

REPORT FROM COUNSEL

VOL. X, NO. 1

SUMMER 2009

SAHN WARD & BAKER is a full service law firm concentrating in the areas of zoning and land use planning; real estate law and transactions; civil litigation in state and federal trial and appellate courts; corporate/business law and commercial transactions; environmental law; municipal law and legislative practice; telecommunications law; 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, municipalities, government agencies and authorities and individuals. Our offices are centrally located to serve our clients on Long Island and in New York City.

Welcome to the Summer 2009 edition of "*Report from Counsel*," a Newsletter for the Firm's clients and the other professionals who consult with the Firm, updating them on our practice as well as important new developments in the law.

NEW DEVELOPMENTS AT THE FIRM

We are excited and proud to report that our Firm has grown significantly over the last several months. Our goal has always been to provide our clients with the highest quality advice and legal representation. Our new attorneys will help us fulfill these goals, and enhance and expand upon our practice areas. We are, therefore, very pleased to introduce the attorneys who have recently joined the Firm.

Miriam Villani, a highly accomplished and respected environmental lawyer, has become a partner of the Firm. Miriam is a former Chair of the Environmental Law Section of the New York State Bar Association, and is currently the Editor-in-Chief of the Section's journal, *The New York Environmental Lawyer*. She writes and lectures frequently on environmental issues. Her practice focuses on all aspects of environmental law, including complex litigation, transactional matters, permitting, and regulatory and compliance proceedings. We invite you to learn more about Miriam by visiting the Firm's website. Miriam has written a Legal Advisory on an important new development in environmental law involving "joint and several" liability in Superfund cleanup actions based on a recent decision of the United States Supreme Court. This Legal Advisory can be found on and downloaded from our website, or call our offices for a copy. Please contact Miriam to discuss these issues, or others of concern, in greater detail.

Kenneth Auerbach has also recently become a partner of the Firm. Ken is a prominent and well known municipal law attorney, and we are honored that he has joined our Firm. Ken will continue to concentrate his practice in all aspects of municipal law, including complex transactional matters and labor and employment law. He will also focus his practice on the areas of zoning and land use planning, environmental law including SEQRA, and litigation. Ken serves as general counsel to the Village of Old Westbury and the Village of Sands Point, and also serves as special counsel to several other municipalities. He also represents private sector clients in all of his practice areas. We invite you to consult with Ken on all matters of concern.

We are also pleased to introduce Erik Zaratina, the Firm's newest associate. Erik joined the Firm in January. Previously, Erik was associated with a New York City law firm, where he was a member of the Firm's litigation group. Erik is admitted to practice law in both New York and Connecticut. Erik graduated from Long Island University, C.W. Post, *summa cum laude*, and received his J.D. degree from the Touro Law Center.

NEW DEVELOPMENTS IN THE LAW:
CONFLICTS BETWEEN SEQRA AND TIME LIMITS TO REVIEW LAND USE
APPLICATIONS UNDER STATE OR LOCAL LAW

The New York State Environmental Quality Review Act (Article 8 of the Environmental Conservation Law) and its implementing regulations (6 NYCRR Part 617) (“SEQRA”) are a complex set of rules and regulations pertaining to environmental review of almost every land use decision made by administrative boards and agencies. The fundamental purpose of SEQRA is to incorporate environmental considerations into the planning, review and decision-making procedures of local governmental agencies. This is accomplished by requiring that administrative agencies determine whether the proposed action is likely to have a significant adverse impact on the environment. This requirement applies to applications for site plan review and approval before planning boards and planning commissions. In such instances, where a site plan application is subject to SEQRA, a reviewing agency must make an assessment of the environmental impacts of the proposed site plan before rendering a decision on the application.

The SEQRA process can be lengthy, expensive and burdensome for both the applicant and municipality or agency charged with review. In order to properly manage the SEQRA process efficiently, the state legislature has imposed throughout the statute, certain time frames for environmental reviews of proposed actions. On the other hand, state and local statutes have their own separate time frames for review and approval of land use applications. Often, these time frames come into conflict.

