

## 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 Spring 2006 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

We are pleased to report that on April 1 we moved into our new office at The Omni building. Located at 333 Earle Ovington Boulevard in Uniondale, New York, just west of the Meadowbrook Parkway and near Hofstra University and Nassau Coliseum, our new office is twice the size of the Firm's previous space. We extend an open invitation to our clients and colleagues to visit at your convenience. The new office will allow the Firm to continue to grow so that we can provide our clients with the finest representation to achieve their goals. Even though we moved, our telephone and telecopier numbers remain the same. We have also updated our web site. Please visit us at [www.sahnwardbaker.com](http://www.sahnwardbaker.com) to stay in touch and follow recent developments in the law and at the Firm.

### NEW DEVELOPMENTS IN THE LAW: LAND USE LEGISLATION ADOPTED AND PROPOSED

#### New Municipal Hearing Notice Requirements

Effective July 1, 2006, the State's General Municipal Law has been amended to add a new section, numbered 239-nn, which establishes a right of notice of a public hearing to an adjacent municipality of certain zoning actions within 500 feet of the municipality's border. The new law authorizes the adjacent municipality receiving the notice to appear and be heard at public hearings on the proposed zoning action. The intent and purpose of the legislation is to encourage the coordination of land use development and regulation among adjacent municipalities so that each adjacent municipality recognizes the goals and objectives of the neighboring municipality. The law defines the term "municipality" to mean a town, village or city (except for a city having a population of more than 1 million persons).

The zoning actions that require notice to an adjacent municipality include the issuance of a special use permit or the granting of a use variance, a site plan review and approval or a subdivision review and approval. The law requires the notice to be given by mail or electronic transmission to the clerk of the adjacent municipality at least ten days prior to any hearing. It provides that the adjacent municipality may appear and be heard on the application. The required notice must be given by the municipality that is considering the zoning action as compared to the more typical notice for a zoning action which is given by the applicant to adjoining property owners.

The new law raises a number of significant considerations. The law does not indicate what will happen if the notice is not properly given. Presumably, the failure to give notice to an adjacent municipality would deprive the municipality that is considering the zoning action of jurisdiction to enact or approve the action. Likewise, while the law provides that the adjacent municipality has the right to appear and be heard, it does not specifically state that the adjacent municipality also

has the right to bring an Article 78 proceeding or other legal action challenging an approval that the municipality has objected to. Further, the law does not precisely define the rights of the adjacent municipality with respect to the applicant for the zoning action. The law only imposes an obligation on one municipality to notify an adjacent municipality. Similarly, the law does not impose any new notice requirements on applicants or provide notice to other interested parties.

We anticipate that these issues and others will arise in the context of particular zoning actions. Doubtless, the ultimate resolution of these issues will be left to the courts or subsequent legislation. It is interesting to recognize that given the close proximity of many of the villages and towns in Nassau and Suffolk County, one or more municipalities might respond to a notice and appear at hearings held by a neighboring municipality to voice opinions concerning a proposed zoning action. Thus, while the goal of the new law is to encourage the coordination of land use development and regulation among neighboring municipalities, the end result may be to add to the complexity and difficulty of presenting applications for zoning actions and further complicate the review and approval process.

### **Temporary Moratoriums**

Turning to proposed legislation, a municipality's enactment of a temporary moratorium on land use and building approvals has become an accepted tool of municipal planning and a common part of the building and development process. Yet, surprisingly, there is no express statutory authority for the enactment of moratoriums. Instead, the authority for enacting moratoriums stems from case law as decided by the courts. As a result, moratoriums are subject to case by case scrutiny and review as to their appropriateness. There are no uniform standards or guidelines that apply to all municipalities. To address these issues, legislation has been introduced in both the New York State Senate and the Assembly to provide express statutory authorization and guidelines for the enactment of moratoriums. The sponsors of the legislation have explained the need for the law on grounds that the absence of a statute authorizing and regulating the enactment of land use moratoriums has created confusion and uncertainty as to the acceptable scope, duration, appeal procedures and the applicability of moratoriums. The intent of the legislation is to provide a comprehensive and detailed statutory scheme for the enactment of moratoriums of limited duration in the issuance of specific types of approvals, such as special use permits, subdivision plats, variances, and building permits. The proposed legislation requires a municipality to make findings of fact of certain conditions affecting the public health or safety that would warrant the enactment of a moratorium. The findings would state the specific boundaries of the land subject to a moratorium and describe the land use approvals impacted. The findings would also delineate the duration of the moratorium. Further, the legislation would "grandfather" certain types of approvals from the impact of the moratorium. Given the frequency with which building and development moratoriums have been enacted, we would anticipate that this statewide legislation will be adopted in some form in the near future. We will continue to monitor the proceedings on the legislation, and report on its progress in future Newsletters.

