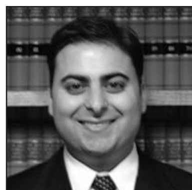
NOTEWORTHY

Reinforcements have arrived! Since our last Legal Update, we have had two new additions to our legal staff. In April, **Andrew S. Kohut** joined us as an Associate

in the Real Estate, Land Use, and Litigation Departments. Andrew received his undergraduate degree in Management Information Systems and Marketing from SUNY Binghamton, and his Law Degree from Rutgers School of Law. Andrew lives in Hoboken, New Jersey.



Our newest attorney is **Anthony S. Bocchi.** Anthony is active in our Litigation Department, in both commercial and general civil litigation. He received his undergraduate degree in Political Science from Rutgers College, and his Law Degree from Seton Hall Law School. Prior to joining our firm, Anthony was a Law Clerk for the Honorable Jonathan N. Harris, JSC, a Superior Court Judge here in Bergen County. Anthony lives with his wife, Jennifer, in West Caldwell.

Following in the footsteps of Of Counsel **Cheryl Morrissey**, who was involved in the Inns of Court in Bergen County for many years, **Jill Rosenfeld** was a June 2006 graduate of the Justice Morris Pashman Inns of Court. **Jill** now participates in the "Transactional Inn" for business lawyers. **Anthony Bocchi** is now a participant in the 2006 to 2008 cycle of the Pashman Inns of Court, where he is working to hone his trial advocacy skills.

Speaking of **Cheryl Morrissey**, with her medical condition significantly improved, in August Cheryl and her husband, Steve, packed up the kids and moved to Galway, Republic of Ireland, where Cheryl is working on her Master's Degree in Human Rights.

Associate, **Jill Rosenfeld,** has been active in the Paramus Chamber of Commerce Education Foundation, and was a member of the Dinner Committee for the Eleventh Annual "Dream Awards" Gala which was held on October 19th. On the subject of "Galas"…..long-term clients, **Bob and Marianne Dill** were again Chairs of the Bergen Community College Foundation's annual event this year on Friday, November 17th. Partner, **Tom Wells**, arm-twisted **Bob** into joining the Board when he was President of the Foundation. Among this year's honorees, is **Bill Villafranco** who will be receiving the 2006 Award for Merit of Philanthropy and Volunteerism. Bill who runs Southwind Associates of NJ, Inc., a regional hedge fund investment firm, and Footprints in the Sand Foundation, works with many of our office clients, and is a good friend. We wish him the best on this honor. Congratulations Bill.

Congratulations also, to perhaps this office's most frequently honored client, **David F. Bolger**, who was recently honored by both the West Bergen Mental Health and Northfield Mount Hermon School. These honors were no surprise, since David made very substantial gifts to both institutions (totaling almost $20 Million) upon the sale of the Farmers & Merchants Bank owned by him in Boise, Idaho.

Partner, **Tom Wells**, who was a member of the holding company's Board of Directors of Farmers & Merchants Bank during the twelve years David owned it, is now on the Bank's Board of Directors of the Bank of the Cascades, a publicly held company based in Bend, Oregon that acquired Farmers & Merchants. Tom is learning the joys of cross-country travel as he flies back and forth to Oregon at least once a month since joining this Board.

Partner, **Stuart Liebman**, continues to be active with the Valley Hospital Foundation, on which he serves as President's Council. Stuart remains President of Temple Beth Sholom in Fair Lawn and is active in Paramus Rotary. Partner, **Kimberly Paton**, is also involved with Valley Hospital, most recently, serving on the Planned Giving Committee of the Board of Trustees. Kimberly also continues to actively lecture at Bergen Community College on estate planning matters. She also recently "Chaired" the "Newspapers and Education Program" for the Care Plus Foundation. This eight week series which ran in The Record, was designed to educate school children about mental health issues.

Of Counsel, **Ken Porro**, who is Chairperson of our Litigation Department, is currently serving as General Counsel to the New Jersey Meadowlands Mayor's Committee, the Meadowlands Construction Officials Organization, and New Jersey State League of Master Plumbers. Just recently, for the third year in a row, Ken was recognized by New Jersey Monthly Magazine as one of the top 5% of the Civil Litigating Attorneys in the state. Speaking of litigators, **Darrell Felsenstein**, of our Litigation Department, is now the Administrative Chairperson of our Litigation Department. He is doing his best to keep **Ken** and **Anthony** organized.

Associate, **Linda Herlihy**, who is an active land use attorney in our office, decided to see what it is like on the other side of the table. Linda recently joined the Midland Park Board of Adjustment as its newest member. Linda also continues to serve the Glen Rock Board of Adjustment as counsel together with Partner, **Stuart Liebman**. Partner, **Tom Wells**, continues as a member of the Bristol, Vermont Planning Commission.

