HILL WALLACK
ATTORNEYS AT LAW

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IN THIS ISSUE

Message From the Managing Partner

Since the founding of **Hill Wallack** in 1978, the firm's growth has been managed by the development of practice areas which were identified by client needs and cultivated with innovative solutions for recurring issues. **Hill Wallack** is proud to announce the addition of another important and experienced practice group — the **Public Finance Practice Group** which provides a full range of corporate, finance and transactional legal services to business clients. We welcome **Paul N. Watter** as a partner and head of the **Public Finance Practice Group**. Mr. Watter represents an extensive list of clients in all areas of Banking & Secured Transactions, Bond Counsel, Securities, Finance and Corporate Law.

We are also pleased to welcome **Nielsen V. Lewis** as partner-in-charge of the **Environmental & Government Regulations Practice Group**. Mr. Lewis has over twenty years of experience in the areas of environmental law, solid and hazardous waste law, insurance law, general civil litigation and land use and development. Since entering into private practice, he has focused on counseling and representing private companies, municipalities and individuals in environmental and land use disputes and litigation.

Along with the addition of a new practice group to address the latest issues facing our clients, this issue of the *Quarterly* focuses on some recent changes in the law and events which affect our lives. Our lead article, *"Cash in on Atlantic City..."* by John F. O'Connell concentrates on the recently-enacted Casino Reinvestment Authority Urban Revitalization Act. Trish McIntire, in *"New Jersey Has Done Its Part in the Wake of the September 11th Tragedy"* discusses a recent law which was passed to simplify the process of obtaining a death certificate under special circumstances. Defending a claim arising from the "Whistleblower" Statute is outlined by Todd Leon in *"Timing Isn't Everything When It Comes to Terminating an Employee";* while Ryan Marrone examines immigration issues in his article *"Non-Immigrant Visas An Avenue for Terror..."*.

Anthony Velasquez explains municipal business development and investment in *"Redevelopment Plans: Mutually Beneficial for Both Developers and Municipalities...";* while Bill Healy explores the design/build method in his article *"The Tolling Effect of the Design/Build Method of Construction"*. Finally, Marc Herman interprets security through surveillance in *"Big Brother is Watching You: Is It Legal?"*

We hope that our *Quarterly* Newsletter is a valuable resource to our readers as **Hill Wallack** endeavors to provide informative, but interesting articles which deal with topics that are related to both your needs and interests. We welcome your suggestions for our future issues and we encourage you to contact the authors with any questions relating to the articles contained in this issue. Please feel free to e-mail your comments or suggestions on future topics of interest to info@hillwallack.com.

- Robert W. Bacso

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Cash In On Atlantic City — Casinos Broaden Role In Redevelopment Projects

by John F. O'Connell

With the August 24, 2001 signing of the Casino Reinvestment Authority Urban Revitalization Act, Chapter 221 of Public Law 2001 (the "Act"), New Jersey's casinos have broadened their role not only in the redevelopment of Atlantic City, but in designated geographic areas throughout the State of New Jersey. The Act, which was sponsored by Senator William Gormley (R., Atlantic), is being touted as a major boost to the State's economy. While it is designed to transform Atlantic City's boardwalk area into an upscale dining and entertainment complex able to compete with Las Vegas, it also provides much needed funding for redevelopment projects throughout the entire State.

"...casino money will be pumped into these urban communities in ways that can significantly affect them..."

Under the Act, the Casino Reinvestment Development Authority (the "Authority") is authorized to establish Real Estate Equity Funds to serve as vehicles for investments in projects approved by the Authority in designated geographic areas. The Real Estate Equity Fund will be a closed-end investment fund which will receive funds from participating casinos in an aggregate amount not to exceed $10 million. While the Authority has had the power since 1984 to invest in projects in the form of equity investments or loans, or a combination of both, and to approve direct investment by casinos in redevelopment projects, this marks the first time the Authority has taken a major step towards reinvestment in geographic areas throughout the State.

And The Lucky Six Are...

In early September 2001, the Authority named six urban districts in the State which would be eligible for partnership with casinos for redevelopment projects. Those districts include Camden, Trenton, Newark, South Amboy, New Brunswick and a combined district made up of four Cumberland County communities and Wildwood in Cape May County. While six districts were named, only one urban-renewal plan was outlined during the Authority's September 6, 2001 meeting – the Tropicana Casino Resort's plan to fund a $20 million redevelopment project in Newark which will refurbish the boarded-up Hahne's Department Store as an apartment/retail/dining complex. The remaining districts named are eligible for at least $10 million in funding under the program.

Although the bill creating the Urban Revitalization Incentive Program was authored by Senator Gormley, it received broad, bi-partisan

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New Jersey Has Done Its Part In The Wake Of The September 11th Tragedy

by Patricia M. McIntire

Grief for the lives lost on that unforgettable September day has dominated the world for the last nine months. The images of the buildings, the pictures of the missing, the heroes and the televised funerals are now beginning to fade. While Americans are slowly healing and moving forward, the families directly affected by the tragedy must contemplate the extent of their loss and contend with the financial worries that lie ahead.

