

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 Spring 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

We are proud and delighted that Dan Baker has been chosen as this year's honoree for the Leukemia & Lymphoma Society Long Island Chapter's Twelfth Annual Invitational Golf Outing, to be held on Monday, June 23 at the Southward Ho Country Club in Bay Shore, New York. Dan has served as a dedicated Trustee of the Society for more than six years, and we invite you to consider joining us for a great day in support of a worthy cause.

Michael Sahn will join a distinguished team of experts and consultants in preparing a Feasibility Study for Ambulance Services being conducted for the Town of North Hempstead. The study will examine the potential consolidation of ambulance and emergency medical services that are currently provided by a variety of different agencies throughout the Town. Michael will provide counsel to the project team in order to analyze the many legal issues posed by consolidation and restructuring.

Our newest associates, Jason Horowitz and John Christopher, have been formally admitted to the practice of law in New York State. Their professionalism and enthusiasm for the law and legal practice adds to the atmosphere of energetic, client-oriented service that has become a hallmark of the Firm. We hope that Jason and John have the opportunity to consult with you on your matters.

We encourage 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: SEIS, FEIS, DEIS and SEQRA REQUIREMENTS FOR MUNICIPALITIES

Perhaps one of the most challenging aspects of the development approval process in New York is understanding and complying with the complex substantive and regulatory requirements of the New York State Environmental Quality Review Act (SEQRA). Both applicants and municipal agencies must understand the intricacies of SEQRA's framework. One of the more important issues in complex projects is whether and when a municipal agency must require a supplemental draft environmental impact statement (SEIS). A planning board's determination not to require a second SEIS was the subject of an important New York State Court of Appeals decision, Riverkeeper, Inc. v. Planning Board of Town of Southeast, 9 N.Y.3d 219 (2007).

When an application is made to a municipal agency for a large scale project or a project in an environmentally sensitive area, the municipal agency, acting as "lead agency," will typically classify the action as a "Type I" or "Unlisted" action, and will issue a "positive declaration" requiring the preparation of a draft environmental impact statement (DEIS) and a final environmental impact statement (FEIS). In most circumstances after the FEIS is deemed complete and the lead agency issues a "findings statement," SEQRA review is finished. There are, however, certain instances where a

municipal agency will require the applicant to prepare a SEIS. Given the size and scope of many projects, these instances are becoming more frequent.

Under applicable regulations, a municipal agency acting as lead agency for the purposes of environmental review “. . . may require an [SEIS], limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; (b) newly discovered information; or (c) a change in circumstances related to the project.” 6 NYCRR 617.9(a)(7)(i). In the case of newly discovered information, the decision to prepare a SEIS “. . . must be based on the following criteria: (a) the importance and relevance of the information; and (b) the present state of the information in the DEIS.” 6 NYCRR 617.9(a)(7)(ii).

In Riverkeeper, a developer submitted an application to the Planning Board of the Town of Southeast for approval of a residential subdivision comprising approximately 300 acres and over 100 homes. The Planning Board, acting as lead agency, issued a positive declaration. Between 1988 and 1991, the Planning Board required the preparation of a DEIS and a FEIS, a draft SEIS and a final SEIS. On February 25, 1991, the Planning Board issued its findings statement. Thereafter, on August 10, 1998, the Planning Board granted preliminary subdivision approval. The Planning Board then granted conditional final approval on June 10, 2002.

Petitioners, constituting several concerned citizen groups, challenged the conditional final approval on the grounds that due to certain changes during the eleven years that had elapsed between the findings statement and conditional final approval, the Planning Board should have required a second SEIS. The Supreme Court remitted the matter to the Planning Board, which adopted a resolution determining that a second SEIS was not required. Petitioners once again appealed, but the Supreme Court held that the Planning Board took the requisite “hard look” at the areas of concern. The Appellate Division, Second Department reversed, holding that the Planning Board “could not have met its obligation under SEQRA without requiring an SEIS to analyze the current subdivision plat in light of the change in circumstances, as explained below, since 1991.” (32 A.D.3d 431, 435 (2d Dept. 2006)). The Planning Board then appealed.