Partner, **James Jaworski**, recently joined the Ramapo College Anisfield School of Business Alumni Advisory Board. Jim also remains active on the West Bergen Mental Health Board of Directors and the Bergen Highlands Ramsey Rotary Club.

Partner, **Jim Delia**, is finishing his 4th year on the Ridgewood YMCA Board of Directors. Partner, **Tom Wells**, remains active on the Board of Trustees of the "Y" where he is also Chairman of the World Service Committee. This past summer, on one of **Tom's** Africa trips, he cut the "Grand Opening ribbon" of a long time Ridgewood YMCA project in Dakar, Senegal.

Here is your copy of **Legal Update** from:

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Legal Update

Vol. 15. No. 1 — ***Wells, Jaworski, Liebman & Paton, LLP*** — Winter 2006-2007

Lawyers & Banks Working Together *(to help you!)*

By: Thomas M. Wells, Esq.

I can almost see you shaking your head at the headline. Do you have a good relationship with your lawyer and your banker? If you do not, you should. Let's talk about why. My experience tells me that the most successful business people learn to work well with their lawyers **and** their bankers. A relationship with a law firm not only will keep you out of trouble, but more importantly, should help a business grow and prosper. Likewise, the importance of a good relationship with a bank.

A good bank will provide a myriad of financial services for a business, including checking, wire transfers, letters of credit, merchant services, and nowadays even investment advice and execution of trades. However, perhaps the most important service for a small business, is the bank's ability to lend the business money at competitive rates. At some point, when a business grows larger, it will need to find its capital from other sources, including investment bankers, joint venture capital, and ultimately, shareholders. However, for our small business clients, a key to success is almost always the ability to borrow money from banks.

So how do you build a good relationship with a banker? **First, be honest.** You need to find a banker that you can lay out your needs to honestly. That is not to say, you should not put your best foot forward, collect your financial data, and be willing to speak as an advocate about your company's good prospects, especially if you have some problems. However, if you cannot tell your banker the truth about your needs and occasional bumps in the road, ultimately, this banker will not be effective for you. This applies to lawyers as well. Any lawyer

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WJL&P And Our Banks

By: Thomas M. Wells, Esq.

We have the good fortune to represent a number of the area's premier financial institutions including **Hudson City Savings Bank, Valley National Bank, Commerce Bank, Citibank** and **Oritani Savings Bank**. Banks need lawyers too, and our firm works in the areas of contract and lease negotiations, land use approvals, employment matters, litigation, and the like for our banking clients.

In addition, many of our relationships with banks are actually when we are identified by the bank as a "loan closing attorney" selected by the bank, but paid for by the lender. For those of you who do commercial loans, you recognize the concept. When a bank makes a commercial loan, typically it will identify a lawyer to

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Ocean Dunes: Friend Or Foe

By: Kenneth A. Porro, Esq.

Ocean dunes have long been acknowledged as an established means for maintaining sandy beaches. Coastal experts, however, have various opinions as to whether these walls of sand truly protect the upland property owners against mother-nature's ocean storms. Ocean dunes, nonetheless, receive great press. Year round property owners; for example, in Long Beach Island, New Jersey and Ocean City, New Jersey, continually praise the dunes for their alleged protection of inland properties. Moreover, millions and millions of taxpayer dollars are appropriated for dune projects throughout the country because of their perceived public protection purpose. Ocean front property owners, on the other hand, have a far differing view. Ocean front

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New Jersey's Identity Theft Protection Act

By: Jill F. Rosenfeld, Esq.

New Jersey's Identity Theft Protection Act went into effect on January 1 of this year. The Act was passed in response to the growing concerns of New Jersey residents that personal information has been, and will continue to be, vulnerable to security breaches by unscrupulous parties.

New Jersey's Identify Theft Protection Act is one of the strongest in the nation. It requires companies operating out of, or conducting business within the state, to (1) immediately contact the State Police; and (2) disclose the breach to its New Jersey customers whenever any suspicious or actual breach of a New Jersey resident's personal information has occurred. The Act allows residents to contact local authorities whenever there is suspicion that personal information has been breached. The Act requires companies which store personal information to destroy the records containing that information when it is no longer needed. It also mandates that Social Security numbers (which have been identified as being most vulnerable to identity theft) be kept separate from all other personal information.

New Jersey also enables its residents to place a security freeze on their consumer credit reports. No other state, to date, has a provision for security freeze available to their residents. At the time a resident requests a security freeze, the credit reporting agency must assign a unique PIN to that resident's record. Only the resident can request a temporary (or permanent) lift of the freeze and only after providing the credit reporting agency with the unique PIN and other identifying information. After the freeze is in place, a resident can request a temporary lift for a specific period of time or for a specific credit

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A Word From Our Managing Partner .... Stuart D. Liebman

This is an exciting time to be the Managing Partner of Wells, Jaworski, Liebman & Paton. This year, our Firm is celebrating its 20th Anniversary. I have been the Managing Partner for the past 10 years. Tom Wells is the founding Partner of the Firm and served as Managing Partner for our first 10 years.