Those killed in the tragedy include executives of some of the largest corporations in the world, owners and employees of small businesses, support and janitorial staff and emergency personnel. Undoubtedly, many victims were their families' primary breadwinners. Regardless of the career choices of these unfortunate men and women, the surviving families have sustained severe financial loss. Fortunately, people today are more likely to have life insurance, Social Security and Workers' Compensation benefits allowing them to provide for their families in the event of death. However, to collect on any of these policies or to receive death benefits, the issuance of a death certificate is vital.

Due to the nature and extent of the damage to the World Trade Center, many families have been unable to, and may never, recover the remains of their lost family members. Prior to September 11th, a family, who could not furnish evidence that a loved one was dead (through identifiable remains), could not obtain a certificate of death until the lost family member had been missing for five years. To redress this significant problem, New Jersey has recently passed a law to simplify the process of obtaining a certificate of death under special circumstances.

Simple Changes Count Most

In the wake of September 11th, there have been many changes made by federal, state and local governments for the protection of its citizens. On October 3, 2001, New Jersey made its own simple change to assist the surviving members of New Jersey victims by passing law which provides for a "statutory" finding of special peril/death in the event of a "catastrophic event." While New Jersey Courts have always had the authority to apply the "special peril" doctrine under common law, the Legislature thought it was an appropriate time to ensure statutory and uniform application to assist its citizens under tragic and special circumstances. The new law permits the families of the victims to obtain a death certificate immediately without the mandatory five year waiting period and without full court intervention.

Special Peril Doctrine

The "Special Peril" doctrine is a common law doctrine which was initially established in the 1860's. The doctrine permitted family members to come before a court to establish a loved one's "death" as fact. The family member was required to provide proof that the person had undergone a "peril" indicative of death or a danger reasonably expected to cause death. Specifically, the family member had to prove circumstances which tended to show the person missing was subjected to special peril or serious danger on the day on which he was last seen or heard. If it found sufficient evidence of likely death, the court could waive the mandatory five-year waiting period, declare the individual dead and direct issuance of a certificate of death. This old doctrine was primarily used for individuals who were lost at sea or who had been aboard shipwrecked vessels or downed aircraft.

Presumption of Death

The new law provides for the presumption of immediate death for persons exposed to a catastrophic event. Specifically, New Jersey amended an existing statute, which provided that a person was presumed dead only after an absence of "five continuous years, during which time he could not be heard from" and his absence "not satisfactorily explained after a diligent search." Thus, the previous statute required the family member to wait the mandatory five years before seeking to have the loved one declared dead and obtain a death certificate. The person's death was presumed to have occurred only at the end of that period unless sufficient evidence of death was presented earlier through court proceeding.

The amended statute allows the missing person to be presumed dead when he is exposed to a specific event certified by the Governor as "a catastrophic event that has resulted in a loss of life to persons known or unknown and whose absence following that event is not satisfactorily explained after a diligent search or inquiry." Circumstances eliciting a finding of a catastrophic event may include an explosion of a building, collapse of a building, airplane explosion or the sinking of a ship at sea. The Governor of New Jersey has issued the necessary certification with respect to the September 11th terror attacks.

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Timing Isn't Everything When It Comes To Terminating An Employee

by Todd J. Leon

In dealing with relationships with employees, employers are frequently faced with difficult decisions. Perhaps the most complex of these involves situations where the employer wishes to terminate an employee who has been the proverbial "squeaky wheel" over a period of time. In taking action against this employee, the employer must be ever-cautious in guarding against potential lawsuits—especially where the employee has reported what he or she believes to be wrongdoing by the employer.

When the employer opts to terminate a troublesome employee, a substantial possibility exists that the jilted employee will pursue legal action against the employer for wrongful termination. Such a lawsuit may include a variety of claims, including those for breach of contract, retaliatory discharge or even discrimination. Commonly, the terminated employee will file suit under the commonly known "Whistleblower" Statute, also known as the "Conscientious Employee Protection Act" or CEPA.

In a recent lawsuit that was successfully defended by **Hill Wallack**, a former employee claimed that he had been wrongfully terminated in violation of CEPA. The employee had a long and well-documented history of poor performance and negative incidents in the workplace. However, the plaintiff alleged that he was fired because he had uncovered what he believed to be fraudulent billing practices of his employer. Although the plaintiff's job responsibilities did not include the investigation of billing irregularities, he undertook precisely such a review of a particular file in question. The employee's independent investigation of his employer's alleged fraud caused the employee to violate his employer's policies against breaching client confidentiality to uncover evidence of fraud.

As a result of the employee's inquiry and complaint of fraudulent billing, the employer performed an internal audit of the client's file, which revealed that the client had been correctly billed. Although, informed of the employer's determination, the employee was nonetheless dissatisfied with the result and wrote a memo to the CEO of the company, demanding that the client's file be reviewed again, and that the client be reimbursed for fees that he should not have paid. The employer maintained that the client was properly billed, and that it had not engaged in any wrongdoing though the employer terminated the employee based upon the employee's historically poor job performance (which predated the employee's complaint of fraud) and based upon the subsequent breach of the employer's client confidentiality policy.