Specifically, at issue before the Court of Appeals was whether changed circumstances, including the Army Corps of Engineers expansion of the delineated wetlands acreage on the site and the tightened regulations pertaining to water quality in a nearby reservoir, required further study and a second SEIS. The Court of Appeals reversed the Second Department, and held that the “hard look” standard of review should be applied to a “. . . lead agency’s determination regarding the necessity for an SEIS.” Riverkeeper, Inc., 9 N.Y.3d at 232. The “hard look” standard requires a court to determine “whether the agency identified the relevant areas of environmental concern, took a ‘hard look’ at them, and made a ‘reasoned elaboration’ of the basis for its determination.” Id. at 231-32.

In its decision, the Court stressed the deference courts must give to the planning board under the “hard look” standard. SEQRA determinations ultimately rest with the lead agency. So long as the lead agency conducts a detailed review and takes the requisite “hard look” at the environmental concerns, the Court of Appeals makes clear that lower courts should not substitute their judgment for the judgment of a lead agency. To this extent, the Court found that, “[t]he lead agency. . . has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts.” Id. Further, “[w]hile a lead agency is encouraged to consider the opinions of experts and other agencies, it must exercise its own judgment in determining whether a particular circumstance adversely impacts the environment.” Id. at 234 (emphasis added).

The decision highlights the important point that SEQRA cases are very fact intensive. Due to the vast amount of environmental information necessary to some development projects, the amount of time each development may take and the complex SEQRA regulations that must be followed, courts are presented with and must make decisions based on very complex and in depth factual scenarios. This type of review was prevalent in Riverkeeper where the Court of Appeals was presented with a large scale development in which the approval process began almost twenty years ago.

It has yet to be determined what effect, if any, the Riverkeeper holding will have on lower courts determinations in SEQRA litigation. However, Riverkeeper provides insight, for both municipalities and private developers, into how

courts should carefully review SEQRA determinations, but ultimately defer to the lead agency when it takes a comprehensive, “hard look” at the facts presented.

MATTERS BEING HANDLED BY THE FIRM

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

In the litigation practice area, Jon Ward, as lead counsel for the Firm, is currently engaged in a trial on behalf of a commercial property owner in an environmental and real estate matter. Our client purchased a parcel of land located next to a gas station. After the purchase, our client learned that the adjoining property was the source of a significant plume of pollution. An underground fuel oil tank at the gas station had leaked and the pollutants migrated across the property line and contaminated our client’s land. When the gas station owner refused to pay for the cleanup, the Firm commenced a lawsuit for our client, which is now in the trial phase. We believe that the growing awareness of toxic spills on Long Island and the expense of environmental remediation are likely to lead to an increasing number of similar lawsuits.

The Orthodox Church of America has retained the Firm to represent its interests in a substantial financial dispute with its former Chancellor. The case is pending in the Nassau County Supreme Court. Jon Ward is lead counsel on the case. The Church is an independent church of the Eastern Orthodox Christian Faith and traces its origins in North America back to 1794. It is comprised of ten geographical dioceses encompassing all of North America, 700 missions and parishes, as well as cathedrals and monasteries throughout North America. The principal office of the Church is located in Syosset.

The Firm continues to represent the Westfield Sunrise Mall in Massapequa in making renovations that include a complete exterior renovation and the construction of additional retail space. These proposals will make the Mall a premiere retail property. Led by Dan Baker, the Firm is assisting Westfield Sunrise Mall with thorough due diligence research to ensure that applications can be presented to the Town in as effective a manner as possible.

MATTERS RECENTLY CONCLUDED BY THE FIRM

The Firm completed two separate real estate transactions on behalf of our longstanding client, Knoll Printing and Packaging, Inc., in the acquisition of a new building in Syosset, which will serve as its corporate headquarters and the sale of the company’s existing building in Roslyn Heights. The company is enjoying great success and needed more space to accommodate its fast growth. The Firm previously represented our client in litigation when the NYS Department of Transportation proposed to construct a sound barrier wall along the north service road of the Long Island Expressway that would have blocked the view of our client’s building and its highly recognizable clock from the roadway.

