

## Winter/Spring 2014 Vol. XV No. 1

Welcome to the Winter/Spring 2014 edition of "Report from Counsel," a Newsletter for the Firm's clients and the other professionals who consult with the Firm, updating them on:

New Developments at the Firm	1-2
Out and About with the Firm	3
Up Close and Personal	3
Matters of Interest	4
New Developments in the Law	5-7

## Sahn Ward Coschignano & Baker, PLLC Expands

*Firm Adds Space in Nassau County Omni Building  
and Opens New York City Office*



Sahn Ward Coschignano & Baker recently expanded its practice at its Uniondale location inside the Omni Building. The expanded space inside the sixth floor at the building adds several thousand square feet, including new offices, a common area and an additional conference room, to better serve the existing clients of the firm.

The firm has also expanded with the opening of a New York City office inside the Chrysler Building at 405 Lexington Avenue, 26th Floor. The new office will enable the firm to better service its clients in the metropolitan area, especially as both the firm's New York City land use and zoning, and litigation practices continue to grow.

Partner Dan Braff is leading the development of the firm's New York City land use and zoning practice with an emphasis on matters before the Board of Standards and Appeals, the City Planning Commission, the Department of Buildings and the Landmarks Preservation Commission. Mr. Braff also provides zoning analyses and counsels clients in connection with air rights transfers throughout the five boroughs.

Mr. Braff has handled high-profile matters in New York City, including, most recently, representing The Church of Jesus Christ of Latter-day Saints in obtaining approval from the Board of Standards and Appeals for a variance to allow the construction of a new chapel in Flushing.

## NEW DEVELOPMENTS AT THE FIRM

### Michele Pincus and Christian Browne Join Firm as Partners



Michele A. Pincus and Christian Browne have joined Sahn Ward Coschignano & Baker as the firm's partners.

Ms. Pincus was previously the associate general counsel for the Long Island Power Authority (LIPA), where she provided legal support in areas such as municipal real property issues, zoning and land use, and other utility matters. She also provided oversight on litigation and internal employment matters and addressed issues affecting LIPA's Board of Trustees.

Before working with LIPA, Ms. Pincus spent 17 years with Lazer, Aptheker, Rosella & Yedid, P.C., based in Melville, New York. As a partner in the firm, she chaired the zoning and land use practice. In this role, she represented developers, property owners and national corporations. She frequently appeared before village, town, zoning and planning boards throughout Nassau and Suffolk Counties. Her expertise was regularly called upon to monitor the best and most effective use of various real estate properties on Long Island. She regularly met with municipal officials and worked with community groups to reconcile competing interests and concerns. Her practice also included the areas of commercial litigation and employment law.

Ms. Pincus also worked at a New York City-based law firm and also served as an assistant corporation counsel with the New York City Law Department where she represented New York City in litigation and negotiations involving zoning issues, building code compliance, environmental regulation and landmark preservation.

Ms. Pincus has received many prestigious awards throughout her career. She was inducted into the *Long Island Business News* "Top 50 Influential Women" Hall of Fame after receiving the honor three times in 2004, 2006, and 2007. She has also received *LIBN's* "40 Under 40" award in 2001, recognizing her as one of Long Island's rising stars in the business community. In 2002, she received the Leadership Recognition Award from the National Multiple Sclerosis Society for her outstanding contributions to the business, civic, and cultural enhancement of Long Island.

She is currently a board member of the Women Economic Developers of Long Island (WEDLI), a group of top-level women executives, and served on its Board of Directors from 1998 to 2008, holding the position of president of the organization from 2004 to 2006.

Mr. Browne concentrates his practice in the areas of commercial litigation, zoning and land use planning, and municipal law. Prior to joining the firm, he managed his own practice, The Law Office of Christian Browne, PC in Uniondale. He was also assistant district attorney in New York County and is a former member of the Town of Hempstead Board of Zoning Appeals.

*Continued on page 2*

### Michele Pincus and Christian Browne Join Firm as Partners

(Continued from page 1)

He is admitted to practice in New York State as well as before the Southern District and the Eastern District of New York. He is also a member of the Nassau County Bar Association and a board member of the Nassau County Catholic Lawyers Guild. In addition, he is an active member of the Friends of Mercy Medical Center.