From 1986 through 2006, our world has changed in dramatic ways. Everyone reading this issue of Legal Update should be able to recall the time before the Internet, cellular phones, and September 11, 2001. Throw in Black Monday in October of 1987, and Y2K, and if you are like me, you wonder "how did we fit all of that in during a mere 20 years?"

WJL&P has also undergone many changes throughout this period of time. We have grown to become a Law Firm of 13 Attorneys plus Paralegals and other support staff. We have worked hard to do the best job possible for our clients in a professional and highly competent manner, and we have had the good fortune to achieve success in meeting this goal.

While our Firm has evolved at the frenetic pace that our business environment has mandated during these past 20 years, we are proud to note that we have also sustained our ongoing commitment to practice law in a civil and collegial fashion, while enjoying a work environment with a familial staff. And as always, we proudly maintain our strong commitment to civic endeavors and activities. We count our civic stature in our various work and life communities as one of our many strengths.

This edition of Legal Update provides you with news on our most recent accomplishments, along with articles covering a variety of topics which we hope you will find interesting and helpful. You will read about changes in some of the procedural aspects of Real Estate Law in New Jersey. You will also find useful information regarding unintended consequences in Estate Planning; what to watch out for when paying contractors; and protection against identity theft. From our growing commercial banking group you will read about the new banking environment. And from our rapidly growing and developing litigation group, you will find information regarding the latest electronic discovery as well as the landmark decisions coming out of the Ocean Dunes litigation.

In our Noteworthy column, we proudly introduce our two newest associates, Andrew Kohut and Anthony Bocchi. As I said at the outset, this is an exciting time to be the Managing Partner of WJL&P. Thank you for being part of our first 20 years, we look forward to sharing the next 20 together, and beyond.

New Jersey Requires That You Promptly Pay The Contractor

By: Andrew S. Kohut, Esq.

On September 1, 2006, Governor Joe Corzine signed legislation formalizing prompt payment of construction contracts to prime contractors by landowners in both the private and public sectors. The government believes prompt payment to prime contractors will result in subcontractors and all other laborers being compensated more quickly for work each performed. Prime contractors have been held to the identical standards in paying those they subcontract work out to. The government feels that in the interest of a fair playing field, property owners be held to the same standards. Such legislation is the government's attempt in helping to foster a more efficient process in property development.

The legislation states that work billed by the prime contractor to the property owner, or the property owner's designated agent, will be due within thirty days from the date billed. If on the thirty-first day a property owner has failed to remit the required payment, they will be liable for the unpaid balance plus interest will begin to accrue on the unpaid balance at a rate of prime plus one percent. Interest will continue to accrue until the prime contractor has been paid in full.

Requirements for 30-Day Payment

However, the thirty day time limit is unenforceable unless two prerequisites are met. First, the work completed must be in accordance with the construction contract agreed upon by both parties. Second, the property owner must approve and certify all work delineated on the billing statement. Be advised, the billing statement will be deemed accepted by the property owner unless a written statement of monies withheld, and reasons for such withholdings, is received by the prime contractor within twenty days of the billing date.

Upon written notice being given to the defaulting property owner seven days after initial default, contractors may suspend performance of a construction contract without facing the penalty of breach of contract. However, if a written statement was given within the 20 day time frame and the defaulting party is making a good faith effort to remedy the situation, a contractor is not entitled to suspend performance.

Remedies

The remedies and rights provided for in this new bill are not the only avenues of recourse a prime contractor has in dealing with a defaulting property owner. This legislation does not seek to limit a prime contractor's legal recourse, but serves as an addition to those remedies currently available within established State law. Further, the remedies and rights provided for in this new legislation will supersede any provisions of existing State law which contradict and/or conflict such remedies and rights. Lastly, any civil action which is brought to collect payments in accordance with this legislation must be conducted within the State and the prevailing party shall also be entitled to reasonable costs and attorney's fees.

Those who support this legislation see the creation of a protective shield for those small business owners who go unpaid for work they perform. But whether the intent of the legislation is realized is another matter. It would seem that this bill will be extremely beneficial to those contractors involved in larger scale projects in which the property owner is seeking an economic benefit. However, those contractors who survive on smaller scale projects, which are usually done for luxury and not economic necessity, may not reap the same benefits. In a stagnate housing market, common sense would seem to dictate that the average homeowner may delay having work performed fearing the repercussions previously discussed in this article.

Andrew S. Kohut is an Associate at WJL&P. Andrew is active in the Land Use and Real Estate areas of our practice.