"In taking action against this employee, the employer must be ever-cautious in guarding against potential lawsuits..."

Consequently, the employee filed a Complaint against his former employer, claiming that his termination violated the Whistleblower Act. **Hill Wallack** successfully defended the lawsuit on the basis of the employee's well-documented record of poor performance, as well as his breach of the employer's employment policies; the matter was dismissed on a motion for summary judgment.

It is important to note that every employment case is different and is often based on the perception of the parties, commonly referred to as the "he said, she said" scenario. This article addresses some of the steps that an employer can take to best defend such a case.

What Must the Employee Prove?

To prevail on a CEPA claim, an employee must show that: (1) he or she reasonably believed that his or her employer's conduct was violating either a law, a rule or regulation promulgated pursuant to a law; (2) he or she performed whistleblowing activity by reporting or complaining about the employer's alleged violation; (3) an adverse employment action was taken against the employee; and (4) a causal connection existed between the whistleblowing activity and the adverse employment action. A report of perceived employer wrongdoing by an employee to his employer qualifies as whistleblower activity.

If the employer wishes to terminate the employee or to take some other measures against him, including actions such as a demotion, the denial of a raise, or even something seemingly so innocuous as the restriction of computer access privileges, it should clearly document and rely solely upon non-retaliatory reasons for the adverse employment action. If the employer's termination of the employee is, even in part, because he has reported some wrongdoing, the employer opens itself up to potential liability under CEPA-based theory of retaliatory discharge.

Damages for a CEPA violation may be costly as an employee can recover lost past and future wages, emotional damages, attorneys' fees and potentially punitive damages to an employee that prevails upon an action.

One of the key issues facing an employer when it ultimately decides to take adverse employment action against an employee *who has voiced a complaint in the workplace* is the timing of the action. If the employer responds with adverse action too quickly, the employee will surely point to the swiftness of the decision as evidence of the employer's retaliatory nature.

The timing issue is relevant to the third prong of a successful retaliation claim mentioned above, which requires the employer to show the existence of a causal link between his protected activity and the adverse employment action. Our courts have generally found that the timing of the allegedly adverse action may be *suggestive* of retaliatory motive, but that the timing

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Non-Immigrant Visas An Avenue For Terror: What Is The INS Doing, and Is It Enough?

by Ryan A. Marrone, Esq.

On October 12, 2001, James W. Ziglar, the Commissioner of the Immigration and Naturalization Service, presented a statement to the Senate Subcommittee on Technology, Terrorism, and Government Information ("Committee"). The statement was offered to advise the Committee about how technology can be utilized to improve our immigration system in light of the tragedy of September 11, 2001. The crux of the Commissioner's statement addressed two database improvement projects which have previously been mandated by Congress. These are the Student Exchange Visitor Information System ("SEVIS") and the Data Management Improvement Act.

SEVIS is designed to afford more rapid access to the limited records currently maintained on foreign students, as well as provide for the housing of readily accessible data for all foreign national students holding visas. Congress designated a deadline on December 20, 2003 for the implementation of the SEVIS system, and unfortunately prior to September 11, 2001, the development and deployment of the system were hampered by objections from academic establishments. However, at the time of his statement, the Commissioner assured the Senate that the INS intends to beat the deadline. While the SEVIS system is essential to shoring up the United States' ability to monitor foreign national students, the Commissioner advised that its effectiveness relies upon the review and revision of the process by which foreign students gain admission into the U.S.

Does The INS Have Any Legal Basis For Its Actions?

The Data Management Improvement Act, passed by Congress in 2000, requires the development of a fully-automated integrated entry-exit data collection system. Currently, the INS collects data on the entry and exit of certain visitors in paper form which must be transferred to an electronic database in a painstakingly inefficient manner which results in weekly or monthly delays in access to the information. The new system would be instantaneous and is slated for initial deployment at airports and seaports by the end of 2003, the 50 largest land ports by end of 2004, and all remaining ports by the end of 2005.

In conjunction with the previous two database projects, the INS continues to work with other Departments and Agencies in order to better prevent the entry of persons who wish to do harm to America's citizens, residents, visitors and institutions. Unfortunately, there is one area which the commissioner failed to address in accomplishing his tasks—that is the requirement of fingerprinting for non-immigrant visas.

What About Fingerprinting?

Currently, the INS only requires the fingerprinting of aliens who are seeking adjustment to permanent resident status (green card) or naturalization. Any foreign national seeking entry into the United States on a non-immigrant visa does not have to be fingerprinted. Non-immigrant visas include the tourist visa, student visas, and certain work visas, the most common of which is the H-1B. More disconcerting is the fact that under the H-1B visa, family members of the alien are eligible for visas under a derivative visa for which the application process fails to conduct a fingerprint and background check.

The information which America has gained from the terrible events of September 11, 2001 has revealed that those, who seek to harm our citizens, institutions and way of life, are not in this country with a green card and certainly are not seeking naturalization. Rather, such persons are using our less stringent non-immigrant visa system to enter the United States and utilize the fruits of this nation's principles against it. The principles that our country was founded upon provide for independent business and a freely accessible higher educational system. These very principles are being exploited in an effort to destroy the basis which affords their existence. And while another fundamental characteristic of our country is America's diversity, these times have caused us to sacrifice certain liberties in order to preserve freedom.

