

## REPORT FROM COUNSEL

VOL. VI, NO. 2

FALL 2005

*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 and alternative dispute resolution; 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 2005 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 IN THE LAW: The Ongoing Debate over Eminent Domain**

In our last Newsletter, we reported on the eminent domain case of Kelo v. the City of New London, which was then pending before the United States Supreme Court. The Kelo case presented the issue of whether "economic development" constitutes a valid "public purpose" to justify the use of eminent domain powers under the Fifth Amendment of the United States Constitution. On June 23, 2005, the Supreme Court issued its decision, holding that state and local governments may exercise the power of eminent domain for economic development purposes just as they would for construction of public works such as highways, tunnels, bridges and parks.

The decision has been met with considerable commentary in the media and in legal and legislative circles over the appropriate use of the powers of eminent domain. To put Kelo in perspective, it did not change the law in New York State, as previous State decisions had already approved the broad usage of eminent domain powers. In fact, one of the cases the Firm has been handling, reported in this Newsletter in a section that follows, concerns the use of eminent domain powers to acquire private property to assist in expanding a shopping center.

Nonetheless, the controversy over the Kelo case has led to the introduction of legislation on the federal and state level to restrict the use of eminent domain powers. According to one source, legislators in no less than 28 states have already introduced more than 70 bills addressing the use of eminent domain power in their states, and several proposals have been introduced in Congress. One proposal would bar the use of federal economic development funds for any projects where governmental entities have used eminent domain powers.

In our view, the Kelo case is not of major significance here on Long Island. Most Long Island municipalities are not inclined to undertake large scale economic redevelopment plans which would require using the power of eminent domain to effectuate their plans. On the other hand, we do believe that municipalities will continue to enact new zoning codes and ordinances preceded by moratoriums on the issuance of building permits and zoning approvals, which will have the net effect of bringing about significant land use changes.

In this regard, the key consideration is and has always been whether zoning changes and ordinances are in accordance with a comprehensive land use plan adopted by the municipality. It is in this area that we expect to see expanded litigation and controversy involving municipal governments and private property owners.

### **The Scope of the Federal Clean Water Act**

In another matter of importance to our region, the United States Supreme Court has agreed to hear a pair of cases presenting the question of the scope of the federal regulation of wetlands under the Clean Water Act. The cases present the issue of just how far the Clean Water Act extends in regulating “intrastate” waterways or wetlands that may have little or no direct connection to interstate navigable waterways involved in commerce. The question before the Court is whether Congress intended the Clean Water Act to cover waterways or wetlands that are fully within state lines. If the Act covers these as “navigable” waters, defined in the Act as “the waters of the United States, including territorial seas,” then federal agencies such as the United States Army Corps of Engineers and the Environmental Protection Agency have jurisdiction. If not, then regulation is purely a state or local matter. The implications are vast, since virtually any local body of water, wetland, pond or tributary could fall under federal regulation if the Act is interpreted broadly, with resulting complexities for local development proposals and permits.

### **The Impact of the Hurricanes on Energy Supply Issues in Our Region**

National events and issues often impact legal matters and proceedings in our region. The recent hurricanes that have devastated parts of the Gulf States have made us aware of how vulnerable we are to events that affect national energy supplies. These events and their consequences will certainly be in the forefront of the debates we expect in our region on the siting of new power generating facilities, renovations to existing power plants, a proposed facility for the storage and pumping of Liquefied Natural Gas (LNG) to be sited in the middle of Long Island Sound and increases in utility rates and charges. All of these matters will have significant impacts in areas of environmental, administrative and energy law. They will also affect many land use, zoning and development decisions, all of which are customarily dependent upon the availability, supply and price of energy.

We will continue to report on these matters in future Newsletters.

### **NEW AND ONGOING MATTERS BEING HANDLED BY THE FIRM**

The Firm continues to represent clients in matters of importance in our different practice areas. In the area of land use and zoning, we have been retained on two significant projects, one commercial and the other residential in nature.

We are pleased that Westfield Properties, the largest retail property group in the world, has retained the Firm to represent its Westfield America division as it begins to formulate plans for the renovation and re-development of The Westfield Sunrise Mall in Massapequa. The company owns and operates approximately 68 million square feet in American malls, known as Westfield Shoppingtowns, located in California, Colorado, Connecticut, Florida, Illinois, Indiana, Maryland, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio and Washington. The Firm will represent Westfield America in all matters regarding the renovation and re-development of the mall, including working with Town of Oyster Bay boards, community groups and all other municipal agencies.

We are also representing a client in the development of 40 acres of land located in Old Westbury. The parcel of land will be developed as a prestigious residential subdivision. The Firm will be involved in every aspect of site development, including applications for subdivision approvals and permits.

Sahn Ward & Baker is representing Waldbaum’s in the demolition of an older supermarket in Lindenhurst, which will be replaced by the development and construction of a store featuring a new concept known as “Waldbaum’s Fresh.” This is part of a national trend in supermarkets focusing on organic foods and products in an upscale, natural atmosphere. The Firm will be involved in all matters pertaining to land use and applications for permits and approvals.

The Firm's litigation practice is active in many cases pending in state and federal courts. As mentioned earlier in the Newsletter, the Firm has successfully represented a private property owner in an eminent domain dispute with the City of Glen Cove that echoes the recent United States Supreme Court Kelo decision. A piece of residential property adjoining a shopping center prevented a well-known drug store chain from establishing a new store and expanding its parking lot. The City invoked the power of eminent domain to take the residential property from its private owner and convey it to the owner of the adjoining property to accommodate the drug store. The issue of just compensation for the taking was at the heart of a trial in Supreme Court that resulted in a substantial compensatory award to our client. After trial and examination of expert witnesses, the Court ordered an award to the Firm's client, finding that the City had not offered just compensation, and our client was entitled to a significant sum in order to be made whole for the taking of the property. Notwithstanding the national debate over the scope of eminent domain, property owners are still entitled to be paid fair market value for their property.

