

**REPORT FROM COUNSEL**

Attorney Advertising

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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 2007 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**

The Firm's municipal law and legislative practice area has been growing in several important respects. In February, the Firm was appointed as counsel for the Zoning Board of Appeals and the Planning Board of the City of Glen Cove. The scope of our representation will also include serving as special counsel to the City in the adoption of a new comprehensive Master Plan and revisions to the City's zoning code. The Firm was also recently retained to represent the Board of Ethics of the Town of Smithtown in a complex matter under consideration by the Board. Tom McKeivitt, the Firm's Special Counsel, is taking the lead in this case. Jon Ward was selected to serve as a hearing officer in an administrative adjudication proceeding on disciplinary charges brought against an official in a Nassau County Village. The Firm has also taken on several, substantial new cases for our long standing client, the Metropolitan Transportation Authority. All of these matters supplement the Firm's representation of private clients before governmental agencies, boards and authorities in a way that makes the Firm's practice in these areas of the law among the most sophisticated on Long Island.

We invite you to visit our newly-redesigned and updated website. The site will "launch" very soon. News and articles of interest have been added. We welcome your thoughts and feedback on the site. We also encourage you to contact any of the Firm's partners or counsel with general questions and comments, or to continue an open dialogue on topics of interest.

**NEW DEVELOPMENTS IN THE LAW**  
**SEQRA – ITS ROLE CONTINUES TO GROW**

The use of the SEQRA statute (New York State Environmental Quality Review Act) to challenge land use development approvals is a trend that continues to grow. Indeed, a SEQRA challenge to a development approval may soon be, if it is not already, the preferred means for a judicial challenge. While the case law in New York and across the nation in the field of environmental review litigation has grown in recent years, there are several distinct themes and principles that we briefly review here.

A threshold issue in SEQRA challenges that often arises is whether the challenger has "standing," that is, the right to sue. A recent case dealt with this question. In Matter of the Village of Liverpool v. Town of Sullivan Planning Board, 13 Misc. 3d 732 (Sup. Ct. Sept. 29, 2006), the Court was confronted with a suit to set aside the Town Planning Board's findings regarding the construction of a Wal-Mart Supercenter and related approvals. The challenge came from the Village of Liverpool, an adjacent municipality. The Town's Planning Board moved to dismiss the case. The Court denied the motion. The Court found that the challenger Village had made the requisite showing of an "injury-in-fact" which fell within the zone of interests that SEQRA was designed to protect and that the Village demonstrated that it would suffer environmental harm different in kind and nature than suffered by the public at large. To support this conclusion, the Court found that although

the project itself was not within the Village, it would add significant new traffic to roadways within the Village. The Court went on to find that the traffic impacts objected to by the Village were of the exact type SEQRA was implemented to analyze and quantify. Therefore, the Court ruled that the impact of those concerns were peculiar to the Village itself as an adjoining municipality, and thus different than generalized concerns of the public at large.

Given standing, or the right to sue, the Courts continue to define the role of the “lead agency,” the body designated to conduct the SEQRA review, in terms of taking a “hard look” at all of the potential impacts. Where the reviewing agency takes the required “hard look,” and makes a “reasoned elaboration” of its findings, the Courts generally will not disturb or overturn the SEQRA determination. Matter of Avy v. Town of Amenia, 27 A.D.3d 557 (2<sup>nd</sup> Dept. 2006); North Country Citizens for Responsible Growth v. Town of Potsdam Planning Board, 2007 N.Y. Slip Op. 03608 (3<sup>rd</sup> Dept. 2007). On the other hand, if the Court finds that the lead agency did not take an appropriate “hard look,” the Court will invalidate the findings. Waldbaum, Inc. v. Incorporated Village of Great Neck, 10 Misc. 3d 1078(A), 814 N.Y.S.2d 893 (Sup. Ct. Jan. 9, 2006). While this may sound like a straightforward test, it is anything but that. The analysis of whether a lead agency took a “hard look” is ultimately fact driven. Since SEQRA cases often involve very complex factual issues of environmental impacts on such matters as traffic, sewage disposal, wetlands, water resources, air pollution and the like, these cases are extremely complex and require substantial expert analysis and detailed review of the record made before the lead agency – a record that is often voluminous. In other words, the “hard look” test is a simple formulation that is difficult to apply.