A potential solution would be if the INS implemented fingerprinting for all non-immigrant visas in conjunction with a re-fingerprinting process when extensions of stay are requested. This would create a more stringent process for non-immigrant visas. Such requirements combined with the policies presented by the commissioner would serve to better protect our country.

Regardless of whether the INS pursues a modification to the fingerprinting procedures, in light of the recent events of September 11, 2001, there shall be continuing and significant changes that will be made to our INS regulations. As a direct result, it is imperative that individuals, educational facilities and corporations have adequate legal advice with respect to such immigration related matters.

Ryan A. Marrone *is an associate of the firm where he is a member of the* ***Litigation Division*** *and the* ***Administrative Law/Government Procurement*** *and* ***Immigration Law Practice Groups.***

SPOTLIGHT

NEW PRACTICE AREA

We are proud to announce the addition of a **Public Finance Practice Group.** "From the founding of **Hill Wallack** in 1978", said Robert W. Bacso, Managing Partner of the firm, "we have managed our growth by developing practice areas, identified by client needs, by creating innovative solutions to recurring issues presented to us. Today, we announce another major advance: the arrival of an experienced **Public Finance Practice Group** providing a full range of corporate, finance and transactional legal services to business clients."

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NEW PARTNERS

Paul N. Watter has joined the firm as a partner and head of its **Public Finance Practice Group.** Mr. Watter represents an extensive list of clients in all areas of Banking & Secured Transactions, Bond Counsel, Securities, Finance and Corporate Law. Mr. Watter earned his law degree from Rutgers University Law School and is admitted to practice in New Jersey, New York, U.S. District Court, District of New Jersey and the U.S. Court of Appeals, Third Circuit. He is a member of the United States District Court for the District of New Jersey and a member of the United States Third Circuit Court of Appeals.

The firm recently added ***Nielsen V. Lewis*** as partner-in-charge of the **Environmental & Government Regulations Practice Group,** whose distinguished legal career includes over twenty years of experience in the areas of environmental law, solid and hazardous waste law, insurance law, general civil litigation and land use and development. Since entering into private practice, Mr. Lewis has focused on counselling and representing private companies, municipalities and individuals in environmental and land use disputes and litigation. Before entering private practice, Mr. Lewis served as a Deputy Attorney General of the State of New Jersey providing legal counsel to the New Jersey Board of Public Utilities. In that capacity, he gained extensive administrative law experience and enjoyed an intensive appellate practice before the New Jersey Superior Court, Appellate Division, and the Supreme Court of New Jersey. Mr. Lewis earned his law degree from the University of Michigan Law School and is admitted to practice in New Jersey, the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit. He is a member of the American, New Jersey State, Mercer County and Princeton Bar Associations.

Michelle M. Monte**,** formerly a senior associate with **Hill Wallack**, has become a partner of the firm in its **Creditor's Rights/Bankruptcy Practice Group.** Ms. Monte concentrates her practice in all matters of creditors' rights and bankruptcy, including workouts, foreclosures, replevin actions and collections. Her extensive client list includes some of the country's largest secured creditors, and her work deals with debtors in possession and debtors and trustees in liquidation and reorganization proceedings. She earned her law degree from St. John's University School of Law and is admitted to practice in the State of New Jersey and the United States District Court for the District of New Jersey.

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NEW ASSOCIATES

Andrew T. McDonald has joined **Hill Wallack** as an associate in the firm's **Administrative Law/Government Procurement Practice Group.** He concentrates his practice in General Litigation, Administrative, Environmental and Regulatory Compliance. Mr. McDonald earned his law degree from Seton Hall University School of Law and previously served as Judicial Law Clerk to the Honorable Lawrence M. Lawson in Monmouth County, NJ. He is a resident of Howell, NJ and is admitted to practice in the State of New Jersey.

Nicole Perdoni-Byrne has joined the firm in its **Banking & Secured Transactions Practice Group.** Ms. Perdoni-Byrne concentrates her practice in all matters of banking and secured transactions, including: acquisition finance, construction financing and refinancing, loan modification, restructuring, loan documentation, workouts, foreclosures and closings. She earned her law degree from Seton Hall University School of Law and is admitted to practice in the State of New Jersey. She is a resident of the Borough of Helmetta.

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APPOINTMENTS & RECOGNITION

Edward H. Herman, a partner with **Hill Wallack** has been re-appointed Chairperson of the Workers' Compensation Substantive Committee of the New Jersey Defense Association. He is past-president of the Association and has been practicing law for more than 30 years. He is a recognized authority throughout New Jersey on the law and the practice of workers' compensation matters and is a Certified Workers' Compensation Attorney by the New Jersey Supreme Court. He presides as Municipal Court Judge in Spotswood, as well as in the Boroughs of Helmetta and Highland Park. Mr. Herman is a member of the firm's **Litigation Division** and partner-in-charge of the **Workers' Compensation Practice Group.** His principal area of practice is in the representation of major self-insured corporations, insurance companies and clients of third-party administrators in the defense of

workers' compensation claims, as well as defense of tort liability and environmental litigation.