Ocean Dunes: Friend Or Foe

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property owners spend millions of dollars to purchase these unique special properties which provide views, access and breezes. These oceanfront property owners protect their properties from storms by way of bulkheads or other less visually intrusive methods than a wall of sand. Long Beach Island for example, has numerous sand dunes which were created without governmental intervention by property owners who maintain their privately created reasonable sand dunes through lower sand dunes captured by dune grass plantings and dune fencing.

Long Beach Island's townships are currently proffering an ambitious dune protection project which involves a 22 foot high sand dune with a 50 foot wide peak, which steeps down an additional 130 feet. This Long Beach Island monstrous wall of sand will directly have an effect on property owners' views, access and ocean breezes. Depending upon whom you speak with, you will receive quite a difference in opinion. The oceanfront property owners are generally against the unbridled dune project. Whereas, the inland property owners are, in general, in support of the project, except those inland property owners who see the dune project as a waste of taxpayer dollars, as well as creating an excessively long access path to get to the ocean waters.

Property Rights

New Jersey law has long recognized that the loss of view, loss of access and loss of ocean breezes are protected rights. These rights are guaranteed by the United States Constitution Fifth Amendment taking clause and as against the States through the Fourteenth Amendment. It is unfortunate that the Army Corp. of Engineers and the DEP have in many sand dune projects chosen proposals which do not balance ocean views, access and breezes. More specifically, it is possible to have an ocean dune constructed, with a lower height, but a wider volume. Thereby, the base of the dune may be wider but the views of the property owner are intact. It is a chilling feeling to stand between an oceanfront property dwelling and a dune alleyway in which there is little or no ocean breeze or ocean view. There are however, numerous flies and gnats, which lie in waiting behind the wall of sand for the property owner and his/her guests.

Discrimination

Civil Rights Discrimination is an interesting issue emerging throughout the State of New Jersey in combating unbridled dune projects. More specifically, government entities that demand execution of sand dune easements without compensation are running afoul of civil rights laws. Again, this issue of protection is questionable in that numerous sand dunes projects throughout the state and country, where a large storm has occurred, the sand dunes are literally nothing more than a band aid which has eroded. In many cases, the sand dune sand ends up in the living room of the ocean front property owners.

More offensive is the governmental practice of not providing certain benefits to ocean front property owners who do not sign the property taking easement agreement. For example, in Long Beach Island, New Jersey, property owners in Harvey Cedars who did not execute the unbridled easement agreement were subject to harassment by inland property owners and local officials. These Harvey Cedars ocean front property owners which had normally received sand replenishment in the past through beach badge annual funds, now would no longer receive such beach replenishment sand until they executed the non-compensating unbridled dune easement agreements. Even whereas in the Long Beach Island case, there are no protective provisions within the dune easement agreement to protest oceanfront property owners' ocean view, access or breeze. Governmental officials should be reminded of the Federal and State civil rights statutes known as Section 1983 laws. Unfortunately, the Section 1983 cases are not well publicized as it is extremely expensive to litigate these civil rights causes of actions. This author, however, believes that the continuing abuses of government action against civil rights and property rights will force certain honorable citizens to challenge unjust governmental action. Moreover, this author welcomes such necessary litigation in order to protect our constitutional property rights and way of life.

The Balance

In sum, ocean dunes do provide a recognized public purpose and thereby it is extremely difficult to stop such ocean dune projects. The balance, however, is that if government does wish to construct ocean dune projects, there must be safeguards in place to protect oceanfront property owners' ocean views, access and breezes. The balance between the public need and constitutional rights is not always a clear one. Emotions on both sides are strong. The answer, as in most cases, is found somewhere in between the public need for reasonable dune dimensions and oceanfront property owners' reasonable need for ocean views, access, and breezes.

Kenneth Porro is "of Counsel" at WJL&P and practices in the area of Litigation.

Dune Buster Strikes Again!!!!

Word just in - - - on November 16th, Ken Porro was successful in persuading the Superior Court to dismiss a NJDEP lawsuit which sought the taking of private property without compensation in Surf City. New Associate, Anthony Bocchi, assisted on the brief for this case. This comes as no surprise as Ken had previously handled, and won, the seminal New Jersey case out of Ocean City, which mandates that loss of ocean view and access, is an "unconstitutional taking" unless the property owner is compensated.

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Lawyers & Banks Working Together *(to help you!)*

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you cannot tell the truth to, you do not want.

Second, both the bank as an institution and the individual banker are important to you. Banks know this, and know that ultimately, loans are made by people, not institutions. This is one of the reasons when bankers sometimes switch banks, the loans and other banking relationships follow them. Thus, in an ideal world, you want to find an institution that believes in good customer service, provides good competitive rates, is generally supportive of your type of business, and you want to find a banker that meets all of the same criteria, and, if possible, one that you personally like……and likes you. If you are shaking your head saying you do not have that kind of relationship, do not hesitate to give us a call as we know some great bankers who might be just the right person for you to meet with to begin to build the kind of banking relationship you want.