That leads to another continued theme in SEQRA cases – the need for the lead agency to require preparation of a Supplemental Environmental Impact Statement (SEIS). Since the review of complex environmental issues often takes months, if not years to complete, the information and data initially presented for analysis may grow old, stale or out-of-date by the time the lead agency is ready to adopt its final conclusions and determinations. The Courts are frequently now upholding challenges to SEQRA findings based on the need for the submission and analysis of a SEIS before the final decision is made. Matter of Riverkeeper, Inc. v. Town of Southeast, 32 A.D.3d 431 (2<sup>nd</sup> Dept. 2006). The Riverkeeper case illustrates this principle. In this case, the Board relied on a SEIS prepared for the project twelve years prior to the date of decision. When the final action was challenged, the Court overturned the Board’s SEQRA decision, finding that potential environmental impacts, especially regarding water use, water quality and protection of wetlands changed over this twelve year period, and that the Board could not have met its obligations under SEQRA without a further SEIS. While the twelve year period in the Riverkeeper case may seem extreme, in fact, the cases are pointing toward the need for the timely submission of a SEIS to allow an agency to take a “hard look” at environmental impacts in circumstances with a much shorter time frame from beginning of the review process to the final determination. This trend may actually make the SEIS all but a mandatory part of a thorough SEQRA review in all complex cases.

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

Jon Ward continues to lead the Firm’s growing litigation practice area in representing clients in a broad array of commercial litigation in state and federal courts. In one case, the Firm has been retained by the MTA to represent it in a commercial landlord/tenant dispute pending in Nassau County Supreme Court. The tenant, a well known Nassau County law firm, is suing the MTA and prior owners of the building seeking to recover in excess of \$500,000 in rent based on an alleged mistake in the terms of the lease. The Firm continues to represent Hollywood Video in a lawsuit pending in the United States District Court for the Eastern District of New York. Hollywood is being sued by Kimco for \$1.9 million in damages arising from an alleged improper termination of a commercial lease. We also recently completed the briefing of an appeal in the Appellate Division, Second Department under the New York State Environmental Quality Review Act. The Village of Great Neck appealed from a determination of the Nassau County Supreme Court which ruled that the Village failed to comply with SEQRA when it rezoned approximately 19 acres of property in the Village from an Industrial to Residential classification.

The Firm is representing clients in numerous real-property disputes involving easements and adverse possession, and it continues to represent clients in a wide variety of business and partnership disputes.

In the area of real estate development, the Firm continues to represent a New York City-based real estate developer in connection with the redevelopment of an entire block-front area in Westbury in order to convert a former commercial and

industrial building to a modern office complex. This project has been ongoing for several years and is transforming an industrial area north of Old County Road in the Town of North Hempstead into a first class office complex. The project has involved variance and site plan approval applications to the Board of Zoning Appeals and the Town Board, environmental review proceedings, real estate transactions for the acquisition and financing of the properties that are part of the overall project area, and representing the client with co-counsel with respect to real estate tax certiorari proceedings, credits and exemptions.

We also are representing the owner of the former Saks Fifth Avenue department store located on Franklin Avenue in Garden City in proceedings to complete the award winning conversion and renovation of the former retail facility into a mixed-use office and commercial building. We are proud to be associated with this project and to be part of our client's professional team that has accomplished this major renovation and re-utilization of a landmark property on Long Island.

Dan Baker is taking the lead in representing the franchisee of a major national restaurant chain in making applications to the Town of Oyster Bay in order to open a location on Sunrise Highway in Massapequa. The applications involve working with the project architect and engineer to gain variances from the Zoning Board of Appeals, a special use permit from the Town Board and site plan review by the Department of Planning.

The Firm is seeking approvals on behalf of a country club located in the Incorporated Village of North Hills to allow for renovations and additions to the existing clubhouse. The project requires approvals from three different Village boards for a special use permit, site plan review and architectural review. The granting of these applications will allow the club to construct new ballroom facilities and additional amenities, as well as to provide a new facade to the clubhouse.

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

The Firm successfully represented King Kullen Grocery Co. Inc. in obtaining zoning approvals to begin construction of a new Wild by Nature supermarket and a separate free-standing pharmacy on a vacant parcel of land located on Long Beach Road in Oceanside. Working with Town of Hempstead officials and a team of consultants and engineers, Dan Baker and Michael Sahn took the lead in successfully crafting the applications for variances and site plan approval to meet Town requirements and to address local concerns. The parcel was previously the site of the Oceanside Theatre and a retail supermarket. Wild by Nature is a full-service natural and organic food market and a leader in its field.