Thomas F. Carroll, III, a partner of **Hill Wallack** and member of the firm's **Land Use Division,** recently was a featured speaker at the National Business Institute seminar entitled *"Current Issues in Subdivision and Zoning Law"*. Mr. Carroll provided fellow attorneys, engineers, surveyors and other professionals with an update on the current state of zoning and land use law affecting the State of New Jersey. Mr. Carroll has significant experience in the land development application and permitting process, and has a practice concentration on the litigation of land use matters at the trial level and in the appellate courts. A member of the Board of Directors of the New Jersey State Bar Association's Land Use Section, Mr. Carroll has authored numerous articles and presented seminars concerning land use issues.

Ronald L. Perl, partner-in-charge of the firm's **Community Association Law Practice Group,** was recently elected as Chair-Elect of the Community Association Institute Research Foundation. The Community Association Institute (CAI) Research Foundation is a national, non-profit 501(c)3 organization founded in 1975. The Foundation is the driving force for common interest community research, development and scholarship. CAI, founded in 1973, is the only organization both recording the history and identifying trends in residential community association living. There are more than 205,000 community associations across the country, reflecting the growth of community-based solutions to modern housing problems. The CAI Research Foundation serves as the catalyst for positive change in the community association industry by: illuminating future trends and opportunities; supporting and conducting research and mobilizing resources.

Jeffrey L. Shanaberger, a partner with **Hill Wallack** has been appointed Chairperson of the Public Entity Law Substantive Committee of the New Jersey Defense Association. Mr. Shanaberger is a member of the firm's **Litigation Division** and **Trial & Insurance Practice Group.** An experienced trial attorney, Mr. Shanaberger has a practice concentration in trial and appellate practice, with an emphasis in insurance defense and matters of professional, governmental and public entity, civil rights and product liability.

In a major victory for towns in New Jersey, the Federal Court of Appeals has ruled that builders of nursing homes and other similar facilities could not use the federal civil rights laws to circumvent local zoning procedures. The Appeals Court refused to permit the developer of a proposed 95-bed facility in Scotch Plains to bypass the local zoning board and to present the key proofs in its case for a zoning variance directly to the federal courts. It upheld the decision of the zoning board denying approval for the facility. ***Stephen M. Eisdorfer***, special counsel for Scotch Plains, hailed the decision as a victory for home rule. "In New Jersey, we count on local government to make fair and responsible decisions concerning zoning and land use. Permitting nursing home developers to bypass local procedures and to make their cases directly to the courts conflicts with this system. It undermines responsible decisionmaking by local zoning boards." Mr. Eisdorfer**,** a partner in the firm's **Land Use Division,** represented Scotch Plains throughout litigation and in the argument before the Court of Appeals.

Dakar R. Ross, an associate of **Hill Wallack** where he is a member of the **School Law** and **Municipal Law Practice Groups,** recently appeared as a featured guest on the Community Affairs Program for WTSR 91.3FM speaking on faith-based initiative and general legal topics in the Trenton Community. A resident of Westhampton, NJ, Mr. Ross received his law degree from Rutgers University School of Law and is admitted to practice in the State of New Jersey and the United District Court.

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SEMINARS

Craig W. Summers, a partner of **Hill Wallack** and member of the **Workers' Compensation Practice Group,** was recently a featured speaker during a seminar *"The Workers' Compensation Ergonomics and Safety Update"*. This practical, two-day seminar was designed for human resource managers and provided informative, up-to-date, effective solutions to the problems arising in the workplace. Mr. Summers concentrates his practice in the representation of major self-insured corporations, insurance companies and clients of third-party administrators in the defense of workers' compensation claims, as well as defense of tort liability. He is a resident of Turnersville, NJ.

Kenneth E. Meiser, a partner of the firm, was recently a featured speaker at the National Business Institute Seminar entitled "*Major Land Use Laws in New Jersey*". Known for his role in several precedent-setting legal decisions including Mount Laurel I and II, Mr. Meiser is a partner of the **Land Use Division** which includes the firm's **Land Use Litigation** and **Environmental Applications Practice Groups.** This one-day seminar provided practical solutions to the problems that current environmental and land use regulations create in the transfer, development and financing of commercial, industrial and residential real estate.

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Redevelopment Plans: Mutually Beneficial For Both Developers and Municipalities in Times of Economic Recession

by Anthony L. Velasquez

During periods of economic downswing, municipalities often seek ways to attract business development and investment. Difficulties caused by economic decline are compounded in municipalities where once thriving business districts have become less desirable due to structural dilapidation, poor maintenance, obsolete buildings, vacant industrial and manufacturing plants and other conditions. Older business districts may be further plagued by irregular lot sizes and faulty street arrangement or design. However, many municipalities are choosing to redevelop downtrodden business districts through laws that permit tax incentives for investors who relocate into their communities.