Mr. Browne is a graduate of the College of Holy Cross and Fordham University School of Law.

### Adam H. Koblenz Named Recipient of LIBN's "Leadership in Law" Award



Adam H. Koblenz was selected to receive *Long Island Business News*' "Leadership in Law" Award in the category of Associate. The ceremony took place November 14, 2013 at Crest Hollow Country Club in Woodbury.

The Leadership in Law Award recognizes those attorneys who carry the following qualities in their profession: dedication, hard work, skill, tenacity and excellence. The award is dedicated to those individuals whose leadership — both in the legal profession and in the community — has had a positive impact on Long Island.



### Long Island Business News Honors Miriam Villani

Miriam Villani was honored as one of Long Island's Top 50 Most Influential Women by *Long Island Business News*. A special ceremony took place on October 17, 2013 at the Crest Hollow Country Club in Woodbury.

### Brian S. Stolar Appointed Village Attorney for the Village of Woodsburgh



The Village of Woodsburgh has appointed Brian S. Stolar as its new village attorney. In his new position, he will act as legal advisor to all village staff and the various village boards and commissions and assist them in carrying out their functions. He will also prepare legislation, draft and review contracts, assist the village in complying with federal, state and local regulatory laws and regulations, serve as litigation counsel, and render opinions on a variety of issues.

### Michele Pincus profiled in Long Island Business News

Michele Pincus was featured in the August 9-15, 2013 edition of *Long Island Business News*, in which she discussed her previous role as associate general counsel with LIPA and how she became interested in law.



### John Christopher, Miriam Villani and Elaine Colavito participate in the "Bridging the Gap" program presented by the New York State Bar Association's (NYSBA) Young Lawyers Section.

The two-day program took place on January 31 and February 1 during the NYSBA's weeklong annual meeting, which was held at the New York Hilton Midtown in New York City. Mr. Christopher was the Program Co-Chair for the NYSBA's Young Lawyers Section's Bridging the Gap MCLE program. During this transitional program, newly admitted attorneys who attended the two-day course received 16.0 credit hours. Mr. Christopher — who concentrates his practice in the areas of municipal law, zoning and land use planning, commercial and real estate transactions and commercial and landlord/tenant disputes — is the 10th Judicial District Co-Representative to the Young Lawyers Section (YLS) of the New York State Bar Association and the YLS Liaison to the Real Property Law Section. Ms. Villani, who is a former chair of the NYSBA Environmental Law Section, and the current editor-in-chief of that section's publication, *The New York Environmental Lawyer*, spoke during the first day of the program. In her presentation "Environmental Law — It's Good to be Green," she discussed environmental law practice, with an emphasis on various areas of law that may require environmental law consultation. In her presentation "I Want A Divorce! How to Advise Your Clients in Matrimonial Proceedings," Ms. Colavito discussed child support under the Domestic Relations Law.

### Daniel Baker and John Farrell have been named Board Members to Touro Law School's newly launched Land Use & Sustainable Development Law Institute.

In partnership with other planning, development and environmental organizations, Touro's Land Use & Sustainable Development Law Institute will help foster greater understanding of local land use law, environmental law and public policy by providing a forum for discussion and resources. It will also provide its law students with more opportunities to serve their local communities and develop their skills.

### John Christopher was named Young Lawyer of the Month by the Young Lawyers Committee of the Nassau County Bar Association.

Mr. Christopher, an associate with the firm, is an active and contributing member of the Nassau County Bar Association and the New York State Bar Association, serving as an Executive Board Member and 10th Judicial District Representative to the Young Lawyers Section. His profile was featured in the November 2013 issue of *The Nassau Lawyer*.

### Chris Coschignano was sworn in for a fourth term as Oyster Bay Town councilman.

Mr. Coschignano was elected in 2001 to serve on the Town Board. He was re-elected in 2005, 2009, and most recently in 2013. In 1995, Mr. Coschignano was appointed counsel to the town's Zoning Board of Appeals to oversee the operations and exclusively handle all municipal litigation involving the Zoning Board of Appeals. He served in this position until his election to the Town Board in 2001.



## Chris Coschignano Raises Funds for Wounded Warrior Project

Chris Coschignano, a partner with the firm and a member of Oyster Bay's Town Board, participated in the Oyster Bay Town Supervisor's 5K Run, which was sponsored by Sahn Ward Coschignano & Baker, on October 19, 2013. The event coincided with the town's two-day Oyster Festival.