This issue was addressed by the Nassau County Supreme Court in the case of *Cervasio et al. v. City of Glen Cove Planning Board et al.*, Trial/IAS Part 7, Nassau County, Index No.: 017334/07, entered December 18, 2008. In *Cervasio*, a developer brought an Article 78 proceeding in the nature of mandamus against the City’s Planning Board and the City’s Building Inspector. The developer claimed it was entitled to a default approval, i.e., an approval based on the Planning Board’s failure to act on the application in accordance with two separate timing provisions in the City Code. The first timing provision required that the Planning Board must schedule a public hearing within sixty-two days of receiving a complete submission from an applicant. The second timing provision provided that a site plan application was approved by default if no determination was made on the application sixty two days after the close of the public hearing. When the proceeding was commenced, approximately eleven (11) months after the filing of the original application, the Planning Board still had not finished its review under SEQRA.

The Supreme Court rejected the developer’s arguments and agreed with the Planning Board in holding that the developer’s application was never complete and that, in any event, “. . .where there is a conflict between the timing provisions of local, ‘approved by default’ ordinances and SEQRA’s ‘elaborate procedure frame work’ (*New York City Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 NY2d 337, 347 [2003]), ‘SEQRA must prevail,’ since SEQRA ‘far overshadows the rights of developers to obtain prompt action on their proposals’ (*Chase Partners, LLC v. Incorporated Village of Rockville Centre*, 43 AD3d 1049, 1052, quoting from, *Matter of Sun Beach Real Estate Dev. Corp. v. Anderson*, *supra*, 98 AD2d 367, 375-376; *Tinker Street Cinema v. Woodstock Planning Bd.*, 256 AD2d 970, 972-972; *Figgie Intern., Inc. v. Town of Huntington*, 203 AD2d 416, 418-419).” Furthermore, the Court concluded that “reasonable delays will be countenanced where it appears that there [*sic*] were caused by the agency’s acquisition or review of information necessary to an initial determination of environmental significance (*Tinker Street Cinema v. Town of Woodstock Planning Bd.*, *supra*, at 972).”

The Court’s ruling clarifies that SEQRA time frames take priority over the time limits imposed by local statutes or ordinances governing the review of a site plan application. The courts have thus acknowledged that so long as the administrative agency is acting reasonably in its pursuit of information in order to make an informed decision on an application, the priority is for the SEQRA review to be accomplished fully and properly. This ruling emphasizes the great weight and significance the courts have placed upon environmental review of land use applications.

MATTERS OF INTEREST AT THE FIRM

Under the guidance of Dan Baker, the Westfield Sunrise Shopping Mall is preparing to undergo a dramatic transformation, with the renovation of existing underutilized retail space. This renovation will create a new “lifestyle” center that will include outward facing restaurants with sidewalk cafes, new facades and a fitness center, as well as improved site circulation, landscaping and parking areas. The project involves substantial review by the Town of Oyster Bay Department of Planning and Development and the Department of Environmental Resources and hearings for approvals by the Zoning Board of Appeals and Town Board for approval of variances, special use permits and site plans in connection with the project.

The Firm was honored to serve as Special Counsel to the City of Glen Cove, providing legal guidance and counsel concerning land use and zoning issues as the City developed its first Master Plan in more than 50 years. The creation of the new Master Plan lays the groundwork for the future of the City, including multiple redevelopment projects from the waterfront to the downtown area. It was a major undertaking that required expertise in many different disciplines. The recently adopted comprehensive Master Plan provides the City of Glen Cove with a clear vision as the City moves into the future. We look forward to our continuing representation of the City as elements of the plan are implemented.

Under Tom McKeivitt’s guidance, the Firm has prepared a new ordinance for the City of Glen Cove that will mandate the use of visual simulation submissions to accompany applications for large scale projects. With the passing of the ordinance, Glen Cove has become the first municipality in the United States to require the submission of visual simulations with certain land use applications. The use of three-dimensional computer modeling itself is not new to the building and development community, but this will be the first time that a municipality has made its use a requirement for the zoning and land use application process.

The Firm was pleased to represent the Sid Jacobson Jewish Community Center in obtaining permits and approvals to upgrade facilities at the Robin Hood Country Day School in Brookville, which the JCC recently purchased. The camp is now operating and providing great service to the campers and their families.