Third, do not ask the banker to believe in your business more than you do. What do I mean by this? Simply, recognize that if you are a small business, you will have to put yourself personally on the line if you want to borrow money from the bank. This means at the very start of a small business you will likely not get a business line of credit. You will simply have to borrow against existing equity, likely, in the form of a home equity loan. Even after your business grows and shows that it can more than meet its financial obligations, bankers will still usually want personal guarantees. While there is a natural tendency on behalf of bankers to always want as much collateral as they can get, and by lenders and their counsel to try to keep the amount of collateral down, recognize that you must ultimately be fair to the banker and give them enough collateral to feel as confident in you and your loan as you do.

Fourth, consider having more than one banking relationship. Our banking clients will not like to hear me say this, but most successful business people have more than one banking relationship. Thus, if one bank cannot step up when a particular credit facility is needed, perhaps another can. It also does not hurt to create a little bit of competitive pressure when your principal banker also knows you have a relationship with another banker. Although all banks seek to have every one of your loan and depository relationships, my advice is to have a little bit of your banking relationship with another bank at the same time.

This said, recognize that if you want to do substantial borrowing from a bank, you will undoubtedly need to have deposit relationships with the same institution. Banks have the ability to "borrow money" (at, hopefully, a lower rate) that they use to lend to their customers. However, they make the most profit on money that they get from depositors. The very best thing for a bank is money held in a checking account that does not pay interest. This becomes free money for the bank, and allows a substantial margin when they lend that money out. Most businesses do not keep substantial deposits in non-interest bearing accounts. If your business is one of those that do, recognize that you have real value to the banking institution, and do not be afraid to negotiate that into more competitive rates.

Fifth and finally, reward good service with loyalty. Good service comes in many forms. A quick return to your telephone call, attentive and creative review of your needs, a willingness to work through your business plans, and perhaps suggest good ideas for building your business, a quick review of your borrowing requests (both bankers and certainly lenders know, that lenders not only want a quick "yes" to a borrowing request, but that there is nothing worse than a slow "no"). If your banker gives you good service, do not be afraid to be loyal, even if the guy down the street offers a little better interest rate on deposits, or will lend to you just a little less expensively. Banking is a business too, and from time-to-time some financial institutions put out "loss leader" products just like your supermarket does. Do not be fooled by this. Do not change an otherwise good banking relationship for a small monetary gain. If the service is good, and the rates consistently competitive, if not the lowest or the highest, be loyal to your banker as he or she has been to you.

Thomas M. Wells is the Senior Partner at WJL&P, and divides his time between our New Jersey and Vermont offices. He practices in the areas of Land Use, Real Estate, and Business & Corporate and also enjoys working with Non-Profits.

WJL&P And Our Banks

Continued from page 1

represent the bank's interest, with the fees for this work paid for by the lender. Thus, a lender needs its own lawyer, and also pays the bank's lawyer.

I would not be exaggerating to say, we have closed literally thousands of loans from either side of the table, sometimes representing the lender as the "loan closing attorney" and sometimes representing the borrower. Perhaps because we represented borrowers so many times, when we are the lender's counsel, we seek to put together quick, clean, loan documents; solve collateral and title issues; and to do all this very efficiently and at a minimum cost. This benefits the borrower and, we think ultimately, the financial institution as well, because the borrower is usually happier with the bank if the lender's counsel does a good job at a reasonable fee.

My personal experience in banking goes off in a different direction as well. For more than 10 years, I served on the Board of Directors of the holding company of Farmers & Merchants Bank in Boise, Idaho. This bank was solely owned by our client, David F. Bolger. Last April, **Farmers & Merchants Bank** was purchased by the **Bank of the Cascades** (CACB), an Oregon based bank that now has 34 branches in Oregon and Idaho. When this happened, I was elected to the Board of Directors of the Bank of the Cascades. Unlike a Holding Company Board that met only quarterly and usually by telephone, the Bank Board meets monthly, and in Oregon. My trips back and forth to the west coast have now become so frequent that I am starting to know the flight attendants by their first names. This Board service, however, has given me exciting new insights into the other side of what banking is all about, and I am very much enjoying this service.

I Am Building A House . . . Can I Be Stopped?

By: James J. Delia, Esq.

After saving for years, you go to build your dream home. You spend hours with your designers, shop for your contractor and choose your materials. You finally file for your zoning and building permits, get your approvals and build! Construction begins. Things appear to be moving along nicely, and then the project comes to a screeching halt. The Municipal Construction Officials have ordered you to stop work. During the building process, it is discovered that your project is too tall, too big or too close to a neighbor's property. After investing hundreds of hours and thousands of dollars, you have learned that somewhere along the way, a mistake has been made and you cannot proceed further until you fix it. As horrid and inconceivable as this scenario appears, it can and does happen on rare occasions.