Councilman Coschignano ran in the 5K to raise funds for the Wounded Warrior Project, the non-profit veterans service organization that offers a variety of programs, services and events for wounded veterans.

"It was a great day at the Supervisor's 5K Run," said Mr. Coschignano. "We had over 30 runners and walkers who helped us raise over \$2,000 for the Wounded Warrior Project." Friends and family were able to show their support by donating money or participating as a running or walking member of Mr. Coschignano's team.

A very grateful Mr. Coschignano was proud to say that he was able to run the entire race without walking; however, he was prouder of the camaraderie that was shown. "We all had such a wonderful time together. Thank you to all who participated and to all who donated."



*Friends and family of Chris Coschignano at the Oyster Bay Town Supervisor's 5K Run on October 19, 2013.*

## SWCB Sponsors 2013 Marcum Workplace Challenge

Sahn Ward Coschignano & Baker, PLLC was one of the participating sponsors for this year's Marcum Workplace Challenge, which took place July 30, 2013 at Jones Beach State Park.

Business professionals from more than 200 local companies were in attendance, many of whom took part in the 3.5-mile run/walk. Participating organizations included businesses, non-profits and governmental agencies, representing almost every industry in Nassau and Suffolk Counties.

Proceeds went to benefit the Long Island Children's Museum, Long Island Cares - The Harry Chapin Food Bank and the Children's Medical Fund of New York.



*Jason Horowitz (front row, second from left) is joined by participating sponsors and beneficiaries of the 2013 Marcum Workplace Challenge.*

## Michael Sahn Attends the Burton Awards for Legal Achievement



*Michael Sahn and U.S. Supreme Court Justice Sonia Sotomayor.*

On June 3, 2013, Michael Sahn attended the Burton Awards for Legal Achievement in Washington, D.C. Now in its fourteenth year, The Burton Awards recognizes and rewards legal scholarship, writing and achievements in the law by partners and counsel from the nation's law firms, members of the judiciary

and legal educators. This year's program featured a presentation of the "Contemporary Book of the Year in Law Awards" to U.S. Supreme Court Justice Sonia Sotomayor, followed by an interview with the judge.

## UP CLOSE AND PERSONAL

**Congratulations to attorneys Jason Horowitz and his wife Stephanie on the birth of a baby girl, Elaine Colavito on the birth of a baby boy and John Christopher on the birth of a baby girl.**

**A federal magistrate judge presiding over *Equal Employment Opportunity Commission v. Signal International LLC*, No. 12-cv-00557 (E.D. La.), ruled in favor of the plaintiffs represented by Joseph Bjarnson on a discovery motion brought by the defendants.** Signal International was seeking the discovery of information concerning the immigration status of up to 500 Indian nationals involved in the suit. Mr. Bjarnson represented the intervening plaintiffs pro bono along with the Southern Poverty Law Center, the American Civil Liberties Union, the Asian American Legal Defense and Education Fund and Crowell & Moring LLP.

**Wayne Edwards represented the developers of a newly opened Panera Bread location in Bellmore.** The new restaurant has two stories, making it the first of its kind on Long Island. Mr. Edwards, a partner with the firm, represented MGD Investments in front of the Hempstead Board of Zoning and Appeals and handled lease negotiations for the developer. The new Panera Bread seats 118 and has a 900-square-foot second floor. The restaurant was developed over three vacant properties that housed a carpet store, a restaurant and a paint store.

**The firm successfully defended a client, ECI Limited, USA, in a breach-of-contract lawsuit filed by an international company, GFE Global Finance.** ECI Limited was in a contract with GFE to deliver confectionary equipment to the company, which operated in the Ukraine. Under the terms, the equipment would be delivered “FOB Taiwan” in accordance with the contract. During the time of delivery, GFE’s ownership changed hands. GFE sued ECI Limited for breach of contract, stating that its current agents never received its bill of lading for the equipment as promised. The firm was able to prove that his client had met its obligations to deliver the equipment to the company, which underwent a sudden ownership change while the delivered product was in transit and the Eastern District Court of the United States agreed. Jon Ward, Andrew Roth and Joseph Bjarnson represented the client in this litigation.

