and featured performances by Tony Bennett and Aretha Franklin.

Jon Ward, a Member of the Community Board of Southside Hospital, part of the North Shore-LIJ Health System, took part in a gala dinner in late October, honoring Mark J. Solazzo, North Shore-LIJ's Chief Operating Officer.

Dan Baker continues to devote time and energies to the Leukemia & Lymphoma Society as an active member of its golf outing committee. He is equally dedicated to helping make the Touro Law Center's Alumni golf outing an annual success. In addition, Dan has been appointed to serve for a third term as a member of the State of New York Commission on Quality of Care for the Mentally Disabled's Surrogate Decision-Making Committee (SDMC) Program.

### **UP CLOSE AND PERSONAL**

Our sincere and warm congratulations to Thomas McKeivitt and his wife Samantha on the birth of their first child, Connor James. Connor very kindly waited until three days after the end of the New York State Legislative session to make his debut on June 26, 2007. We wish Tom and Samantha great joy as parents of their beautiful son.

Two of our associates, Jeffrey Greenblatt and John Christopher, were married this summer. Both couples enjoyed their honeymoons in Hawaii! We wish them and their families a lifetime of happiness and love. Jeff's wife, Jaclyn, is a third-grade teacher at Norman J. Levy Lakeside School in Merrick. John's wife, Christina, is a Physicians Assistant at St. Francis Hospital in Port Washington.

As the holiday season approaches, we wish all of our friends and colleagues the very best!