The Firm is representing a mortgage holder in proceedings in New York State and in federal court proceedings pending in Salt Lake City, Utah, concerning a parcel of land in New Hyde Park. The case provides a cautionary tale for those who finance their own property sales. The property was sold for \$1.4 million, with the buyer making a \$400,000 payment and the seller financing \$1 million. Several months after the closing, the buyer was indicted for alleged criminal activity and federal law enforcement officials commenced an action to seize the property under civil forfeiture. To protect the purchaser's mortgage, our client must now establish the validity of the lien in potential competition with the federal government, which is seeking forfeiture of the land. Our last Newsletter featured a similar situation for the buyer of a large commercial property. In that case, our client had purchased a building and became ensnared in an outstanding dispute between the seller and its creditor. The lesson is clear – parties to real estate transactions must conduct thorough investigations of their counterparts in the transactions, especially when they are financing the sale.

Sahn Ward & Baker also has an active commercial transactions practice area. We are continuing our representation of an individual who has long served as the Trustee and President of a prestigious private school in Suffolk County. The individual has been a major benefactor to the school for nearly 15 years and made a multi-million dollar loan to the school. Sahn Ward & Baker was retained to protect this substantial loan now that the school is being sold to ensure that the loan is repaid from the proceeds of the sale. Complexities in private lending agreements of this nature, as well as in the sale of the school, necessitate careful legal representation on behalf of our client.

The Firm has been retained in a transaction involving the purchase and development of a parcel of vacant land in Valley Stream. We are representing the client in all phases of the transaction, from the initial purchase of the land and obtaining all zoning permits and approvals, to setting up a corporate structure for the transaction, negotiating financing for building projects and overseeing landlord/tenant matters.

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

The Firm has been privileged to represent Temple Sinai of Roslyn in applications to approve important renovations and additions to the Temple's facilities and building. These improvements will allow the Temple to better serve its members and the community for many years. The extensive applications for the approvals involved a series of hearings and the resolution of complex land use issues. We are pleased that our efforts contributed to the successful outcome of the project.

The Firm won timely approval of an application for a special use permit for a spacious Italian restaurant in the Town of Oyster Bay. Our success was the result of an experienced legal team that worked closely with the project engineer and architect.

In the commercial litigation practice area, the Firm has represented Waldbaum's Inc., a subsidiary of the Great Atlantic & Pacific Tea Co., Inc., in Great Neck in a breach of contract lawsuit between the supermarket owner and an adjacent property owner. A settlement has been reached whereby our client will sell the shopping center at a price that is satisfactory to both parties and in turn, all litigation will be dropped by the opposing company.

### **OUT AND ABOUT**

Michael Sahn has served as a source for three articles on the United States Supreme Court's Kelo decision on the scope of the powers of eminent domain. The first, an article in Long Island Business News, appeared before the decision was made. After the decision was announced, Michael was interviewed by both Long Island Business News and Real Estate Weekly, explaining what the decision means for property owners on Long Island and in the New York-metro area.

Jon Ward has become a member of the Chicago Title Insurance Company Nassau County Advisory Board. The board position, which is by invitation only, provides a forum for real estate leaders to discuss trends in the marketplace and help Chicago Title provide superior service. Chicago Title is the largest title company in the nation, and we are proud that Jon was invited to become a member of this Advisory Board.

Dan Baker, a member of The Board of Trustees of The Leukemia & Lymphoma Society and an active member of the group's golf committee, was instrumental in organizing a charitable golf outing at the Southward Ho Country Club in Bay Shore. Dan is also involved with the golf committee on behalf of the Touro Alumni Center and helped with the August golf tournament held at the Muttontown Country Club to support construction of Touro's new law school in Central Islip.

The May issue of Nassau Lawyer featured a comprehensive article by Karen Roth on historic preservation and the federal, state and local laws governing preservation in New York State. As a result of the article, Karen was interviewed on "Law You Should Know," WHPC 90.3 FM, to discuss historic preservation. Karen has recently become involved with preservation groups in Long Beach to expand her knowledge and experience in a hands-on capacity.

Please call our office or visit [www.sahnwardbaker.com](http://www.sahnwardbaker.com) to obtain reprints of these articles.

### **UP CLOSE AND PERSONAL**

This past summer, we were pleased to have three talented and energetic summer associates, Alyssa Litman, Jeff Greenblatt and Jason Horowitz, working at the Firm. Alyssa is now in her third year of law school at Hofstra, Jeff is a third year law student at St. John's and Jason is in his second year of law school at Touro. All three made significant contributions to the Firm and we wish them well as they continue their legal education.

If you call our office, you have heard the lovely voice of Eleanore Mills. Eleanore is an award-winning songwriter and recording artist who has recently been included in the All American Music Guide. We are delighted that she has received this recognition and we know that you share our congratulations and best wishes for Eleanore in her music career.

### **BREAKING NEWS**

Sahn Ward & Baker is on the move! As we go to press, the Firm has finalized plans to move to new office space to better serve our clients and accommodate our growing practice. We are moving to The Omni Building, a well known Reckson building located at 333 Earle Ovington Boulevard, in Uniondale. For your convenience, our telephone and telecopier numbers will remain the same. We plan to move in January, 2006. Look for an announcement from us soon.