**Daniel H. Braff secured approval from the New York City Board of Standards and Appeals (BSA) to extend the term of a variance that authorized an attended below-grade transient parking garage located on East 29th Street in Manhattan.** The garage originally received a variance under the New York State Multiple Dwelling Law in 1966 to permit the use of an accessory parking garage for attended transient parking, despite being located in a residential zoning district, where transient parking was not permitted. Mr. Braff secured the approval in less than three months. As part of the application process, he also presented the application to Manhattan Community Board 6, which recommended that the BSA approve the application.



Partner Dan Braff concentrates his practice in New York City land use and zoning matters.

**The firm successfully obtained land use and building approvals on behalf of the Roslyn Highlands Hook and Ladder, Engine and Hose Company, Inc. for a newly constructed firehouse in East Hills.** The project was financed with tax-exempt bonds, which the law firm also assisted in obtaining for the fire department. The new 7,842-square-foot building, which is located on Harbor Hill Road (next to East Hills Park), replaces the former firehouse on 270 Warner Avenue in Roslyn Heights and provides not only fire protection services for local residents, but also emergency services and an ambulance response team. The Village of East Hills previously provided approvals for the new firehouse, which the firm also handled on behalf of the fire department. The Town of North Hempstead authorized the issuance of \$3.415 million in tax-exempt bonds, allowing the fire department to borrow the funds needed to build the new firehouse rather than financing the project through a conventional loan, saving the local taxpayers tens of thousands of dollars.

**Daniel H. Braff secured approval from the New York City Board of Standards and Appeals (BSA) to extend the term of a special permit originally granted under the pre-1961 Zoning Resolution that authorized an accessory commercial outdoor parking lot in a residential zoning district in the Bronx.** The original grant was issued in 1957 and authorized the continued operation of a commercial accessory parking lot for more than five cars for use by a bank on the adjacent site (presently Citibank) in what was then a residential district. Mr. Braff secured a 10-year extension of the special permit.

**The firm’s litigation group resolved a multi-year foreclosure and bankruptcy matter.** After more than five years of litigation in Federal District Court, New York state court and the U.S. Bankruptcy Court for the Eastern District, the firm successfully resolved a matter in favor of its client involving a large waterfront parcel in Sheepshead Bay, Brooklyn. The firm’s client was a private lender and its note was secured by a mortgage on the waterfront parcel. After years of foreclosure litigation in state court, the mortgagor declared bankruptcy, moving the action to the bankruptcy court, where the firm successfully navigated the matter through the bankruptcy court, culminating in the firm’s client taking title to and possession of the parcel. The litigation was spearheaded by Jon Ward and Daniel Braff.

**The firm obtained summary judgment allowing its elderly client to sell her residence, despite the opposition by her stepchildren.** The firm obtained summary judgment on an expedited basis for an elderly client who sought to sell her brownstone in Brooklyn so she could move into an assisted living facility and receive treatment for a debilitating medical condition that she was suffering from. The client’s stepchildren commenced an action challenging her ownership of the building and seeking to block the impending sale on the grounds that the deed had allegedly not been delivered by their now-deceased father to their stepmother. After the firm presented incontrovertible proof of delivery of the deed, the Brooklyn Supreme Court dismissed the stepchildren’s claims, thereby clearing the path for our client to sell the property and move into the assisted living facility. The case was handled by Andrew Roth and Joseph Bjarnson.



## Navigating Uncharted Waters in Land Use Development

### *Proceeding in the Wake of the Supreme Court's Ruling in Koontz v. St. Johns River Water Management District*

NOTE: This article first appeared in the September 2013 issue of The Nassau Lawyer.

Highly publicized, recent decisions by the United States Supreme Court have dealt with a variety of social policy issues such as health care reform, marriage and civil rights. The Court's decision in *Koontz v. St. Johns River Water Management District* ("Koontz") has received much less public attention. Yet, *Koontz* has wide sweeping consequences for land owners, developers and local municipalities involved in the review and approval of applications for land-use permits. In fact, it has been feared that the decision will "work a revolution in land-use law"<sup>1</sup> by depriving local governments of the ability to charge reasonable permit fees.

