HILL WALLACK
ATTORNEYS AT LAW

Quarterly
NEWSLETTER

Volume 14, Number 1

IN THIS ISSUE

Message From the Managing Partner

One of the common misperceptions about the legal profession relates to the hyperactive judicial system: one wherein scheming lawyers and judges shape public policy on a proactive basis. While this belief is bolstered by sharply divergent views on touchstone social issues such as politics, abortion, guns and housing for the poor, the reality of the matter is that the judicial system is primarily a reactive one. For the most part, it is the fast pace of society which forces confrontation with issues to which the legal system must respond, more often than not, in a tortuously slow fashion. As current issues of impact evolve however, we enjoy offering them up for your inspection.

We open this issue with Andrew McDonald's and Len Collett's critical analysis of the SCI in their article *"State Commission on Investigation—Fact or Fiction?"*. Joan Osborne examines the growth of mold claims in *"Mold Claims: The Next Big Thing in Personal Injury Litigation…";* while Niel Lewis discusses prime land development in his article *"The Greening of Brownfields Redevelopment"*.

Meridith Mason brings us up-to-date on consumer protection in *"Home Inspectors Beware and Home Buyers Be Wary…";* while Nicole Perdoni-Byrne alerts us to property tax relief in her article *"Is There Tax Relief on the Horizon for Homeowners?"* Finally, Dakar Ross reviews the parameters governing the collection of attorney's fees in foreclosure actions in his article *"To Collect or Not to Collect—A Mortgage Lender's Quandary"*.

We are sure that you will enjoy both the substance and the variety of the articles in this issue. Again, please let us know the subjects you would like to see covered in the *Quarterly.* As always, we invite you to contact us with your comments, suggestions and questions.

- Robert W. Bacso

As we go to press, recent events in the war on Saddam Hussein have clearly shown again what was revealed on 9/11: The American hero comes from all walks of life, from every race and from each sex. Pfc. Jessica Lynch, we salute you. In the most real way, you are what we are all about.

HILL WALLACK
ATTORNEYS AT LAW

To request information, please call the authors directly at (609) 924-0808 or send an e-mail message to info@hillwallack.com

Help us keep our mailing list up-to-date.

Please contact Monica DiMucci Sargent, Marketing Coordinator at (609) 734-6369 or send an e-mail message to info@hillwallack.com with any name or address changes to continue delivery of your complimentary Hill Wallack Quarterly Newsletter.

State Commission on Investigation—*Fact or Fiction?*

by Andrew T. McDonald & Len F. Collett

Once, the Grand Inquisition combated heresy and witchcraft. The inquisitors arrested, interrogated and tried suspected heretics and, if found guilty, they received the penalties of prayer, fasting or imprisonment—if lucky. Confessions, often coerced from the accused, aided the inquisitors' quest for truth and supported real or imagined transgressions. While it is clear that our system of justice has made great strides since the Middle Ages, especially in a State renowned for its fairness and due process, the State Commission of Investigation (the "SCI") presents an intriguing, yet troublesome, exception to this tradition.

"The SCI has extremely broad authority to conduct investigations regarding effective enforcement of State laws."

History of the SCI

In 1968, the New Jersey Legislature established the SCI as an independent investigative arm of the Legislature. The SCI has extremely broad authority to conduct investigations regarding effective enforcement of State laws. Its authority extends to organized crime and racketeering, the conduct of officers and employees of both the government and public corporations, and any other matter concerning public peace, safety or justice.

Appearing before the SCI

An individual summoned to give testimony before the SCI has the right to be accompanied by counsel. Counsel is permitted to advise the witness if, *only if,* the consultation does not interfere with the proceeding. Although questions relevant to the inquiry may be submitted by counsel, the Commission shall ask the individual only those questions *it deems appropriate*. A person appearing before the SCI is not permitted to produce evidence or witnesses on her own behalf, nor is she permitted to cross-examine the evidence or witnesses brought forth against her. At the conclusion of the examination, the person is permitted to file a brief, sworn statement relevant to the testimony for incorporation in the record created at the hearing.