Plans for revitalization of distressed areas often include streetscape overhauls, lot consolidation, street and lot reorganizations, uniform signage requirements and relocation of telephone lines and poles. These plans provide road maps for more accessible and efficient business districts and enhance the aesthetic value of the community. Such benefits generate greater investment and development.

Steps to Redevelopment

The start-up of a redevelopment project, though, is usually the most difficult task faced by a municipality because few businesses are willing to be the first to reinvest in an area that has become distressed. A municipality that takes advantage of the "Local Redevelopment Law" and adopts an aggressive redevelopment plan, however, can encourage investors by providing substantial incentives.

In order to adopt such a plan, the governing body must, in conjunction with the planning board and upon public hearing, make a finding that a particular area contains conditions requiring redevelopment. Such conditions may include any of the following: buildings that are substandard, unsafe, unsanitary, dilapidated or obsolete; abandoned buildings that were previously used for commercial, industrial or manufacturing purposes; municipal-owned land that has remained unimproved for numerous years and is unlikely to be developed through private capital; buildings or land detrimental to the safety, health, morale or welfare of a community due to the poor conditions; under-utilized buildings; or areas destroyed or substantially harmed by various causes, such as fire, storm, cyclone, tornado, earthquake or other casualty.

Once a redevelopment area is delineated, the municipality may adopt by ordinance a redevelopment plan that provides for the planning, development, redevelopment and/or rehabilitation of the area. A redevelopment plan should define the appropriate land uses, building requirements, population densities, traffic flow, public transportation, utilities, recreation areas and community facilities. The plan should also identify any land that is proposed to be acquired in order to implement the goals of redevelopment. In addition, it should demonstrate its relationship to both the municipal and county master plans and the State plan.

Benefits Include Possible Tax Incentives

After adoption of a redevelopment plan, the municipality may invite investors to undertake redevelopment projects within the area while offering substantial tax incentives. Such tax breaks may include five-year tax exemptions and/or abatements, or 30-year tax exemptions for qualified developers. A municipality that has adopted a redevelopment plan also has increased legal capacity to acquire property within the delineated area and increased flexibility to sell property within the area without having to adhere to the traditional public bidding strictures, as long as such acquisitions and sales further the redevelopment goals of the community.

There are many mutual benefits that can be reaped by both a municipality and a developer where an aggressive redevelopment plan has been adopted. Most importantly, the new businesses can realize substantial tax savings while revitalizing a business district and returning previously non-productive properties to the municipal tax rolls. A revitalized business district will lead to additional investment and increased desirability of a community, which any struggling municipality would welcome with open arms.

Anthony L. Velasquez *is an associate of* ***Hill Wallack*** *where he is a member of the* ***Litigation Division*** *and* ***Administrative Law/Government Procurement Practice Group.***

The Tolling Effect of the Design/Build Method of Construction

by William J. Healy

The design/build method is becoming an increasingly popular method of construction. On a design/build project, a single entity is responsible for providing both the design and construction services, as opposed to the owner separately contracting with a design professional and a general contractor. This method is commonly utilized with the expectation of shortening the duration of the project, reducing overall project costs and eliminating the potential for disputes over design errors or omissions. However, the design/build method may also serve to toll the repose period for actions arising out of negligent design.

"It is important that design professionals be aware of the effect that specific forms of contracts may have on the way they conduct business."

What Is The Repose Period?

The Statute of Repose, as set forth in *N.J.S.A. 2A:14-1.1,* establishes a ten-year limitations period on any claim arising out of a defect in improvement to real property in an action against any person who designed, planned, supervised or constructed the improvement. Typically, with respect to architects and engineers who provide design services only, and are not involved with the supervision or management of the project, the period of repose begins ten years and one day after the design professional's plans are delivered to and accepted by the contracting party. Simply stated, when a design professional rendered services on a particular job for which the work was accepted, such professional person could look back ten years and one day after the performance or furnishing of such services and know there was repose from liability.

However, with design/build contracts, the repose period with respect to the design begins to run when the project has been substantially completed. This typically occurs when the certificate of occupancy has been issued, and the structure is capable of being used for its intended purpose.

The Tolling Effect

Occasionally, a situation arises where a claimant brings a negligent design cause of action when the design phase of the project occurred more than ten years prior to the injury, but where the project had been substantially completed for a period of less than ten years. A situation such as this is not unusual, especially given the fact that with large projects, the design phase may occur months or years prior to the commencement of construction.

For example, a lawsuit may be initiated against a design professional, who was responsible for both the design and construction of a particular project, whereby it is alleged that the injury originated during the design stage. There is no claim arising out of the construction phase other than adherence to the allegedly defective design; however the design was created more than ten years before the filing of the Complaint, while the construction of the project was completed less than ten years from the same filing date. In a situation such as this, the Court would be compelled to find that the completion of the design stage alone, during which the defect originated, is insufficient to immunize the design professional under a "design/build" contract even though it occurred beyond the ten-year period. See, *Welch v. Engineers, Inc.* (1985).