In *Koontz*, the developer sought permits from the Water District to build a shopping center on 3.7 acres of land that comprised part of a 14.9-acre tract of wetlands located on the south side of Florida State Road 50, east of Orlando. To build the shopping center, it was proposed that the 3.7 acres of the wetlands be filled; the remainder of the tract would remain as wetlands.

Florida law requires permit applicants seeking to build on wetlands to offset any resulting environmental damage with mitigation measures. Initially, the developer offered to mitigate the environmental effects of his plan proposal by deeding a conservation easement to the Water District that would cover nearly three-quarters of his property. The Water District rejected this proposal. The developer could obtain approval from the Water District for construction of the 3.7-acre shopping center only if he:

1. reduced the size of his proposed development and, *inter alia*, deeded to the Water District a conservation easement on the resulting larger remainder of his property; or
2. hired contractors to make improvements to Water District-owned wetlands several miles away.

The developer objected that the Water District's demands were unduly burdensome and the Water District denied the application.

The developer then filed suit against the Water District based upon state law that provides for money damages for agency action that is an "unreasonable exercise of the state's police power constituting a taking without just compensation."<sup>2</sup> The Florida trial court found the Water District's action unlawful having failed to satisfy the requirements of the U.S. Supreme Court's prior rulings in *Nollan v. California Coastal Comm'n* and *Dolan v. City of Tigard*.<sup>3</sup> The *Nollan/Dolan* cases held that "the government may not condition the approval of a land-use permit on the owner's relinquishment of the owner's portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use."<sup>4</sup>

The Florida District Court of Appeals affirmed the trial court, but the Florida State Supreme Court reversed on two grounds.

First, it held that the petitioner's claim failed because, unlike in *Nollan* or *Dolan*, the Water District denied the developer's application. In *Nollan/Dolan*, the complaining landowners were granted approvals, but with conditions they alleged were burdensome and confiscatory.

Second, the Florida State Supreme Court held that a demand for money to mitigate the impacts of a development proposal by a municipal government as part of a land use approval cannot give rise to a claim under

*Nollan* and *Dolan*. In *Nollan/Dolan*, the demands on the applicants were not conditioned upon the payment of money to offset perceived negative impacts of the approval. Rather, the demands were for the conveyance of property or property rights.

The developer filed a Petition for Writ of Certiorari from the decision of the Supreme Court of Florida. Based on the Writ, the issue before the U.S. Supreme Court was whether the denial of a land-use permit can invoke a violation of the Takings Clause under the U.S. Constitution.

In answering this question, Justice Samuel A. Alito, Jr. writing for the 5-4 majority, in which he was joined by Chief Justice Roberts along with Justices Scalia, Kennedy and Thomas, held that the long-standing principles of *Nollan/Dolan*, which "provide important protection against the misuse of the power of land-use regulation," do not change depending on whether the land use application is approved or denied. The Court also held that a government's demand for money as part of an approval from a land-use permit applicant must also satisfy the *Nollan/Dolan* test.

The Court's analysis focused on whether the Water District's actions satisfied the requirements of the "nexus and rough proportionality" tests established in *Nollan* and *Dolan*. The Court stated, in relevant part:

*Nollan* and *Dolan* accommodate both real realities by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a "nexus" and "rough proportionality" between the property that the government demands and the social costs of the applicant's proposal. Our precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in "out-and-out ... extortion" that would thwart the Fifth Amendment right to just compensation. Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.<sup>6</sup>

*Koontz* raises many questions and issues. For one, the Court uses the term "extortionate demands" to describe excessive requirements that municipalities place on land-use applicants that do not pass the *Nollan/Dolan* test.<sup>7</sup> The opinion does not give a clear definition of that term. There is no bright line test as to whether a demand is "extortionate." The Court explained that when an applicant is forced to relinquish property rights as a condition for a land-use approval, "[e]xtortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them."<sup>8</sup> To illustrate this point, the Court stated that:

[o]ur decisions in the [*Nollan/Dolan*] cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable.<sup>9</sup>

The Court was "[m]indful of the special vulnerability of land use permit applicants to extortionate demands for money ..."<sup>10</sup> The Court also recognized that "[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."<sup>11</sup> Presumably, if the government's demand fails the proportionality test, it then gives rise to a

## Navigating Uncharted Waters in Land Use Development

(Continued from page 5)

constitutional claim because it is an impermissible burden. Yet, the Court's opinion does not provide clear guidance as to when a demand crosses the line and becomes "extortionate."