Due Process?

One would assume that, along with its significant powers to investigate and refer for prosecution alleged wrongdoings, the SCI would be required to afford witnesses with due process safeguards which are similar to those in other criminal or administrative proceedings. Generally, investigative bodies do not publish their accusations without first holding an adjudicatory proceeding at which the subject's guilt is established. For instance, proceedings before Grand Juries are secret, and all persons permitted to be present before Grand Jury proceedings are required to take an oath of secrecy. Conversely, in situations where the Attorney General or a local prosecutor brings charges against a defendant, that defendant is entitled to her day in court where the charges against her will either be proven by the State, or she will be declared innocent.

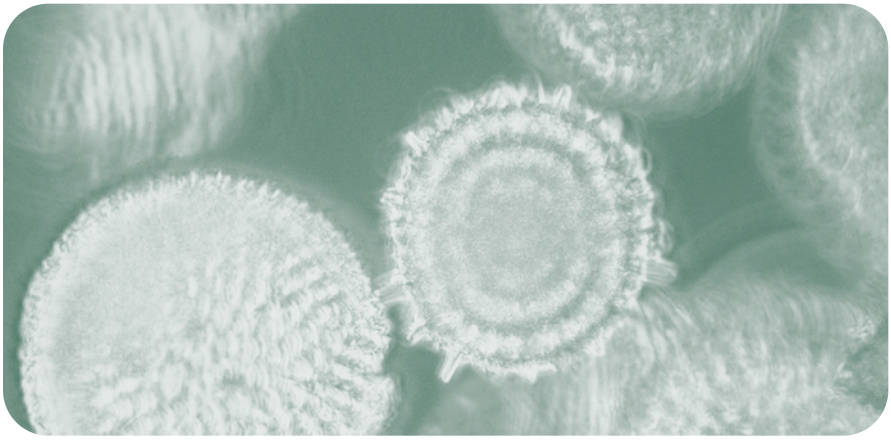
While the SCI was created "to discover and to publicize the state of affairs in the criminal area, to the end that helpful legislation may be proposed and receive needed public support," its mandate does not end there. The SCI must refer any information or evidence of a reasonable possibility of criminal wrongdoing to the Attorney General who has the discretion whether to initiate prosecution. In addition, the SCI is obligated to publish its report wherein it is free to intimate that the persons it investigates have been involved in significant wrongdoing.

continued on page 10

Mold Claims: The Next Big Thing In Personal Injury Litigation—

And Construction Professionals Are Going To Be Target Defendants

by Joan Howell Osborne



The Litigation Scenario

Consider this scenario which plays itself out throughout the United States everyday: An architect or engineer prepares plans and specifications for the construction of a condominium development. However, within a few years of the completion and occupation of the units, the owner or property manager discovers that there are some leaky areas of the building. In making repairs of the leaky areas, the manager and condominium board discover that moisture conditions have allowed for the growth of molds (of various types) on some surfaces of the building, including accessible interior areas. The occupants, upon learning of the mold problem, become concerned that their heretofore unexplained symptoms, such as headaches, general malaise, respiratory problems, were in fact, caused by the mold exposure. The presence of the mold has converted a garden variety construction defect claim into a multi-plaintiff, (possibly a class action) personal injury litigation nightmare that will take years to resolve. Experts in epidemiology, as well as multiple physicians, will need to be retained to defend the action in addition to the architectural or engineering experts. The plaintiffs may seek medical monitoring in addition to personal injury damages.

Despite the Lack of a Strong Causal Link of Mold to Illness and Questionable Proofs, Courts Throughout the U.S. Have Returned Multi-Million Dollar Verdicts for Plaintiffs

Even experts, who dispute the toxicity of airborne mold, or its ability to cause disease in humans in the amounts typically present, acknowledge that mold can cause allergies, exacerbate asthma and cause fungal diseases in people with compromised immune systems, including the elderly. (Current State of the Science, Seminar by Janet Weiss, M.D., University of California at Berkeley). As the litigation in other jurisdictions creates a body of law supporting the claims of physical injury caused by mold exposure, design professionals face a risk of substantial claims whenever a building they design develops a leak problem that is not adequately and timely remediated. Compounding this problem is the fact that currently there are no federal standards on exposure levels to give guidance on whether an exposure is potentially harmful or not. Nor are there inspection protocols or standards for remediation methods.