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

The Firm continues to represent clients in significant zoning, real estate, corporate and commercial litigation matters.

Dan Baker and Michael Sahn are taking the lead in our representation of Westfield Corporation, the largest retail property group in the world, on the multi-million dollar renovation and re-development of The Westfield Sunrise Mall in Massapequa. Plans for the renovation include major interior alterations, reorganized common areas, reconfiguring all escalators, a two-story interior carousel, a large family area, new bathrooms, a food court, and a new exterior facade.

The renovation of the former Saks Fifth Avenue store on Franklin Avenue in Garden City will soon be underway, and we are proud to be representing the new owner in obtaining permits and zoning approvals. The former department store is being converted into a multi-use building that will include a health club and fitness center, retail stores, a restaurant and professional office space. The variety of uses and special requirements for combining retail, office and personal service facilities in one location makes this a complex project, drawing upon the Firm's resources with Michael Sahn as lead counsel, and a fine team of experts and consultants.

Dan Baker is serving as lead counsel in our representation of a property owner seeking to rezone a large piece of land from industrial to commercial. The vacant parcel is located near the Ronkonkoma railroad station and our client wishes to convert it into a parking lot to serve commuters. Parking is in demand in the area, but due to recent changes in the Brookhaven Town Code, the current zoning district does not allow for the proposed use. The Firm will represent our client in negotiations with the Town, applications for a zoning change and special use permits, and all related matters to accomplish our client's goals.

Jon Ward continues to represent the Firm's clients in complex commercial litigations pending in federal and state courts. New cases include the defense of a financial institution in two separate class actions brought under the federal Fair Debt Collection Practices Act in New York federal court; representation of a mortgage lien holder in a civil forfeiture action brought by the United States of America in Utah federal court and a related commercial mortgage foreclosure brought by the client in New York federal court; and representation of a partner in a real estate investment partnership in an action pending in New York State Supreme Court for an accounting, dissolution, and sale of the partnership property.

In the area of commercial and real estate transactions, Richard Weinberg is representing a Belgian corporation in a complex, reverse IRS Section 1031 Tax Free Exchange. This transaction involves the purchase of a replacement property prior to the sale of the exchange property. In a normal transaction, the exchange property is sold first. Under Section 1031, a taxpayer avoids paying a capital gains tax upon sale of an asset and defers payment of the tax until the sale of the replacement asset. There are many complex rules and regulations governing the entire transaction and therefore considerable expert advice is required.

Richard Weinberg is counseling an individual purchasing a 50% interest in a successful restaurant located in Suffolk County. The transaction involves an agreement of purchase with the Seller, a shareholder agreement with the remaining shareholder and an application to the State Liquor Authority for a license on behalf of the new shareholder.

Finally, Richard Weinberg is our lead counsel in representing a client in the sale of a heavy machinery and tooling distribution business that involves a sale contract, negotiation of a new lease with the owner of the building, and a consignment agreement with the Purchaser. This will enable our client to retain inventory on the premises and sell it item-by-item until the equipment is sold. Uniform Commercial Code filings are involved to protect the Seller's interest.