*Koontz* also raises another important question. How does the denial of a land-use permit application lead to a constitutional claim when the applicant had no vested right to the permit to begin with? Stated another way, if there is no "vested" right to a permit or zoning approval, how can an applicant be entitled to constitutional protection if the government denies an application?

The *Koontz* decision may have a profound impact on how local governments engage applicants for land-use permits in the future. Justice Kagan may be right, particularly as municipalities may fear a *Koontz*-based constitutional challenge to both approvals and denials. *Koontz* may lead municipalities to grant or deny land use applications, or refrain from imposing conditions they consider appropriate for potentially the wrong reason; namely, the concern of litigating costly legal battles.

It will be interesting to see how local governments across the nation respond to land use applications in the wake of the *Koontz* decision. Local government boards may give greater deference to the land-use applicant as they weigh the imposition of conditions or consider a denial of an application in which they have asked for measures to mitigate impacts or the payment of money for mitigation purposes that the applicant has

rejected. These are very complex issues and *Koontz* leaves much open to interpretation for future land-use permitting by local governments.

The dissent suggests that the balance has now tipped in favor of the land-use applicant, over the municipality, at the bargaining table for a land-use permit. It remains to be seen whether the *Koontz* ruling erodes the ability of local municipalities and applicants to negotiate beneficial terms and conditions that protect the public interest, but do not run afoul of the Constitution.

### FOOTNOTES:

1. *Koontz v. St. Johns River Water Management District*, 570 U.S. \_\_\_, 133 S.Ct. 2586 2602 (2013).
2. *Id.* at 2593.
3. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
4. 113 S.Ct. at 2591.
5. *Id.*
6. *Id.* at 2595 (internal citations omitted).
7. *Id.*
8. *Id.*
9. *Id.* at 2594.
10. *Id.* at 2603.
11. *Id.* at 2596.

By Michael H. Sahn and Adam H. Koblenz

Michael H. Sahn, Esq. is the Managing Partner of Sahn Ward Coschignano & Baker, PLLC. He is a former co-chair of the NCBA's Real Property Law Committee. Adam H. Koblenz, Esq., a Partner at the firm, contributed to this article.



## Establishing, Maintaining and Expanding Nonconforming Uses

NOTE: This article first appeared in the September 2013 issue of The Nassau Lawyer.

Zoning ordinances are enacted with the intent to create a compatibility of uses within specific geographic areas of a municipality. However, there are certain uses that disrupt the balance that the ordinances are enacted to create. These are known as nonconforming uses. A nonconforming use is "[a] use of property that is no longer authorized due to rezoning, but lawfully existed prior to the enactment of the existing zoning ordinance ..."<sup>1</sup> "Due to constitutional and fairness concerns regarding the undue financial hardship that immediate elimination of nonconforming uses would cause to property owners ... courts and municipal legislators have adopted a grudging tolerance of such uses."<sup>2</sup> As a result, nonconforming uses are "permitted to continue, notwithstanding the contrary provisions of the ordinance."<sup>3</sup> Nevertheless, the overriding public policy of zoning is to reasonably restrict and eventually eliminate these types of uses.<sup>4</sup>

To that end many municipalities have adopted special code provisions which establish conditions or circumstances whereby the right to continue a nonconforming use will be lost if the use ceases for a proscribed period of time. For example, the Town Code of the Town of Huntington states that

if a nonconforming use ceases to remain continuous and active for a period of one year, then that use is lost and the property in question must be used for a purpose authorized by the Code.<sup>5</sup> In other words, failure to continue a nonconforming use may very well mean its end.

In many instances, properties containing nonconforming uses are significantly more valuable than other properties in their surrounding area and the primary concern of owners of these uses is to protect their economic interest. Conversely, municipalities generally view non-conforming uses as detrimental to property values of the surrounding community because they are at odds with the designed and preferred development of the area.<sup>6</sup>

Since the goal is to ultimately eliminate these uses, when a question concerning the validity of a nonconforming use arises, the burden is on the property owner to "demonstrate that the property was indeed used for the nonconforming purpose... at the time the zoning ordinance became effective."<sup>7</sup> This can be a daunting task for property owners, particularly when the code in question was adopted in the 1930s or 1940s. As in any case, as time passes documents become lost or misplaced and memories begin to fade. Generally speaking, the best evidence to establish a nonconforming

Continued on page 7

## Establishing, Maintaining and Expanding Nonconforming Uses

(Continued from page 6)

use is the live testimony of individuals with firsthand knowledge of the history of a property and its continuous use in a nonconforming manner. In fact, the Town of Babylon goes as far as requiring the presentation of actual witnesses at a public hearing when the request involves any use other than a single family home.<sup>8</sup> Clearly, the difficulty of satisfying this burden becomes proportionally more difficult based on the age of the code.

