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REPORT FROM COUNSEL

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SAHN WARD & BAKER *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.*

Welcome to the Fall 2008 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

Congratulations to our colleague and Special Counsel, Thomas McKevitt, on his re-election to the New York State Assembly. Tom represents the 17th Assembly District, which covers parts of the Towns of Hempstead and North Hempstead. We have great admiration for Tom, who serves his constituents and his clients at the Firm with the highest degree of integrity, skill and dedication. Tom is an expert in the areas of municipal law, zoning and land use planning and telecommunications law. A significant case he recently won is discussed in the section of our Newsletter entitled Matters Concluded by the Firm. We look forward to his continued achievements and successes in public service and at the Firm.

We are very pleased to announce that Joseph B. Rosenberg, Esq., has become Counsel to the Firm. Mr. Rosenberg concentrates his practice in estate planning, wills, trusts, probate and related areas, advising individuals and families with privately-owned businesses and significant assets on the transfer of wealth from one generation to the next. Mr. Rosenberg maintains offices in Garden City and midtown Manhattan. Mr. Rosenberg is a member of the Board of Directors of the Gurwin Jewish Nursing & Rehabilitation Center in Commack, New York, and is the Executive Vice President of the Touro Law School Alumni Association. To learn more about Mr. Rosenberg, please visit our website.

We invite you to visit www.sahnwardbaker.com on a regular basis to learn more about the Firm's ongoing activities and accomplishments, which are frequently updated on our website.

NEW DEVELOPMENTS IN THE LAW: PRE-EXISTING NONCONFORMING USES

As municipalities enact new and more restrictive zoning ordinances, landowners often find that a use of their property that was legal when originally established no longer conforms to the standards of the newly enacted ordinance. This "nonconformity" with a municipality's zoning ordinance creates what is known as a pre-existing nonconforming use. As a general rule, nonconforming uses are constitutionally protected and will be permitted to continue despite the new ordinance. Today, most municipalities have code provisions that define what constitutes a pre-existing nonconforming use, and set forth the circumstances under which such a use may be continued, changed, or expanded. Because of this, each case before the courts dealing with a pre-existing nonconforming use is fact specific. Reference to the language of the municipal code that governs the nonconforming use is always required to analyze the permissible scope of change to the use. However, there are several general principles of law that give guidance to property owners and developers.

One issue that frequently arises is whether an increase in the "volume" of a nonconforming business use constitutes an impermissible expansion of the use. One of the important appellate court cases dealing with this issue is Tartan Oil Corp. v. Board of Zoning Appeals of Town of Brookhaven, 213 A.D.2d 486 (2d Dept. 1995). In Tartan Oil Corp., the Court held that the modernization of the gas pumps at a pre-existing nonconforming gas station did not constitute an expansion

of that use, even though the new pumps could serve twice the number of customers as the old pumps. In reaching this holding, the Court set forth the principle that "merely increasing the volume of business does not amount to an expansion of a nonconforming use[,] . . . [n]or does the modernization of the machinery used in the business. . . ." (Internal quotations and citations omitted). Id. at 488.

More recently, in Piesco v. Hollihan, 47 A.D.3d 938 (2d Dept. 2008), a neighboring property owner commenced an Article 78 proceeding to challenge a zoning board's decision that the erection of a tent and canopy over an existing outdoor dining area of a pre-existing, nonconforming restaurant was not an impermissible expansion of that use. The Appellate Division affirmed the Supreme Court's ruling. The Supreme Court upheld the zoning board's decision, stating that "[t]he erection of a tent/canopy over the outdoor dining area is neither a separate 'use' nor an expansion of the nonconforming use of the property for a restaurant." Further, in applying the holding of Tartan Oil Corp. the Court stated that "[a]n increase in volume or intensity of the same nonconforming use as has occurred on the property for decades is not an expansion of that nonconforming use. . . ." Id.

Tartan Oil Corp. and Piesco illustrate factual circumstances common to many pre-existing nonconforming use cases. Generally, in such cases, a pre-existing nonconforming business has existed on a property for many years. Then, due to an increase in business activity, the need for the modernization of business equipment at the property, or the owner's desire to improve the economics of the use of the property, the issue of an "expansion" comes before a local zoning board. The holdings of Tartan Oil Corp. and Piesco are especially relevant to cases with similar fact patterns in that they provide protection to the owners of pre-existing nonconforming uses by differentiating an increase in the volume of business, or the modernization of business equipment, from an impermissible expansion or change of that use. In many instances this is a very fine factual distinction. However, this type of analysis and differentiation will allow pre-existing nonconforming uses to legally continue and be economically viable. Therefore, the specific facts of each case must be analyzed and measured against the municipal ordinances in question.