The question is: how could it happen? Whenever a building project occurs there are two separate and distinct types of municipal reviews: a review for a Zoning Permit and a review for Construction Permit. The Zoning Permit review is usually performed by the Municipal Zoning Officer and is to assure that the proposed project meets all local zoning requirements, both as to use and as to "bulk" criteria. Each municipality and each zone within that municipality have their own set of standards which limit and define such things as the height of a home; front, side and rear yard setbacks; floor area ratios (the floor area of the home compared to the size of the lot); minimum greenery and the like. Conversely, the Building Permit review is more technical and related to assuring that the framing, electrical, plumbing and other building and life safety issues are addressed.

A Mistake

Say for example, a mistake is made on a plan and incorrectly calculates one of the bulk criteria such as the height. During construction, a neighbor or passerby complains that the house looks too tall. The Zoning Officer scrutinizes the plans once again and realizes there was a miscalculation. This is what happened in the case of <u>Grasso v. Borough of Spring Lake Heights</u>, decided by the Appellate Division on November 24, 2004. In <u>Grasso</u> the owner/builder received his permits and spent considerable sums on construction. While under construction, it was determined that the method the builder used to calculate the height was incorrect (in Spring Lake Heights, the height of a home is measured from the curb, not the foundation). The project was stopped and Grasso was required to apply to the local Board of Adjustment to seek a variance for the height of the home. The Board of Adjustment denied the variance request.

Grasso appealed to the Court. The Court upheld the denial in spite of Grasso's legal argument that the municipality should be "estopped" (i.e. barred) from disallowing Grasso to build his project because Grasso relied on the permits which were issued and invested substantial funds. The Court held:

". . .a municipality may be estopped from enforcing its zoning ordinance if a landowner makes substantial expenditures in good faith reliance on a permit that was issued because of a municipal official's erroneous, <u>but at least debatable</u>, interpretation of the Zoning Ordinance."

"A building permit issued contrary to a Zoning Ordinance or building code cannot ground any rights in the applicant."

As can be seen from the <u>Grasso</u> holding, a municipality will not be estopped from revoking a permit where a clear "undebatable" error has been made. Put in other terms, if there is no debate in the interpretation relating to the zoning error, the municipality can stop the project dead in its tracks. This is a painful outcome. Therefore, it is essential that you, as a homeowner or commercial owner have comfort before your project begins that your project meets local codes - both the building code and the zoning code. Rest assured that your design professionals are there to protect you to make sure mistakes like these do not occur. Also, when a mistake is revealed, Boards usually tend to be sympathetic to your plight. However, when in doubt, do not be afraid to ask the tough questions before construction starts.

James J. Delia is a Partner at WJL&P who practices in our Land Use and Real Estate areas.

A Gift Of Eduction

As WJL&P celebrates its 20th anniversary, we decided to forego our annual gift for clients (no coffee table book this year!) and do something really special. In honor of all our clients and friends, we are making a contribution to create a Wells Mountain Foundation scholarship. The recipient of the scholarship is Victoria Galley, who lives in the village of Kopeyia in the Volta region of Ghana, in West Africa. She is a second year student in a three year program in Business Administration at Cape Coast Polytechnic. Very few young women from Victoria's village receive any education beyond elementary school. It is a credit to her hard work and dedication that she is now on her way to a degree. We are excited to be able to help her reach this goal.

Wells Mountain Foundation was started by Tom and Carol Wells and daughter Jordyn in 2005. Given a big boost this year by a significant contribution from client, David Bolger, the Foundation is providing support for projects in Haiti, Senegal, Ghana, Zambia and Israel and a children's literacy program in Vermont and New Jersey. The particular emphasis of WMF is education, literacy, family issues and the arts in developing countries. In addition to support of charitable programs, eight young people, including Victoria (two women and six men) are currently studying with WMF scholarships.

If you are interested in knowing more about the Foundation, take a look at its website located at ***www.wellsmountainfoundation.org*** or contact Tom Wells.

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If It Is In Your Computer…. It May Show Up In Court

By: Anthony S. Bocchi, Esq.

The 21st century is known by many as the "Technological Revolution," with gadgets, gizmos and computers getting smaller, faster and better as each day passes. Recently, the New Jersey Supreme Court formally took into account the technology age when it adopted amendments to the court rules to deal with the special issues "E-discovery" presents. The rule changes, which took effect on September 1, 2006, regulate discovery in the age of e-mail, voice mail, computer files and other information being stored electronically. The changes appear in civil rules covering case management conferences (4:5B-2), scope of discovery (4:10-2), production of documents (4:18-1) and others.