In sum, the critical date with respect to the Statute of Repose and claims based upon negligent design, where a design/build method of construction has been utilized, is ten years after the performance or furnishing of services and construction for the entire project which is undertaken. The court will not break the project down into stages for the benefit of the designer/general contractor.

It is important that design professionals be aware of the effect that specific forms of contracts may have on the way they conduct business. When entering into any form of contractual relationship, the design professional may wish to seek the advice and assistance of legal counsel for the purpose of formulating provisions that express their specific intent and that provide them with the applicable statutory safeguards.

William J. Healy *is an associate of* ***Hill Wallack*** *where he is a member of the* ***Litigation Division*** *and the* ***Construction Industry Practice Group.*** *He concentrates his practice in the representation of architects, engineers and design professionals and their professional liability insurance carriers.*

Big Brother

Is Watching You: Is It Legal?

by Marc H. Herman

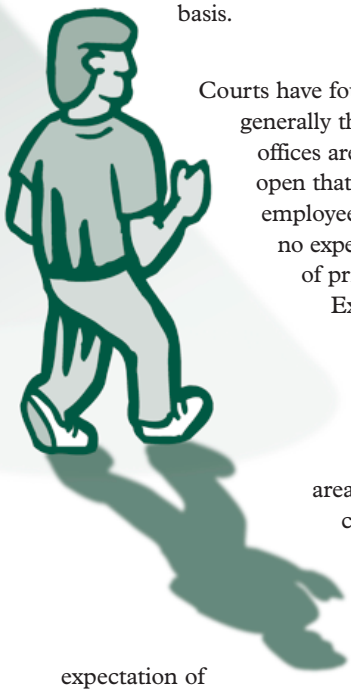
In these days of heightened concern over employee misconduct and corporate espionage, many private employers take additional steps to enhance their security through surveillance. Is this lawful?

Video Alone

In New Jersey, internal corporate surveillance is controlled by State statutes as well as the Federal law commonly referred to as "The Wiretap Act." Interestingly, video recordings alone, those without an audio component, fall outside the scope of these statutes. When interpreting these statutes, New Jersey courts have ruled that a homeowner, who installs a video surveillance system in her home to record activities that occur within, has acted within the scope of the law. That is, the taping of a child care employee without the knowledge of such employee is lawful so long as audio sound is not recorded.

Video With Audio

When oral communications are involved, however, the issue becomes less clear. As a general principle, if a person has a reasonable expectation of privacy in an oral communication, interception by a third party may be unlawful. In the workplace context, the expectation of privacy is addressed on a case-by-case basis.



Courts have found generally that many offices are so open that an employee can have no expectation of privacy. Examples of such a rule can be seen in many areas: a law clerk does not have an expectation of privacy in the court's chambers, desks, file cabinets or other work areas; a bank owner, who leaves his office door open, does not have an expectation of privacy when working in his private office; employees of a telephone company do not have an expectation of privacy in open work areas; and two mechanics have no expectation of privacy when arguing in a machine shop where they work. Most significantly, the courts have held that a currency trader does not have a reasonable expectation of privacy in conversations on the exchange floor since there can be no reasonable expectation that legitimate bystanders are not carrying concealed tape recorders.

"…New Jersey courts have ruled that a homeowner, who installs a video surveillance system in her home…has acted within the scope of the law."

Exceptions apply and need to be considered closely. The most important exception includes the audio taping of conduct of certain protected professions, including doctors, clergy, news reporters and attorneys. Under certain circumstances eavesdropping may lead to criminal penalties.

A Solution

Concerns regarding corporate surveillance may be overcome through informed consent prior to recording. That is to say, an employer may require as a condition of employment that an employee accept the recording of communications while at work. This may be done through a carefully and properly drafted disclosure form, as well as clear disclosures that work-place recordings are being made.

In sum, an employer can record the actions of its employees for a myriad of uses. However, care must be taken by the employer in placement and operation of the devices, as well as the later use of those recordings. With careful planning and coordination, security can be enhanced through the use of recording devices.

Marc H. Herman *is an associate of* ***Hill Wallack*** *where he is a member of the* ***Litigation Division*** *and* ***Workers' Compensation Practice Group.***

Timing Isn't Everything... cont. *(continued from page 4)*

alone is insufficient to create an absolute *inference* of causation. In other words, our courts have generally recognized that close temporal proximity between the employee's action and his termination may be generally indicative of a retaliatory discharge by the employer, but it is not absolute proof of improper motive.

What Can An Employer Do to Protect Itself?

Unfortunately, there is nothing an employer can do that will *absolutely* insulate it from ever being sued by an employee for adverse employment action, including wrongful termination. However, an employer can certainly take steps to help combat a possible argument by an employee that such adverse employment action was in direct retaliation for engaging in protected activity. Such precautions may include:

- Documenting the poor job performance of the worker throughout or at any time during the employee's entire career. This may include formal written notice to the worker of deficient performance of duties or improper behavior in the workplace. It may also include memoranda by supervisors documenting verbal counseling of the worker with respect to poor performance or misbehavior. Such memoranda should be written contemporaneously with or shortly after an incident or warning being given.
- Documenting the process by which the employer evaluates the employee and determines the type of adverse action it takes with respect to the employee. If the decision is made by a management team, the employer must ensure that the team base its recommendation or decision on performance or inappropriate conduct while disregarding the employee's action or complaint which could be characterized as "whistleblower" activity.
- Consideration of the timing of the decision to terminate. Unless the employee has an extremely well-documented pattern of poor performance or inappropriate behavior, or there is strong evidence that the termination decision has already been made, taking adverse action immediately after the employee engages in whistleblower activity may be problematic. Taking additional time to document the employee's poor performance or improper behavior may help to insulate the employer or supervisory team that reviews the employee's history from information related to the employee's "whistleblowing."

