

## 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 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

As we approach the busy holiday season, we take this opportunity to thank our clients, colleagues and friends for their support and guidance throughout the year. In the last eight months, we have moved to our new offices at The Omni Building and welcomed New York State Assemblyman Thomas McKeivitt as Special Counsel to the Firm. Both events mark what we believe are significant developments to further the four qualities that are the hallmarks of the Firm – *Excellence, Service, Leadership* and *Vision* – and will enable us to continue to provide the highest level of counsel and expertise to our clients.

We congratulate Tom on his re-election victory. Tom represents the 17<sup>th</sup> Assembly District which covers parts of the Towns of Hempstead and North Hempstead. Prior to joining the Firm, he served as a Deputy Town Attorney for the Town of Hempstead. We are confident that his years of experience in the public sector will add to the depth of our practice areas, particularly in zoning and land use planning, litigation and appeals and municipal law. If you have not already had the pleasure of meeting him, we invite you to come by the office or simply call to say hello.

### NEW DEVELOPMENTS IN THE LAW

***Adverse Possession:*** The old adage that "possession is 9/10ths of the law" is never more true than in the law of adverse possession, an ancient doctrine that dates back to English common law. Under the law, a person in possession of real property that he or she does not actually own can gain good title to the property provided that he or she can prove to a court that such possession has been (i) hostile and under a claim of right; (ii) actual; (iii) open and notorious; (iv) exclusive; and (v) continuous for the required period (ten years in most cases). A person may possess land for purposes of adverse possession by either enclosing it or cultivating and improving it.

Given the fact that so many of us either have a fence, cultivation or improvements encroaching on our property, or encroaching on our neighbor's property, it is not surprising that adverse possession is one of the most commonly litigated areas of real estate law.

In recent years, a number of court decisions have raised the issue of whether or not a person can acquire title to a parcel by adverse possession if such person, in fact, knows all along that they are possessing someone else's land. Some courts have found that such knowledge of ownership by another destroys the requirement that the person claiming possession possess the property under a "claim of right." After all, if a possessor knows that the disputed property is owned by someone else, the courts have reasoned, how could the possessor have a good faith "claim of right" to the property?

In *Walling v. Przbylo*, 7 N.Y.3d 228 (2006), a recent decision issued by the New York Court of Appeals, New York's highest court, resolved the issue, holding that "actual knowledge that another person is the title owner does not, in and of

itself, defeat a claim of right by an adverse possessor.” According to the Court, “[c]onduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors . . . . The issue is ‘actual occupation’ not subjective knowledge.”

Thus, in Walling, the Court of Appeals clarified that it is the “actual possession” of someone else’s land without that person’s permission that is at the core of the law of adverse possession. The mere fact that the possessor knows that someone else owns the disputed property will not, in and of itself, destroy the possessor’s claim of title by adverse possession.

**Limited Liability Companies:** New legislation effective as of June 1, 2006 made significant changes to the requirements for limited liability companies, including foreign and professional limited liability companies, to publish notice of their formation within 120 days after the effective date of their formation. These changes relate to the content of the notices, the number of weeks of publication, the newspapers to be used and penalties for non-compliance. The law also imposed requirements on LLC’s formed prior to June 1, 2006 to comply with certain publication and filing requirements. Since many such entities may not have fulfilled the new requirements, it is important to review an LLC’s organizational documents to be sure the entity complies with the new law. We invite you to confer with us on these matters.

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

Dan Baker continues to take the lead in our representation of Westfield Properties, the largest retail property group in the world, in the renovation and re-development of The Westfield Sunrise Mall in Massapequa. Recently, under Dan’s guidance, approvals were obtained for significant, new identification signs to be constructed in two locations on the perimeter of the mall property. These signs will help establish the new identity of the mall and are a fundamental part of the re-development plans. The re-development plans also include recent approvals for a variety of interior renovations. With the Firm’s assistance, these enhancements to the mall will be in place for the holiday season.