"E-Discovery"

The E-discovery rule amendments seek to deal with "ESI," or electronically stored information. According to a New Jersey Supreme Court Civil Practice Committee report, ESI is defined as "any material that is stored in an electronic format, including, but not limited to, word processing documents, video and audio files, spreadsheets, presentations, e-mail, web pages, voice-mail, and text messages." As such, ESI may be stored on a computer, a computer network, a backup tape or disk, a hard drive, flash drive, or other electronic media storage devices.

A study by the University of California highlights the importance of obtaining electronic discovery because more than 90 percent of information produced by businesses is stored in digital format, rather than in paper documents. Given that today more people and businesses store more data electronically, the rule amendments were prompted by the need to prevent discovery searches from becoming nebulous, high-priced fishing expeditions.

Protections

The protections the amended rules seek to implement occur early on in the litigation process. The party responding to an information request should be allowed to withhold ESI if it is not reasonably accessible "because of undue burden or cost." At the same time, however, the rule amendment also says, "If that showing is made, the court may nevertheless order discovery from such sources if the requesting party shows good cause." Furthermore, "If a request does not specify the form or forms for producing electronically stored information, a responding party shall produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable."

The amended rules put the onus on individuals and/or businesses to get a handle on their data retention systems so that they may better inform their counsel what's in their system. In short, better cataloging can save the cost of restoring documents from dozens of tapes if an enterprise is able to identify the one tape that contains the requested documents. Thankfully, new technology has made tape restoration less expensive.

Anthony S. Bocchi is an Associate at WJL&P and practices in our Litigation area.

The "Mansion Tax"

By: Linda M. Herlihy, Esq.

Over the last couple of years, the real estate closing has become more expensive and more burdensome thanks to the "Mansion Tax" and the filing requirements that go along with it.

The Mansion Tax requires Buyers to pay a tax equal to 1% of the purchase price over $1,000,000.00. This became effective in July 2004 and initially applied to all property utilized or zoned residential only. Then in January 2005, it was amended to exempt vacant land. The Mansion Tax was amended once again in July 2006 to include Class 4A commercial property (income-producing real property).

The required forms have also changed. The Affidavit of Consideration was once utilized only by the Seller in the following instances: (a) New construction; (b) Senior citizen/blind person/disabled person; (c) Low and Moderate Income Housing; and (d) Full exemption from the realty transfer fee in seventeen (17) specified circumstances. Now there is both a Seller's Affidavit of Consideration (RTF-1) and a Buyer's Affidavit of Consideration (RTF-1EE). The latest revisions to the forms were made in August 2006. The new form requires that the County Municipal Code and Municipality of Property Location be completed. And, when dealing with Class 4A commercial property, a calculation of the equalized assessed valuation of the property must be completed and included.

Bergen County takes this all a step further. It now requires that a Seller's Affidavit of Consideration, in duplicate, be submitted with every Deed sent in for recording whether the type of property or amount of consideration makes the Mansion Tax applicable or not. In addition, in Paragraph 1 which identifies the address and town of the property, it is required that "Class 2 - Residential" be added to that line if the property is residential. Oh, and one more thing, every check for a realty transfer fee in excess of $10,000.00 must be certified.

Linda M. Herlihy is an Associate at WJL&P who practices in our Land Use and Real Estate areas.

UNTIL DEATH DO US PART

"Until Death Do Us Part", an expression most often heard in wedding vows. But did you know that the concept also applies to a jury verdict for commission of fraud and conspiracy?

Lawyers for Kenneth Lay successfully argued to a US District Judge that Lay's conviction for fraud and conspiracy in the Enron case should be erased now that Ken is dead. The Judge found that a 2004 5th U.S. Circuit Court of Appeals ruling applies and that a Defendant's death pending appeal extinguishes his entire case because he had not had a full opportunity to challenge the conviction and the government should not be able to punish a dead Defendant or his estate.

While we would not recommend this technique as a form of estate planning, we can assume that the heirs and beneficiaries of the Lay estate are not disappointed about having the conviction erased. Of course, we urge our corporate clients to avoid the type of conduct and activities that led to Kenneth Lay's conviction in the first place.

- Stuart D. Liebman, Esq.

E-mail Your Attorney

You can E-mail directly to your attorney's desktop computer. Address e-mail by using the first letter of the first name with the last name, followed by "wellslaw.com." Documents can be attached to your E-Mail.

As an example: E-Mail to Jim Jaworski should be sent to "jjaworski@wellslaw.com."

How Assets Are Owned Will Affect Distribution At Death

By: Kimberly A. Paton, Esq.

Our regular readers know that I always recommend a person have a Will, Living Will and Power of Attorney.