Pending Legislation Will Attempt to Change Standards for Building Construction to Reduce Risk of Mold Contamination

A bill was introduced into Congress in June, 2002, to attempt to address some of the problems created by the burgeoning mold litigation and its consequential effects on health, and the availability of insurance. One aspect of the proposed legislation would create an insurance program for toxic mold which would be run by the Federal Emergency Management Agency. The legislation would also study the health effects of indoor mold growth and make exposure level findings. Additionally, the Department of Housing and Urban Development would issue a report on the impact of construction standards on mold growth and "promulgate guidelines identifying conditions created during construction that facilitate the growth of indoor mold." A New Jersey bill was introduced into assembly in November 2001, requiring the disclosure of mold hazards in the sale of housing, providing funds for mold remediation, and requiring the adoption of a mold hazard construction code, but was not passed and is no longer pending. At this time, the federal legislation is pending in committee. We will continue to monitor the legislation and any state legislation affecting the building design and construction trades.

What Can Design Professionals Do Now?

Even a perfectly designed and perfectly constructed building will have some degree of moisture infiltration. Nevertheless, the presence of a leak will likely lead to a claim that the design, rather than faulty construction, resulted in the introduction of moisture and led to the growth of toxic mold. Due to the extent of the publicity of mold claims, architects will be charged with

continued on page 10

The Greening of Brownfields Redevelopment

by Nielsen V. Lewis

There is only so much pristine land available for residential development in New Jersey. The finite supply of such lands, sometimes referred to as "greenfields," is being reduced by increasing governmental restrictions on "sprawl" and as more greenfields are being acquired for permanent open space and conservation purposes. It is dwindling with each new housing development that goes up on prime lands still available. With the passage of time, the reuse of "brownfields" for residential development is becoming an increasingly attractive option for builders to consider.

"… the reuse of 'brownfields' for residential development is becoming an increasingly attractive option for builders to consider."

What Are Brownfields?

Many of us have some understanding of "brownfields." In its classic application, the land use term "brownfields" refers to abandoned or underutilized commercial or industrial properties burdened with contamination. Some brownfields of this nature are the forlorn legacy of New Jersey's industrial history.

Not all brownfields, however, are industrial lands in urban areas. Contaminated properties of different types are found in many places. As of April 2001, more than 12,000 sites were identified on DEP's list of known contaminated sites. Not included in this inventory are hundreds of solid waste landfills covered over decades ago without modern environmental safeguards. Other brownfields are less notable. An otherwise pristine parcel of land, on which a defective underground storage tank is discovered impeding development, is a brownfield. In truth, brownfields of infinite variety can be found in suburban and rural settings in municipalities throughout New Jersey.

Development Within Brownfields Favored

Since the Governor Whitman administration, the State of New Jersey has adopted a policy in favor of restoring brownfields to productive use. A major step was taken in this direction with enactment of the Brownfield and Contaminated Site Remediation Act (Brownfields Act) in 1998. The Brownfields Act provided new incentives for developers to restore abandoned and underutilized contaminated properties to productive use, including more flexible cleanup requirements and protections against unknown environmental liabilities. Related laws furnish tax incentives to make investment in such properties more attractive.