Finding an individual that recalls particular facts of land uses or structures for a code enacted in the 1930s would mean finding an individual between approximately 90 and 100 years of age. While not impossible, as years pass the burden to establish the use becomes increasingly more onerous as people pass away and memories fade. Simply put, uses that have existed for many years can be lost because there is no one that can attest to the use of the property prior to the adoption of the zoning ordinance.

If the property owner fails to locate individuals with direct knowledge of the property, the only alternative is to try to establish the use through the submission of documentary evidence. Documents such as property tax records, aerial photographs, surveys and Sanborn Maps can, in some cases, provide valuable information about a site's history and uses. Whether a collection of documents and photographs are sufficient to establish continuous nonconforming usage obviously depends on the quality of the evidence in relation to the nonconformity the property owner is seeking to protect. Regardless, it is incumbent upon the property owner to create the best record possible in the event of a judicial challenge to the determination of the municipal board or official charged with reviewing applications for nonconforming uses.

Once a nonconforming use has been established, property owners must be conscious of special regulations applicable to their use. Most municipalities have adopted restrictions governing the expansion of nonconforming uses because, while these uses are permitted to continue, "... they may not be enlarged as a matter of right."<sup>9</sup> Therefore, it is within the sound discretion of the municipality to permit or preclude the expansion of nonconforming uses.<sup>10</sup>

While some municipalities permit limited expansion of nonconforming uses and structures, others strictly prohibit it. For example, in the Town of Babylon, a legal nonconforming structure may be expanded as of right by 25% of the existing floor area and by 25% of land area for a nonconforming use.<sup>11</sup> Conversely, the Town of Huntington completely prohibits expansion of nonconforming uses.<sup>12</sup>

Clearly, the right to continue a nonconforming use is constitutionally protected and the courts will protect property owners' rights to maintain said uses. However, expansion and/or modification of these uses may not be possible even when the additional use could be considered compatible with the authorized use. For example, in *McDonald v. Zoning Board of Appeals of the Town of Islip*,<sup>13</sup> the court, citing to a municipality's right to restrict the expansion of nonconforming uses, upheld the determination of the Zoning Board to deny the expansion of a pre-existing, nonconforming landscaping and excavation business to include a mulching and recycling operation. Thus, even though mulching and recycling is arguably an ancillary use of a landscaping business, it was still considered an impermissible expansion and the right to prohibit the expansion was upheld by the court.

There is, however, one exception to this rule which applies when the land is considered a resource (i.e., mines, quarries, landfills, etc.). In those instances the courts have taken a "vested rights" approach.<sup>14</sup> A vested right inures to the property owner when he or she invests a substantial sum of money into a property pursuant to a validly issued permit.<sup>15</sup> Once a right

is vested, the municipality is estopped from preventing the project or use from going forward.<sup>16</sup>

According to the Court of Appeals, there are special considerations that should be made because "as a matter of practicality as well as economic necessity, a quarry operator will not excavate his entire parcel of land at once, but will leave areas in reserve, virtually untouched until they are actually needed."<sup>17</sup> Simply put, where a property owner evidences his or her intent to use an entire parcel for a particular use, through a significant financial commitment or otherwise, they will be allowed to expand the use to the entire parcel.

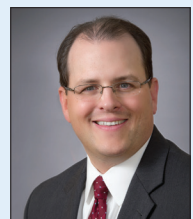
Clearly, establishing, maintaining and expanding nonconforming uses is a difficult endeavor. Due diligence is essential when dealing with nonconforming uses because property owners and prospective purchasers stand to lose a great deal if the nonconforming use is not preserved.