A Will distributes "probate assets". However, if you currently own assets with another person or have an account that names another person as "POD", "TOD", "ITF" or otherwise establish a beneficiary, then such account is not a probate asset and will not be distributed pursuant to your Will. This account will be distributed to the named joint owner or beneficiary. (This can be true of many assets - real estate, stocks, bonds, insurance, CDs, 401(k) plans, IRAs, etc.)

It is important to review how assets are owned when you prepare your Will to insure that the Will shall control. It is also important to remember this after you have signed your Will, when opening new accounts, changing accounts, purchasing assets (house, stocks, bonds, etc.) to ensure that the asset is distributed as you desire. Perhaps you do intend that your co-owner will receive the asset even though the Will specifies a different distribution. That's OK; however, you want to be in control of this decision. For example, typically a Mother has a Will that leaves everything equally to her children. Mother may open a bank account with a joint ownership with her daughter. Was this for convenience? Did Mother expect that this bank account would be distributed equally to her children (as per her Will), or, did Mother intend that the daughter named as joint owner would receive those "extra" assets at her death as a "thank you" for the extra care the daughter provided Mother?

Mother can leave her assets as she chooses. However, she must understand that a joint account will go to daughter. Planning tip - If Mother does not intend daughter to get this whole account, she could sign a Power of Attorney and leave the account in Mother's name to avoid any question. Alternatively, if Mother wants daughter to receive the extra account, it's helpful to let your other children know this, with a brief note kept with Mother's Will.

Another important consideration is tax consequences, and Medicaid consequences.

Sometimes, Mother adds daughter to an account thinking that this will "save taxes" or protect the assets from "Medicaid". In general, this doesn't work. However, this is very complicated and facts must be considered and analyzed before making any such determination.

Additionally, such a gift may create capital gains taxes that could have been avoided if the asset/house stayed in Mother's name.

We at Wells, Jaworski, Liebman & Paton, LLP can review your assets and goals and properly counsel you on how to best accomplish those goals and avoid unexpected consequences or family turmoil.

Kimberly A. Paton is a Partner at WJL&P and is the Chairperson of our Estate Planning, Probate and Elder Law Department.

Family Estate Disputes

By: Darrell M. Felsenstein, Esq.

Unfortunately, more and more litigation matters involve disputes between family members over inheritance and estate issues. Not all disputes center on the decedent's Last Will and Testament. Often, the focus is on inter vivos gifts; i.e., gifts made during the lifetime of the decedent.

Inter vivos gifts have long been disfavored by New Jersey Courts and there must be strict compliance with all requirements for creating such gifts. The required elements needed to prove inter vivos gifts, as set forth in the New Jersey Supreme Court case of Pascale v. Pascale, are as follows:

1. The donor must perform some act constituting the actual or symbolic delivery of the subject matter of the gift;
2. The donor must possess the intent to give;
3. The donee must accept the gift.

Interestingly, the burden of proving an inter vivos gift shifts to the party that asserts the claim. The New Jersey Supreme Court has declared that the donee must show by explicit and convincing evidence that the donor intended to make a present gift and unmistakably intended to relinquish permanently the ownership of the subject gift. Only the understanding and absolute abnegation of power will make the alleged gift enforceable. If the judicial mind is left in doubt or uncertainty as to exactly what the status of the transaction was, the donee must be deemed to have failed the discharge on its burden and the claim of gift must be rejected. An additional element, imposed by New Jersey Courts, is that the donee must prove that the donor relinquished ownership and dominion over the subject gift.

With respect to the principal of undue influence, its application in inter vivos transfer litigation is different than when used in a will contest. In one case, the Appellate Division found that in an inter vivos transfer case where one is giving what one can still enjoy, the presumption of undue influence is raised more easily than in cases involving wills. Certainly, the proving of undue influence or the intent of a party to make an inter vivos gift and meeting the above requirements is extremely fact sensitive.

It is, of course, extremely sad when family members must resort to the Courts when a loved one has passed away. However, these issues bring about strong emotions and often become highly contentious and thus, Court involvement is the only way to bring about resolution.

Darrell M. Felsenstein is an Associate at WJL&P who practices in our Litigation area.

New Jersey's Identity Theft Protection Act

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check whenever the resident wants to allow access to credit information.

Although New Jersey residents now have added protections as a result of the Act, the U.S. Congress has a bill pending which may eliminate these protections. HR3997 would diminish the security freeze provision making it applicable to identity theft victims only. It would also make it much less likely that New Jersey residents will be notified when a potential breach occurs, since it gives companies the discretion of whether or not to notify residents. Finally, the Act prohibits any state attorney generals or legislatures from enforcing or enacting identity theft rules and regulations, leaving that responsibility solely in the hands of federal agencies. The majority of the various consumer protection agencies have contacted Congress as well as testified before Congress, requesting major revisions to HR3997 in an effort to eliminate its serious shortfalls.

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