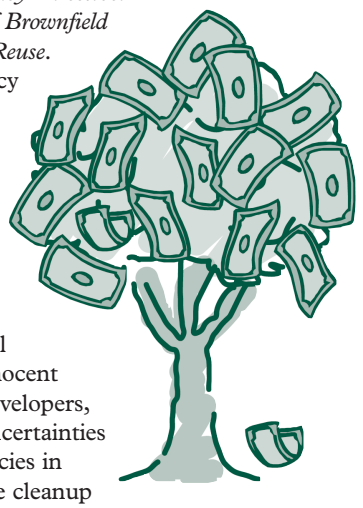
Under Governor McGreevey's administration, the redevelopment of brownfields has assumed an even higher priority. We have all read about perceived problems of "overdevelopment" in New Jersey—clogged highways, dwindling water supplies, overcrowded schools and escalating property taxes. With the stated purpose of improving the quality of life in New Jersey by adhering to principles of "smart growth," the state has announced an aggressive agenda to check sprawl and congestion through smart growth planning, state regulatory reforms and strategic infrastructure funding decisions.

DEP's "Big Map"

The Department of Environmental Protection (DEP) has been assigned a lead role in the state's smart growth campaign. Its potential impact is graphically illustrated with DEP's recent posting of "the Big Map" on its website. On this preliminary map, areas where development are to be encouraged are shown in green. Yellow areas designate areas requiring a more restrictive and cautious approach to development, and red areas designate "no growth" critical natural resource areas, including wetlands and contiguous areas, dedicated open space and farmland preservation lands, endangered and threatened species habitat, high quality waters designated Category One (C1), and other environmentally sensitive areas. The most striking feature of the Big Map is the small amount of green space.

New State Policies and Success Stories

The redevelopment of brownfields is a significant component of the current administration's smart growth program. *Executive Order No. 38* calls for the creation of various additional regulatory incentives to redevelop brownfields. The feasibility of brownfields redevelopment has been further enhanced by DEP's adoption of a new brownfields policy, *2002-2003 DEP Policy Directive: Acceleration of Brownfield Cleanup and Reuse*. The new policy calls for significant regulatory changes providing greater protections against environmental liability to innocent brownfield developers, removal of uncertainties and inefficiencies in the DEP's site cleanup



continued on page 11

Home Inspectors Beware and Home Buyers Be Wary:

Recent Developments In The Consumer Fraud Act and Its Application To Home Inspections

by Meridith F. M. Mason

Anyone who has purchased a home has likely retained the services of a professional home inspector. The obvious purpose of having one, at least from the buyer's perspective, is to know what he or she is getting into before the purchase is finalized. Usually, the contract for sale has been signed by the parties, a settlement date has been scheduled, and the buyer will now find out what problems the home has, if any. If the inspection report reveals few problems with the home, the buyer may decide to simply move forward with the contract as-is and deal with them on his or her own once the buyer has moved in. If the inspection indicates major problems or various smaller issues, it may enable the buyer to reduce the price or back out of the contract altogether.

"…the purpose of…a home inspection is to give a consumer a rational basis upon which to decline to enter into a contract to buy…"

Relief May Be Available To Home Buyers Against Home Inspectors Under The Consumer Fraud Act

Herner v. Housemaster, decided by New Jersey's Appellate Division in March 2002, has shed light on the fact that problems may exist when dealing with home inspections as between the home buyers and the home inspection company. It has, as a result of those problems, made available to home buyers relief against home inspection companies under New Jersey's Consumer Fraud Act (the "Act"), under certain circumstances which justify such relief, such as those which existed in *Herner.*

The aim of the Act is to protect consumers against wrongful business practices. In this respect, the Act provides that the "act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice." The "unconscionable" behavior, which the Act seeks to prohibit, is that which lacks "good faith, honesty in fact and observance of fair dealing." In order to violate the Act, there must be, without limitation, an "affirmative act" or a "knowing omission." However, the violator need not intend to deceive the consumer in order for him or her to be held liable under the Act. As for the victim, there must be a resulting "ascertainable loss" in order to recover.