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

We are pleased to report that Sahn Ward & Baker, led by Jon Ward, won a major decision in a matter concerning property owned by our client, Waldbaum's, a regional supermarket chain. In Waldbaum's, Inc. v. The Incorporated Village of Great Neck, et al., Justice Stephen A. Bucaria of the Nassau County Supreme Court annulled the rezoning of 19 acres of waterfront property in the Village of Great Neck, including 2.4 acres owned by Waldbaum's, from an industrial zoning district to a residential zoning district. The rezoning had prevented Waldbaum's from using or selling a 25,000 square former supermarket building on its property for continued commercial use. The decision is of significance to municipalities, developers and private property owners who must strictly comply with SEQRA before proceeding with their development projects. Without properly conducted environmental impact studies, particularly with regard to industrial or contaminated property, any proposed development or rezoning is at risk of being rejected or overturned.

The Firm, led by Michael Sahn, successfully represented Commerce Bank in obtaining all necessary permits and variances to open a new bank branch in Roslyn Heights. We worked with Town officials to ensure that construction could begin on a timely basis and also met with civic leaders and adjacent business owners to address their concerns regarding the proposal.

The Firm provided counsel in a multi-million dollar refinancing of a project to develop properties on Marco Island, Florida. The Firm's client is a subsidiary of a well known Long Island developer. The properties feature nine luxury estate homes and a mixed use development that will contain 14 commercial units and 32 luxury residential condominiums. We

are proud to have previously represented this client on the purchase and financing of these properties, with Michael Sahn and Dan Baker taking the lead to close the transaction.

### **OUT AND ABOUT**

The Firm was honored to host a reception for Hon. Thomas A. Adams, Justice of the New York State Supreme Court, Appellate Division, Second Department, at our new office on April 26. Justice Adams enjoys the finest reputation and has earned the respect of the Bar and his colleagues in the Judiciary.

The New York Court of Appeals held a session in Suffolk County in May for the very first time, and Sahn Ward & Baker was proud to serve as a sponsor of a breakfast program honoring the Court and this important event. We were well represented by our associate, Janessa Trotto, who served on the committee that planned the program, which was hosted by the Hon. A. Gail Prudenti, Presiding Justice of the Appellate Division, Second Department.

Michael Sahn was a speaker at a well-attended continuing education program on zoning and land use law in April. He addressed current case law and legislation for the benefit of developers, engineers, local zoning/land use officials, real estate, business and environmental lawyers. Michael is a regular member of a distinguished faculty and has been invited to present on this topic for several years on behalf of the National Business Institute.

Jon Ward was quoted in a series of articles concerning the significant case successfully litigated in the Great Neck rezoning matter. The case was reported in The New York Law Journal, Long Island Business News and The Great Neck Record. It was also featured in the April issue of Land Use Law Report, a prestigious national newsletter dedicated to high profile cases concerning zoning and land use matters. Please call our office or visit [www.sahnwardbaker.com](http://www.sahnwardbaker.com) to obtain reprints of these articles.

Dan Baker is taking a prominent role in organizing two golf outings this Spring. He is involved in The Leukemia and Lymphoma Society's 10<sup>th</sup> Annual South Shore Invitational Golf Outing, held at the Southward Ho Country Club in Bayshore on June 26. In addition, Dan is helping his *alma mater*, Touro Law Center, with its golf outing, to be held on August 28 at the Muttontown Country Club.

We are very proud to report that our associate Janessa Trotto has been elected Corresponding Secretary of the Suffolk County Women's Bar Association (SCWBA) and a Delegate to the Women's Bar Association of the State of New York (WBASNY), representing Suffolk County in statewide matters. Janessa is deeply committed to service to the legal profession and we commend her dedication.

### **UP CLOSE & PERSONAL**

When you call the Firm or visit, the first person you speak with or see is our receptionist, April McCarthy. April is a highly energetic and dedicated individual who deftly juggles calls and deliveries. April also helps with other administrative tasks. When she is not working, April enjoys baseball and football and is a big fan of Peyton Manning, the Yankees and the Baltimore Colts. We are delighted to have April on our staff.

Golf season is here, and our counsel, Richard Weinberg, an avid golfer, has some sage advice: keep your head down!