With Tom McKeivitt’s guidance, and the assistance of Michael Sahn at the hearing, the Firm represented a local civic association in the Town of Hempstead in opposing the construction of a 60 foot tall cell phone tower that the service provider proposed to construct in the middle of a residential community. Usually, local residents will argue that cell phone towers have a negative impact on property values and on the aesthetics of the community. Thomas McKeivitt’s experience in municipal law brought a different approach. Under law, cell phone companies must meet two distinct guidelines before they can gain approval to build towers. First, the provider must demonstrate that there is a “coverage gap” that requires a new tower and, second, it must be shown that the provider is installing the equipment in the least obtrusive way possible. At the hearing before the Town Board of Zoning Appeals, a renowned expert testified on behalf of the civic association that the cell phone company did not demonstrate a gap in coverage which would entitle them to a tower. The expert and area residents conducted a “call test” where 100 calls were successfully completed using the existing phone service of the cell phone company. After hearing over ten hours of testimony in September, the zoning board adjourned the case to a date to be determined.

Michael Sahn continues to lead the Firm’s representation of two separate entities that are proposing residential subdivisions in The Village of Old Westbury. In one of the applications, involving a 40 acre parcel of land, a negative declaration of environmental impact under SEQRA (State Environmental Quality Review Act) was recently adopted after extensive review proceedings coordinated with the engineering consultants and other consultants for the project. Thereafter, preliminary subdivision approval was granted. As a result, development of the subdivision can now go forward.

With Michael Sahn and Dan Baker taking the lead, the Firm is representing King Kullen Grocery Co. in applications to build a new Wild by Nature Supermarket and a free-standing pharmacy on a property located in Oceanside. This full-service natural and organic food marketplace is an independent subsidiary of King Kullen and a leader in the national trend in supermarkets focusing on organic foods and products in an upscale, natural setting.

In the Firm's municipal law practice area, Dan Baker and Michael Sahn are leading discussions between a major owner of petroleum stations throughout Long Island and New York City with a Nassau County town that is considering local legislation that would restrict accessory uses at gasoline stations, including convenience stores.

In the commercial litigation practice area, Jon Ward is leading the Firm's representation of one of the country's largest video rental companies in a breach of lease lawsuit pending in federal court between our client and a shopping center owner. The case involves the early termination of a multi-million dollar lease by our client due to the owner's failure to timely complete work required to be performed under the lease and its failure to deliver timely possession of the premises to our client. The case involves complex issues of commercial lease interpretation and construction.

Jon Ward continues to lead the Firm's representation of commercial and residential property owners in adverse possession cases, one of the most commonly litigated areas of real estate law (see *New Developments In The Law*, herein). In one case, our client, a car dealership, is seeking to acquire title to a portion of a neighboring property because the disputed parcel has been enclosed and used by the car dealership in connection with its business for twenty years. In another case, our client, a residential property owner, is seeking to block the construction of a fence on a disputed parcel in the client's rear yard. The case involves both a surveying error and a claim of adverse possession because the parcel has been cultivated and improved by the client for over twenty years.

Sahn Ward & Baker is representing a homeowner who lost her home in a foreclosure sale because she failed to pay a few thousand dollars in common charges to a homeowner's association in the community where the home is located. The Firm is seeking to annul the foreclosure and sale on a variety of grounds. The homeowner failed to answer the complaint in the action because, among other things, she was caring for her seriously ill husband who, just weeks prior to the commencement of the action, had been diagnosed with a terminal illness, and who sadly passed away while the foreclosure suit was pending in Court. Additionally, the home, valued at \$1,000,000, was sold at the foreclosure sale for a fraction of its value. Other issues include whether the buyer at the foreclosure sale was a bona fide purchaser.

The Firm is pleased to again represent Habitat for Humanity in Nassau County, New York, Inc. (HFHNC), in the proposed construction of a house in Roosevelt. Habitat for Humanity is a non-profit, ecumenical organization that addresses the housing needs of Nassau County by providing simple, affordable houses which are sold at cost to working families in need. Tom McKeivitt and Michael Sahn will lead the Firm's efforts to obtain all variances or permits necessary for this project.

Richard Weinberg is taking the lead representing a physical therapy practice group in negotiating a sponsorship and service agreement with a major professional sports team. We will report more on this in our next Newsletter.