The Factors Of Herner Giving Rise To Accountability Under The Act

Herner involved a home inspection conducted for first-time home buyers in Bellmawr, New Jersey. The inspection contract included a guarantee running from the earlier of 90 days from the date of the inspection or 30 days from the closing. Unfortunately for the Herners, after the guarantee period had run, they discovered various problems with the home, including ceiling leaks in most of the rooms in the home, a faulty electrical system and a "bouncy" floor in the living room. The report issued to the Herners did not emphasize these problems with the home. In fact, from the report, the home appeared to be almost free from fault—51 of 54 inspected items were given the inspection company's highest rating of "satisfactory", some with comments.

Not only did the report fail to bring to light these major problems with the home, the home inspection company's admitted approach to home inspection reports provided to home buyers was to emphasize the good points of the home and minimize the bad in an effort to not "kill the deal". It did not help the home inspection company that, among other things, 80% of its referrals came from realtors, while its inspectors are trained not to reveal to home buyers that they were part-time or new inspectors.

continued on page 11

SPOTLIGHT

NEW COUNSEL

Hill Wallack has added an experienced litigation attorney, ***Michael T. Sweeney,*** as counsel in the **Trial & Insurance Practice Group.** Mr. Sweeney concentrates his practice in the representation of insurance companies and their insureds in a wide variety of legal matters, including but not limited to catastrophic personal injury, property damage and economic loss stemming from causes of action sounding in governmental, professional and product liability, construction related issues; indemnity and insurance procurement contract issues, and conventional negligence matters. Mr. Sweeney is a graduate of Seton Hall University School of Law in Newark. He is a member of the New Jersey State Bar Association, the New Brunswick Bar Association, the Middlesex County Trial Lawyers Association and the New Jersey Defense Association. He is admitted to practice in both New Jersey and Pennsylvania.

❖ ❖ ❖

NEW ASSOCIATES

Anthony N. Gaeta has become an associate with the firm in the **Litigation Division.** His principal area of practice is in economic and business development with an emphasis on municipal law and government affairs. Mr. Gaeta earned his law degree from Rutgers University School of Law - Newark. He previously served as a Judicial Law Clerk to The Honorable E. Benn Micheletti. He is a resident of Belmar, NJ and is admitted to practice in New Jersey and New York.

Jessica S. Pyatt has joined **Hill Wallack** in its **Land Use Division** which includes the firm's **Land Use Applications, Land Use Litigation** and **Environmental Practice Groups.** Ms. Pyatt is a graduate of Rutgers University School of Law - Newark and is admitted to practice in New Jersey and Pennsylvania. She previously served as Judicial Law Clerk to The Honorable Arthur N. D'Italia and is a resident of Bayonne, NJ.

Mark A. Roney has joined the firm in its **Administrative Law/ Government Procurement Practice Group,** concentrating his practice in Administrative, Environmental and Regulatory Compliance. Mr. Roney earned his law degree from Seton Hall University School of Law - Newark. He previously served as a Judicial Law Clerk to The Honorable Francis P. DeStefano. A resident of East Windsor, NJ, he is admitted to practice in New Jersey.

❖ ❖ ❖

APPOINTMENTS & RECOGNITION

Edward H. Herman, a partner with the firm has been re-appointed Municipal Court Judge in the Borough of Helmetta, Middlesex County. 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. Mr. Herman has been practicing law for more than 30 years and is a recognized authority throughout New Jersey on workers' compensation law and is a certified workers' compensation attorney by the New Jersey Supreme Court. He continues to preside as Municipal Court Judge in Spotswood since 1987 and also serves as Municipal Court Judge in the Borough of Highland Park.

Rocky L. Peterson, a partner of **Hill Wallack** where he is a member of the firm's **Litigation Division, Municipal** and **School Law Practice Groups,** was recently appointed to the Merit Selection Panel of the United States District Court. The Merit Selection Panel assists the United States District Court in choosing a United States Magistrate Judge for the Trenton Vicinage. He is a graduate of Cornell University and received a degree in law from Cornell University School of Law. Prior to joining **Hill Wallack** in 1984, Mr. Peterson was a Deputy Attorney General for the State of New Jersey. He is admitted to practice in New Jersey, before the U.S. Court of Appeals for the Third Circuit and before the U.S. Supreme Court.