As always, **Hill Wallack** stands ready to assist any employer that is dealing with any issue of employment law, including the process of terminating an employee or defending a complaint filed by a former worker. However, seeking the advice of counsel *before* taking adverse employment action against an employee can minimize an employer's exposure to wrongful termination lawsuits.

Todd J. Leon** is an associate of **Hill Wallack** where he is a member of the **Litigation Division** and **Trial & Insurance Practice Group.

Cash In On Atlantic City... cont.

(continued from page 2)

support from nearly every corner of the State. "The impact of this particular legislation by Atlantic City's casinos, not just on Atlantic City but on the rest of the State, will be profound because for the first time partnerships between these casinos and urban centers will be created," Senator Gormley told the Authority. "And casino money will be pumped into these urban communities in ways that can significantly affect them," Senator Gormley stated.

Both Casinos and Urban Districts Benefit

Under the program, casinos which get projects funded must invest at least $20 million in one of the selected urban districts. Besides providing crucial financing to redevelopment projects in the urban districts, the casinos receive benefits as well. Currently, casinos pay a $2 room fee per hotel room to the State. Under the new program, any room fee derived from new projects in Atlantic City will be rebated to the casinos in the form of annual grants from the Authority. The casinos are also entitled to a rebate of all construction-related sales tax, as well as the use of the sales tax generated when the projects open. The Act also provides that an amount equivalent to the total revenues received pursuant to the "Sales and Use Tax Act" from the taxation of construction materials used for building a district project approved by the Authority shall be rebated in the form of a one time grant to the Authority for disbursement to the casino financing the project. Once the district project is complete and/or open for business, all revenues received pursuant to the "Sales and Use Tax Act" from the taxation of retail sales of tangible property and services derived from businesses in the district project will be rebated to the Authority for disbursement to the casino in an annual grant not to exceed $2.5 million. All grants are payable the earlier of December 31, 2022, or until the date on which the combined total of all grants is equal to the approved district project cost. The Act also adds 5 years to the 30-year term in which casinos must pay 1.25 percent of their annual gross revenue to the authority for the funding of development projects.

The Legislature seems to have hit the jackpot as the Casino Reinvestment Authority Revitalization Act is seen as a win-win scenario for all. The approved district projects will revitalize critical urban areas throughout the entire state by generating much needed revenue while at the same time providing a very modest return on the sponsoring casino's investment. It's as though all participants are playing with "house money."

***John Fitzgerald O'Connell** is an associate of the firm in the **Real Estate Division.** His principal area of practice is in the areas of commercial real estate, economic and business development with a particular emphasis on municipal law and government affairs.*

New Jersey Has Done Its Part... cont. *(continued from page 3)*

In order to obtain the benefit of the Governor's declaration, the family must file an action in the Superior Court of New Jersey and establish to the court's satisfaction that the person who is lost was, in fact, exposed to the catastrophic event and has not been found. If it finds that the missing person was exposed to a certified catastrophic event, the court will declare the death to have occurred on the date of the tragedy and direct the Registrar of Vital Statistics for the State of New Jersey to issue a certificate of death for the missing person at no cost to the family.

In addition, the new law codifies the court's authority to establish a date of death earlier than the end of the five-year waiting period if it finds that the evidence justifies such a declaration. The court may make such a finding even without a certification of catastrophe by the Governor.

Retroactive Application Applied

The statutes, as amended, are to be applied retroactively to September 11, 2001. This allows the families of those still missing as a result of the terrorist attacks to immediately apply for their loved one's death certificate. After obtaining that vital piece of paper, an application may be brought for the issuance of letters of administration, for the probate of a will, or for the appointment of a testamentary guardian. This enables families to quickly settle the loved one's estate and concentrate on the healing process.

Patricia M. McIntire *is an associate of the firm in the* ***Litigation Division*** *where she is a member of the* ***General Litigation Practice Group.*** *She concentrates her practice in personal injury and insurance litigation.*

Spotlight... cont. *(continued from page 6)*

COMMUNITY INVOLVEMENT

In a continuing community involvement effort, the **Hill Wallack** Softball Team**,** in conjunction with the Mercer County Bar Association, recently captured the championship at the recent Mercer County Bar Association Corporate Charity Softball Tournament for "Families First". A commitment to community and community service organizations has been and continues to be hallmark of **Hill Wallack.**

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For further information, please contact: **Monica DiMucci,** Marketing Coordinator at (609) 734-6369 or via e-mail at info@hillwallack.com.

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