THE STANDARD OF JUDICIAL REVIEW IN ARTICLE 78 PROCEEDINGS CHALLENGING A ZONING BOARD'S INTERPRETATION OF A ZONING ORDINANCE

As cities, towns and villages throughout the State face increasingly complex land use and development issues, they enact more detailed and comprehensive zoning regulations and ordinances. As a result, the proper interpretation of these regulations and ordinances by municipalities has become a more prevalent theme in court proceedings brought under Article 78 to challenge an administrative agency's interpretation of the regulations.

In general, judicial review of determinations made by an administrative tribunal or officer ". . . is limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion." Matter of Rendely v. Town of Huntington, 44 A.D.3d 864, 865 (2d Dept. 2007). Thus, courts give administrative determinations considerable deference and will not substitute their judgment for that of the administrative tribunal or officer. See, e.g. Pecoraro v. Board of Appeals of Town of Hempstead, 2 N.Y.3d 608, 613 (2004).

Notwithstanding this general standard of judicial review, in cases where an interpretation of a zoning ordinance is at issue, courts apply a different, more stringent standard of review. In these types of cases, courts have held that the administrative interpretation is ". . . not entitled to unquestioning judicial deference and such interpretation will be overturned when it is irrational or unreasonable." Tartan Oil Corp. v. Bohrer, 249 A.D.2d 481, 482 (2d Dept. 1998); See, also, Baker v. Town of Islip Zoning Board of Appeals, 20 A.D.3d 522, 523 (2d Dept. 2005). The rationale behind this more stringent standard of review is that the ultimate responsibility of interpreting the law rests with the court, and administrative interpretations of zoning ordinances should not be entitled to the same deference given to an administrative tribunal or officer in other discretionary types of determinations, such as the granting or denial of a variance application. See, e.g., Id.

Recently, in the case Mamaroneck Beach & Yacht Club, Inc. v. Zoning Board of Appeals of Village of Mamaroneck, 53 A.D3d 494 (2d Dept. 2008), the Appellate Division, Second Department, reiterated the stricter standard when reviewing an administrative board's interpretation of a zoning ordinance. In the Mamaroneck Beach case, the owners of a

beach and yacht club applied to the village planning board seeking site plan approval for the construction of seasonal residences located in the MR Zoning District. The village building director issued a memorandum indicating that the proposed construction was permitted under the code as an accessory use. Concerned local neighbors appealed to the zoning board seeking to review this interpretation. When the zoning board heard the appeal, it disagreed with the building director and determined that based on the definition of an accessory use as a use "customarily incidental and subordinate to the principal use of the land or building located on the same lot with such principal use," the seasonal residences did not constitute an accessory use. The board based this determination upon evidence that the seasonal residences would occupy more than 50% of the total building square footage. The owners of the beach and yacht club commenced an Article 78 proceeding seeking to annul the zoning board's interpretation. The Supreme Court granted the owner's petition and reversed the zoning board's determination. The village board then appealed.

The Second Department agreed with the Supreme Court, finding that the zoning board's interpretation "engrafting area requirements upon provisions defining a permissive, accessory use, based upon square footage of other building structures on the same property, was irrational and unreasonable." Id. at 85. In other words, the appellate court held that the zoning board could not apply additional standards or restrictions to an ordinance that was not otherwise ambiguous. The court noted that, "[a] zoning board has the discretion to interpret an ambiguous provision in cases where 'it would be difficult or impractical' to promulgate a 'definitive' ordinance." Id.; quoting, Matter of Arceri v. Town of Islip Zoning Bd. of Appeals, 12 A.D.3d 411, 412). Thus, when the meaning and interpretation of an ordinance is at issue, careful analysis is needed as to the proper scope of a board's discretion to determine the meaning of the ordinance. Ultimately, the courts will determine the proper interpretation based on a strict reading of the language of the ordinance.

MATTERS RECENTLY CONCLUDED BY THE FIRM

Relying on Tom McKevitt's expertise in the area of telecommunications law and practice, the Firm successfully represented the Franklin Square United Neighborhood Association, a voluntary community group, in opposing the construction of a 65 foot cell phone tower proposed by Omnipoint/T-Mobile in proceedings before the Town of Hempstead Board of Appeals. During the course of several hearings, Tom McKevitt presented expert witnesses to demonstrate that the proposed cell tower was not needed in order to provide adequate cell phone service in the Franklin Square area. Under established state and federal law, there are limited grounds for opposing cell tower applications. Often, community groups do not base their opposition to cell towers on the technical grounds that are legally relevant and available. This case shows that with proper guidance and counsel, and under appropriate circumstances, community groups can defeat proposed cell phone towers in administrative hearings before local zoning boards. Notable also with respect to Tom McKevitt's expertise in this important area of the law is that he guided the City Council of Glen Cove in the adoption of a comprehensive ordinance governing proposed telecommunications facilities in the City.