Lawrence P. Powers, a partner at the firm was recently appointed as Counsel to the New Jersey Association of Structural Engineers. The New Jersey Association of Structural Engineers is a newly formed chapter of a national organization which is intended to advance the interests of structural engineers. Mr. Powers is a member of the firm's **Litigation Division** and partner-in-charge of the **Construction Industry Practice Group.** His principal area of practice is in construction litigation and the representation of design professionals. As an experienced trial attorney, Mr. Powers has represented numerous design professionals in State and Federal Courts and before their respective State Boards.

Ronald L. Perl, a partner at **Hill Wallack** and partner-in-charge of its **Community Association Law Practice Group,** recently appeared as a featured guest speaker on the Community Affairs Radio Program for WBUR Boston regarding New Jersey property owners who are suing homeowners' associations for denying their right to political expression in violation of their constitutional rights. Mr. Perl is nationally recognized for his work in the field of community association law and has participated in drafting legislation in New Jersey that will modernize laws relating to common interest communities. He is a member of the National College of Community

Association Lawyers, has authored numerous publications and lectured frequently on issues related to community association law. He also teaches Community Association Law at Seton Hall Law School in Newark.

Lionel J. Frank, a partner in the firm, was recently appointed to the Mercer County Chamber of Commerce Legislative Committee. The Legislative Committee reviews draft bills introduced in the State Assembly and Senate that could impact employment policy, taxes and the economy in New Jersey. Mr. Frank has a practice concentration in commercial and general litigation with an emphasis on antitrust, trade regulation, and intellectual property law. He has previous experience as a Deputy Attorney General in the Antitrust Section of the Division of Criminal Justice for the State of New Jersey in addition to his roles as special antitrust advisor to each of the State Division of Alcoholic Beverage Control and the New Jersey Sports and Exposition Authority.

Nielsen V. Lewis, a partner at the firm, has been elected Chairperson of the Insurance Law Section of the New Jersey State Bar Association for the 2002-2003 term. Mr. Lewis is a partner in the firm's **Environmental Litigation Practice Group.** The State Bar's Insurance Law Section is a diverse professional association of attorneys, including insurance defense lawyers, insurer and policyholder coverage attorneys, in-house counsel, insurance trade organizations, and attorneys engaged in insurance regulatory and legislative matters. Mr. Lewis has over twenty years of experience in the areas of environmental law and insurance law and litigation. He is a member of the New Jersey State Bar Association's Environmental and Dispute Resolution Sections and is on the Superior Court Roster of Court-Appointed Mediators. 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.

Nicole Perdoni-Byrne, an associate at the firm, was recently elected to the Borough of Helmetta Council. The six-member Borough Council will have a significant role in the transformation of redevelopment in the area. Ms. Perdoni-Byrne is a member of the **Banking & Secured Transactions Practice Group** and 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.

❖ ❖ ❖

SEMINARS

Nielsen V. Lewis was recently a featured panelist in the New Jersey State Bar Association Seminar "Hot Topics in Insurance and Environmental Law," co-sponsored by the Insurance Law Section, the Environmental Law Section and New Jersey ICLE. The Seminar was presented at the New Jersey State Bar Association's Mid-Year Meeting in Orlando, Florida. Mr. Lewis is a frequent lecturer at continuing legal education, business and municipal seminars and is the author of articles on various environmental and insurance law topics.

Lionel J. Frank was recently a featured speaker about careers in law to 40 students at Princeton High School who were participating in the World of Work for Youth Group, a program sponsored by Corner House, a non-profit corporation in Princeton. World of Work for Youth is a program designed to teach at-risk teens job preparation strategies and practical life skills in the context of career exploration and community service.

Dakar R. Ross was recently a featured speaker during the New Jersey Institute for Continuing Legal Education Annual Business Law Symposium—Counseling Non-Profit Entities. This practical, one day seminar was an exploration of the legal issues and challenges that attorneys and other professionals face when counseling non-profit entities, including drafting techniques, corporate governance and officer and director liability issues, government compliance regulations, public reporting and disclosure requirements, and strategies for forming alliances, partnerships and joint ventures.