The Firm has been appointed to serve as Village Attorney for the Village of Old Westbury and the Village of Sands Point. Both are prominent municipalities on the North Shore of Nassau County. Kenneth Auerbach serves as General Counsel to both Villages on behalf of the Firm.

Michael Sahn led the Firm’s representation of our longtime client, The Beechwood Organization, the major partner in a real estate development company designated by Suffolk County to build an important new development in Yaphank. As announced by County Executive Steve Levy, Legacy Village will feature 1,000 units of affordable housing, a destination sports and entertainment venue, and a research park powered by solar energy. The project includes a hotel, restaurants, office and retail space, as well as a variety of housing choices. The project is to be built on land owned by Suffolk County, south of the Long Island Expressway in Yaphank.

OUT AND ABOUT

Michael Sahn was interviewed for a *New York Law Journal* article concerning the challenges facing law firms in a difficult economic climate. Michael commented that the Firm has been able to prosper and grow by virtue of having diversified practice areas such as environmental, municipal and litigation.

The *Cervasio* decision, the topic of the “New Developments in the Law” section of this Newsletter, was referenced in the February edition of *Mealey’s Litigation Report on Real Estate*. It was also written up in *Focus Briefs*, a newsletter on important real estate decisions published by Chicago Title Insurance Company.

In April, Michael Sahn spoke on current case law and new legislation at a continuing legal education program on zoning and land use law 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.

Miriam Villani participated as a lecturer on June 10th in a New York State Bar Association program entitled, *The Redevelopment of Contaminated Property: New York State's Brownfield Program and Beyond*. This CLE course was co-sponsored by the Environmental Law Section and the Committee on Continuing Legal Education of the New York State Bar Association.

Dan Baker co-chaired the Leukemia & Lymphoma Society of Long Island's Annual Golf Outing, held at the Huntington Crescent Club on June 22nd. The day-long event featured golf, brunch, cocktails and dinner. We invite you to join us in supporting the Society.

Dan Baker has been named Alum of the Month for August by Touro Law Center's Alumni Office. He has been an active member of the law school for many years, devoting time and effort to many committees and special events.

Tom McKeivitt was invited to speak on ethical considerations for planning and zoning officials for the New York State Conference of Mayors 2009 Planning & Zoning Summer School, held in conjunction with the Association of Towns, the State of New York and the New York Planning Federation. Tom addressed more than 100 attendees at the Long Island program, which was held at the Town of Islip's Town Hall on July 21st. These programs were also being offered in Albany, Syracuse, and Williamsville, New York.

Tom McKeivitt presented a seminar on April 17th to nearly 300 buildings inspectors in Poughkeepsie at the Hudson Valley Code Enforcement Officers Educational Conference. He lectured on inspecting properties, search warrants, serving appearance tickets and tort liability. On October 15th he will be lecturing to Westchester County building inspectors on the topic of "Legal Aspects of Code Enforcement."

An article on current issues in land use and zoning law co-authored by Michael Sahn, Jason Horowitz and John Christopher appeared in the April issue of *Nassau Lawyer*. To read the article in its entirety, visit the Press Center at our website or call the office for a copy.

Jon Ward coached three teams of students from the St. Patrick School's moot court competition, where daughter Amelia was a member of the sixth grade team. They participated in a regional competition held at Our Lady of Mercy Academy in Syosset, and proud father Jon reports that Amelia did a great job in her role as a witness.

The Firm's attorneys and staff had a great time at this summer's Workplace Challenge Race, held at Jones Beach on July 28th. The event raises funds for a variety of Long Island not-for-profit organizations. In the Men's Team division, our Firm placed 29th out of a field of 103 teams, with an overall time of 1:20:32. We also competed in the Mixed (co-ed) Team and the Women's Team events. Congratulations to all who participated and made it a memorable event.

UP CLOSE AND PERSONAL

Please help us give a warm welcome to Meagan Emma McKeivitt, who was born on July 7, 2009, to proud parents Samantha and Tom McKeivitt. Meagan was born at 7 lbs 7 oz, and she and big brother Connor are doing fine. By coincidence, her birth date is also the date of Tom and Samantha's anniversary!