### FOOTNOTES:

1. *Toys R Us v. Silva*, 89 N.Y.2d 411, 416 (1996) citing from 1 Anderson's *American Law of Zoning* § 6.01, at 481-482 [Young 4th ed.].
2. *Toys R Us v. Silva*, 89 N.Y.2d 411, 416; See also, *Cinelli Family Ltd. Partnership v. Scheyer*, 50 A.D.3d 1136, 1137 (2d Dept. 2008).
3. *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127, 135 (2010); *People v. Miller*, 304 N.Y. 105, 107 (1952).
4. *Id.*; *Pelham Esplanade v. Board of Trustees of Village of Pelham Manor*, 77 N.Y.2d 66, 72 (1990).
5. See, §198-105; See also, *Babylon Town Code* §213-226 (Nonconforming use lost if discontinued for a period of six months); *Hempstead Building Zone Ordinance* § 5 (nonconforming use lost on "abandonment"); *North Hempstead Town Code* §70-208 (E) (Nonconforming use lost if discontinued for a period of one year); *Oyster Bay Town Code* § 246-4.2.2.5 (Nonconforming use lost if discontinued for a period of one year).
6. *Buffalo Crushed Stone Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88, 97 (2009).
7. *Jones v. Town of Carroll*, 15 N.Y.3d 139, 143 (2010) quoting *Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278, 284-285 (1980).
8. *Babylon Town Code* §213-26(D).
9. *Buffalo Crushed Stone Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88, 97 (2009); quoting *Rudolf Steiner Fellowship Foundation v. De Luccia*, 90 N.Y.2d 453, 458 (1997).
10. *Incorporated Village of Laurel Hollow v. Owen*, 247 A.D.2d 585, 586 (2d Dept. 1998).
11. *Babylon Town Code* §213-23(B).
12. See, *Huntington Town Code* §198-102 and §198-103. See also *Oyster Bay Town Code* § 246-4.2.2.3 (prohibiting the enlargement of nonconforming uses beyond an existing structure).
13. *McDonald v. Zoning Board of Appeals of the Town of Islip*, 31 A.D.3d 642 (2d Dept. 2006).
14. See, *Jones v. Town of Carroll*, 15 N.Y.3d 139, 144; See also, *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127, 135 (2010); *Buffalo Crushed Stone, Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88, 97 (2009); *Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278, 285 (1980).
15. *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996); *Ellington Constr. Corp. v. Zoning Board of Appeals of Inc. Village of New Hempstead*, 77 N.Y.2d 114, 122 (1990).
16. *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996).
17. *Jones v. Town of Carroll*, 15 N.Y.3d 139, 144.

By John C. Farrell

John C. Farrell is a land use and municipal law attorney and Partner with Sahn Ward Coschignano & Baker. He is also a member of the Town of Babylon Zoning Board of Appeals.





# S | W | C | B

SAHN WARD COSCHIGNANO & BAKER, PLLC

ATTORNEYS AT LAW

333 Earle Ovington Boulevard  
Uniondale, New York 11553

PRESORTED STD  
US POSTAGE  
**PAID**  
Permit No. 14  
Huntington NY  
11743

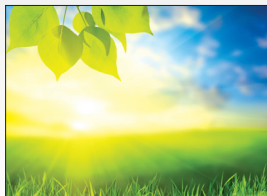
# S | W | C | B

SAHN WARD COSCHIGNANO & BAKER, PLLC

ATTORNEYS AT LAW

SAHN WARD COSCHIGNANO & 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; municipal law and legislative practice; environmental law; corporate/business law and commercial transactions; telecommunications law; labor and employment law; real estate tax certiorari and condemnation; estate planning and administration. 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, municipalities, government agencies and authorities, and individuals. Our offices are centrally located to serve our clients on Long Island and in New York City.

## Check Out Our Blogs:



Environmental Law



Land Use and Municipal Law



Litigation

**[www.swcblaw.com](http://www.swcblaw.com)**

333 Earle Ovington Boulevard, Suite 601, Uniondale, NY 11553

*Please send all correspondence to the Uniondale office.*

New York City Office: 405 Lexington Avenue, 26th Floor, New York, NY 10174

Syosset Office: 116 Jackson Avenue, Syosset, NY 11791

Telephone: (516) 228-1300 • Telecopier: (516) 228-0038 • E-Mail: [info@swcblaw.com](mailto:info@swcblaw.com)