In the Firm’s real estate transaction area, Dan Baker has successfully completed the sale of a Brooklyn building on behalf of the Firm’s client. This transaction became litigious when the buyer, facing issues obtaining financing, first did not comply with a closing date that had already been extended once by the seller and then challenged a “Time of the Essence” demand made by the seller. As lenders have become more cautious as a result of the sub-prime credit crisis, buyers are subject to more scrutiny and held to higher standards than in the past in obtaining financing. The transaction was successfully brought to a close by Dan Baker, and serves as a reminder that the current market requires careful evaluation of all potential buyers by the seller.

The Firm represented the City of Glen Cove Board of Zoning Appeals and the Building Department Administrator in Nassau County Supreme Court against a resident who claimed to have been aggrieved by a determination of the Building Department Administrator. The Court held that the neighboring owner should have first challenged the issuance of the building permit with an appeal to the Board of Zoning Appeals, and since she did not first exhaust her administrative remedies, she was thus not permitted to litigate the issue in a court of law. The law requires that those who disagree with a determination of a municipal official must initially seek redress through any available administrative process. This saves taxpayers the cost of having their governments constantly tied up in expensive litigation and forces property owners and members of both planning and zoning boards to make decisions on local issues.

The New York State Court of Appeals has denied the Village of Great Neck's request for permission to appeal a ruling of the Appellate Division, Second Department, affirming a Supreme Court decision to annul the rezoning of 19 acres of waterfront property in the Village of Great Neck, including 2.4 acres formerly owned by A & P on the grounds that the Village failed to comply with SEQRA before rezoning. As a result, the matter is now final and binding.

Dan Baker has completed a complex series of transactions relating to the sale of a sleepaway camp and a large piece of property in Pennsylvania. This comprehensive transaction involved the sale of the land and buildings, as well as the camp business itself. It also included a contract for consulting services to allow the former owners to assist the new owners during the transition period.

OUT AND ABOUT

Michael Sahn has been appointed a Member of the Board of Directors of the Ronald McDonald House of Long Island, located in New Hyde Park on the campus of Long Island Jewish Hospital. Michael already serves as a Trustee of the North Shore - Long Island Jewish Hospital System.

"Who's Who in Commercial & Residential Real Estate Law" in *Long Island Business News* included a profile of Michael Sahn. As part of the profile, Michael advised buyers to provide for a due diligence investigation period in purchasing real property and to make contract obligations contingent upon the approval of the purchaser's contemplated use and development of property.

Michael Sahn participated as a lecturer in a CLE program, sponsored by the National Business Institute, where he gave a presentation on Current Case Law and Legislative Updates in Land Use and Zoning matters. The Firm will be well represented on August 5, when Michael Sahn and Thomas McKeivitt participate in a National Business Institute CLE seminar entitled "Mastering Land Use and Planning Processes."

Thomas McKeivitt appeared on News 12's "Long Island Talks" as a special expert guest for a show that focused on telecommunications facilities and the challenges that communities face in controlling their construction and siting.

Thomas McKeivitt conducted a New York State mandated training course for the City of Glen Cove's Planning Board and Zoning Board of Appeals at the special request of Mayor Ralph V. Suozzi. Training is available from a variety of sources, but Tom McKeivitt, who is also a New York State Assemblyman and knowledgeable about current laws, made this an especially valuable program. The group of twelve participating members went into great depth and focus on issues about specific laws and procedures that the City deals with on a regular basis. Thomas McKeivitt has also been selected as Counsel to the Board of Ethics of the Smithtown Town Board. Our growing municipal practice area is a reflection of the skills and talents of the Firm's attorneys, who are familiar with the inner workings of complex and sensitive local government matters.

PERSONAL NOTES

The attorneys and staff of Sahn Ward & Baker reflect with profound sorrow on the passing of Richard Weinberg, our esteemed counsel, colleague and friend. Richard made invaluable contributions to the Firm's growth and development. A true gentleman, a lawyer's lawyer, a dignified and elegant man, we will greatly miss his humor, humility and guidance. We extend our sympathies to Joyce, his beloved wife, and his entire family.

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