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

We successfully completed representation of our client in the re-development of the Saks Fifth Avenue department store on Franklin Avenue in Garden City. All approvals have been obtained to transform this former retail site into the Winthrop Wellness Pavilion, which will feature physician's offices and related services for physical therapy, sports medicine and health education, along with an upscale fitness center to be operated by Healthtrax Fitness & Wellness. The Firm's partners were honored to have been invited to attend a luncheon at the Garden City Hotel, where the announcement of the building's use was made by our client to the public and the press.

The Firm has successfully concluded the negotiation of a settlement agreement for a client caught up in a federal civil forfeiture action. The client holds a \$1,000,000 purchase money mortgage on commercial property in New Hyde Park. The owner of the property 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, and, in connection with such indictment, the United States of America commenced a civil forfeiture proceeding in Utah federal court to seize the New Hyde Park property. After months of negotiation and the commencement of a mortgage foreclosure proceeding here in New York that was ultimately removed by the United States to New York federal court, the United States entered into a settlement agreement in which the

government recognized the validity and priority of our client's mortgage on the property and agreed to promptly sell the property to satisfy the outstanding balance owed on the mortgage (including principal, interest and the client's attorney's fees). Additionally, the client was granted the right to credit bid the amount owed to it at the sale, guaranteeing that it will either be paid in full on the mortgage or regain ownership of the building.

Sahn Ward & Baker is pleased to report that we have also successfully concluded our representation of a financial institution in a federal class action suit that was brought under the Federal Debt Collection Practices Act in New York. Our client was facing multi-million dollar exposure, but Jon Ward was able to skillfully negotiate a nominal settlement with our adversary on the grounds that the case lacked merit and was not worth pursuing.

The Firm was privileged to represent The Orthodox Church in America in proceedings to close a mortgage loan transaction to benefit the Church. The Firm reviewed, negotiated and supervised the execution and delivery of all loan documents, and obtained approval for the loan transaction from the New York State Supreme Court based on a Petition filed under New York's Religious Corporation Law and the Not-for-Profit Corporation Law. The Firm worked closely with the New York Attorney General's Office in its review of the Petition prior to formal submission to the Court.

### **OUT AND ABOUT**

Members of the firm continue to serve as sources for the news media in matters pertaining to real estate, commercial transactions and land use law. Michael Sahn was a featured source in the "Your Home" column in The New York Times on the use of bridge loans in residential real estate transactions. Long Island Business News highlighted the increasing presence of legislators in law firms as beneficial for both lawmakers and their law firms, and noted that Assemblyman Thomas McKevitt joined Sahn Ward & Baker as Special Counsel. The New York Law Journal also featured an item on Assemblyman McKevitt joining the firm. Richard Weinberg was a source for an article in Long Island Business News that examined the increasing popularity of I.R.C. Section 1031 tax deferred exchanges in property sale transactions.

In September, Thomas McKevitt took part in a Legislative Breakfast held by the Association of Fundraising Professionals Long Island chapter. He met with fundraising professionals from not-for-profit organizations with regard to his role as the ranking minority member on the Committee on Alcoholism and Drug Abuse, and as a committee member on the Aging and Social Services Committee. Tom was also the guest lecturer at a continuing education seminar for real estate appraisers sponsored by the Columbia Society of Real Estate Appraisers in October entitled "Zoning for Real Estate Professionals."

### **UP CLOSE AND PERSONAL**

This past summer we welcomed two talented summer associates from Touro Law School, Jason Horowitz and John Christopher. John Christopher has continued working at the Firm this fall as part of an internship program sponsored by Touro, and we expect Jason to resume as a part-time intern during the winter.

We are pleased to congratulate Jeffrey Greenblatt, who joined the firm as an associate in the Spring and learned that he passed the New York State Bar Exam as the Newsletter went to press. Both Jeff Greenblatt and John Christopher are engaged and planning weddings next summer. We congratulate them and wish them and their families all the best.

Best wishes also to our assistant, Marie Esposito, on the birth of her new granddaughter, Geena Maria.

Finally, the gaming skills of our Office Manager, Leslie Carr, are known far and wide. Her reputation as an "expert" was reinforced when she hit the jackpot on a recent weekend venture. True to form, Leslie shared the wealth by stocking the office with snacks and "goodies," as she always does. One way or the other, Leslie keeps us all going!