Michael Sahn represented the owner of a 35 acre vacant parcel of land situated in the Town of Brookhaven in the sale of the property to the State of New York. The State's Department of Environmental Conservation had designated the parcel for protection under the State's Open Space Conservation Plan. The State's purchase of the parcel will preserve the parcel, which lies in an environmentally sensitive area, as open space in perpetuity.

Michael Sahn and Jason Horowitz, working closely with well-known architect Marc Spector, of the Spector Group, represented Temple Beth Sholom in Roslyn Heights in securing approvals from the Village of East Hills and Nassau County to build a new Early Childhood Center (ECC). The ECC will be a state of the art facility for pre-school education. We were honored to have served as the Temple's counsel in this important project. The Firm also represented the Temple in negotiating its construction contracts for the ECC. We are pleased to report that construction is well underway.

Dan Baker represented the owners of the Driftwood Day Camp, situated in Melville, in the sale of the camp's property, business and assets. The purchaser owns and operates a nursery school located in Plainview. The Firm had represented the owners of Driftwood when they originally purchased the camp in 2004. After purchasing the camp, Dan Baker had represented the owners in obtaining zoning variances and special permits to allow for substantial improvements to the camp and its facilities, in addition to providing general corporate and litigation services.

Tom McKevitt, who serves as counsel to the Town of Smithtown Board of Ethics, successfully defended the Board in an Article 78 proceeding challenging the Board's determination that a member of the Town Board of Smithtown had violated certain rules of conduct applicable to elected officials. The case reached Supreme Court, in Suffolk County, where the Court ruled that the Board had acted properly in imposing penalties and fines for the improper conduct by the Town Board Member.

OUT AND ABOUT

With great energy and enthusiasm, the Firm's attorneys and staff participated in this summer's Corporate Challenge Race, held at Jones Beach in July. The race raises funds for various charitable foundations. Our team's individual winner was Jason Horowitz, who was the first member of the Firm to cross the finish line of the 3.5 mile race, with a time of 22:25. Overall, our Firm placed 45th out of a field of 142 men's teams, with a time of 1:22:24. Among law firms, our Firm placed 2nd. Please visit the News & Events page of our website to see photos of members of the Firm at this exciting event. We look forward to entering the Corporate Challenge next summer, and encourage our friends and colleagues to join us.

Michael Sahn and Tom McKevitt participated as lecturers in a National Business Institute CLE seminar entitled "Mastering Land Use and Planning Processes" this past August. Michael presented an overview of development and land use law, including recent case law and legislative updates. Tom gave a detailed lecture on environmental issues in property development, and reviewed recent trends and municipal government perspectives. On December 9, Michael and Tom will take part in another NBI seminar, entitled "Current Issues in Subdivsion, Annexation and Zoning."

Michael Sahn participated as a panelist in a program entitled "A Primer for Court-Appointed Referees in Foreclosure" presented at Nassau County Supreme Court on October 28 under the guidance of Hon. Anthony Marano, Administrative Judge of Nassau County, Hon. Edward G. McCabe, Presiding Justice of the Foreclosure Part of the Court and Daniel Dillion, Esq., Director of the Nassau County Court Foreclosure Project. The purpose of the program was to discuss the responsibilities of court-appointed referees in foreclosure proceedings.

UP CLOSE AND PERSONAL

Thank you to all who supported the Leukemia & Lymphoma Society Long Island Chapter's Twelfth Invitational Golf Outing, which honored Dan Baker this past spring. The event was a great success and your support was sincerely appreciated. Dan has been a dedicated Trustee of the Society for more than six years, and we invite your continued support of this important organization.

Our associates, Jason Horowitz and John Christopher, continue to demonstrate great dedication to the practice of law and the Firm's clients. Outside the office, both Jason and John lead active lifestyles. Jason, who grew up on Long Island, enjoys many outdoor activities, including skiing and running. He led our team of runners at this past summer's Corporate Challenge Race. Jason is purchasing an apartment in Long Beach and will log many miles on the boardwalk. Jason is also a big fan of local sports teams. He enjoys season tickets to Jets, Mets and Islander games. At the office, Jason works closely with Michael Sahn in representing the Planning Board and Board of Zoning Appeals of the City of Glen Cove.

John Christopher also enjoys outdoor and athletic activities. John just completed a Duathalon race on eastern Long Island. He also enjoys surfing and recently became certified for scuba diving. John enjoyed scuba diving when he and his wife Cristina recently traveled to the Mayan Riviera in Mexico. John's wife Cristina, a Physician Assistant at St. Francis Hospital, shares John's enthusiasm for outdoor activities. John and Cristina live in Greenvale. At the Firm, John works closely with Jon Ward on many of the Firm's litigation matters.