The Firm represented Professional Orthopedic and Sports Physical Therapy, a prominent multi-center physical therapy practice, in negotiating and finalizing a sponsorship agreement with the New York Islanders Hockey Club. Our negotiations centered on positioning our client as the team's official physical therapy provider. Accommodating the desires of the client and balancing them with the needs of the team required thoughtful negotiation and a great deal of attention to details, all of which was ably done by Richard Weinberg, who represents clients in complex corporate and commercial matters. The contract gives our client the right to be the official physical therapy provider to the Islanders, the use of a skybox and advertisements on the dashboards that surround the ice at Nassau Coliseum, as well as the use of the team logo in approved marketing materials. We are also representing our client in agreements with a number of school districts and educational institutions to provide athletic trainers to serve the needs of the schools' interscholastic teams.

Dan Baker successfully presented an application on behalf of Spiegel Associates, one of Long Island's most prominent property owners and developers, to convert a building in the Town of Oyster Bay from a mixed use warehouse and industrial zoning to office space. The building, located just off of the Long Island Expressway and west of the Route 110 corridor, has been transformed into an attractive office building with extensive alterations to the building itself, the parking lot and the surrounding landscaping.

The Firm worked successfully with a team of engineers and architects in assisting Walgreen's in obtaining site plan approval and a special use permit for an accessory drive-thru to a new pharmacy in the Town of Brookhaven. The property, located on Middle County Road in Centereach, has frontages on two side streets in addition to Middle Country Road. Both the Town of Brookhaven and the New York State Department of Transportation wanted to condition their approvals on the

number of access points regulated to each street frontage by substantially decreasing the number of curb cuts. Since access is vital to the operation of such a store, the project team spent many months and gave a strong effort before the Town of Brookhaven Planning Board, which, ultimately, led to a favorable decision by that Board.

### OUT AND ABOUT

Dan Baker was featured as a “Who’s Who in Tax Certiorari” in the February 2<sup>nd</sup> edition of Long Island Business News. The article provided a look at Dan’s background in land use law and his successful representation of the owner of a large horse farm in Nassau County. To see the article, visit our website or call our office for a reprint.

The same issue of Long Island Business News also included a news item on the appointment of Sahn Ward & Baker by the City of Glen Cove to serve as counsel for the City’s Zoning Board of Appeals and Planning Board.

An article authored by Michael Sahn and John Christopher, a legal intern in the Firm and a third year law student at Touro, on the use of temporary zoning moratoriums throughout New York to control growth and development was published in the April 2007 edition of The Nassau Lawyer, the official newspaper of the Nassau County Bar Association. For a reprint of the article, please visit our website or call the office.

In April, Michael Sahn spoke at a continuing legal education program on zoning and land use law, where he addressed updates in case law and legislation for the benefit of developers, engineers, local zoning and land use officials, real estate, business and environmental lawyers. Michael Sahn is a regular member of a distinguished faculty and has been an invited lecturer for many years on behalf of the National Business Institute.

Michael Sahn also spoke before the Nassau County Women’s Bar Association in late March, presenting a report on changes and developments in New York State zoning and planning legislation.

The November issue of Real Estate Weekly included a news item on our successful representation of Wild by Nature to open a new organic food supermarket in Oceanside.

### UP CLOSE AND PERSONAL

We are proud to recognize Jon Ward’s dedication and commitment to his community. Jon has been named to serve as a Member of the Community Board of Southside Hospital, part of the North Shore-Long Island Jewish Health System. In addition, Jon has become a Member of the School Board of the St. Patricks School, also located in Bay Shore. Jon and his wife Lauraine are involved in many other community activities, and enjoy the Bay Shore area with their three children. We congratulate Jon and his family.

Our congratulations also to Jeffrey Greenblatt, who was sworn in as a member of the Bar of the State of New York. Jeffrey started with the Firm as a summer associate and a law clerk in 2004 and 2005. His professionalism and enthusiasm for the law have made him an important part of our Firm. The next important date on Jeff’s calendar is his wedding in July!

Leslie Carr, our dedicated, talented and hard working office manager, will be moving from Long Island to a new “dream” home in the Lake George area during the summer. Leslie, more than any other person, is responsible for the Firm’s growth and development over the years. Tireless in her efforts, Leslie literally has done it all. No task has ever been too small or too great for Leslie to undertake and successfully complete. Most of our clients, colleagues and friends have come to know Leslie, either personally, by phone or email. Whenever projects or issues arise, our response has always been, “Leslie will take care of it.” Without doubt, Leslie has laid the foundation for our continued growth and ability to serve others. We will all greatly miss Leslie, and wish her and her family the very best for success and good health in their new home and community.