Anne L. H. Studholme recently served as Judge at the Mercer County Regional round of the Vincent J. Apruzzese Mock Trial Competition sponsored by the New Jersey State Bar Association. The competitors, all local high school students, presented cases to a jury. The judges ruled on objections and evidentiary issues and offered feedback, tips, encouragement and gentle critique to the teams of student "lawyers" and "witnesses". Ms. Studholme is a member of the firm's **Land Use Division** and its **Land Use Applications Practice Group.** She also has a practice concentration on federal civil litigation, complex litigation and legal malpractice. Ms. Studholme, a graduate of Princeton University, earned her law degree from University of North Carolina, Chapel Hill, and is admitted to practice in New Jersey and North Carolina.

❖ ❖ ❖

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

Is There Tax Relief on the Horizon For Homeowners?

by Nicole Perdoni-Byrne

As the citizens residing in the municipalities across New Jersey prepare themselves to receive their next quarterly property tax bill and the anticipated tax increase that is becoming a frequent occurrence, it has become crucial to commence efforts to resolve a statewide problem with a statewide solution. Most citizens today are faced with the challenge of coping with the ever increasing cost of living, as well as, continuing to feel as though they are being consumed by the rise in the property tax. Often, for many, the rise in these costs are not coupled with an equal rise in income. Municipal officials are challenged by the demand of their citizens for an increase in the number and quality of municipal services, especially in the area of educating children, that need to be funded from somewhere, while combating the necessity to stabilize property taxes. Again, New Jerseyans are reminded that the State continues to be over-reliant on the funding of government services through the use of the property tax. But in the midst of these competing interests, hope for reform may be forthcoming. Legislators in Trenton have proposed Senate Bill number 478, along with companion bill Assembly Bill number 540 which calls for the convening of a limited constitutional convention to seek and implement a long term solution to the onerous tax burden that debilitates many of the citizens of New Jersey.

The Statistics Evidence Reliance

The State's reliance on property taxation as a method of funding government services and primary and secondary education is clearly evident when comparing the statistical information with other states nationwide. Property tax in New Jersey accounts for over 45% of the total State and local tax revenue while nationwide the average is just over 30%. The per capita property tax burden measured in 1997 was about $1,596, which is almost double the national average of about $825. When evaluating personal income, property taxes account for about 5.6%, two points in excess of the national average, which checks in as about 3.6%. It appears that those citizens with the least are burdened with the most as households with incomes falling in the lowest 20% expend 9.2% of their earnings in property tax. Those with more substantial means—those appearing in the wealthiest 20% of the population—appear to pay 3.6% of their income on property tax (as reported by the New Jersey State League of Municipalities.) This is a problem that as time goes on will prove to become even more burdensome as the cost of education continues to rise, and many municipalities experience a greater influx of school age children to educate, as well as an increase in the demand for government services.

"Most citizens today are faced with the challenge of coping with the ever increasing cost of living…"

The Proposed Legislation

In an effort to adequately address this issue, Senate Bill number 478 has been introduced, calling for the convening of a limited constitutional convention for the express purpose of reforming the current system of property taxation as a vehicle to fund government services and education. Proposals to revise and amend the State Constitution to effectuate property tax relief will be explored and examined if the convention is so convened. The bill recognizes that the current system of funding via the property tax system is "unfair" because the burden is not based on a taxpayer's ability to pay and is being applied in an "inequitable and non-uniform manner." The bill's drafters recognize that the most optimal effort to aid the municipalities' struggles to find revenue is to amend the State Constitution to allow for municipalities to become less reliant on property taxes as a source of revenue. This effort, if brought to fruition, will be a better alternative means of funding local government services and lessening the burden on individual taxpayers.

The mission of the Convention, as set forth in the bill, is to "recommend amendments to the New Jersey Constitution and revisions to the statues which, while revenue neutral in their overall impact, eliminate inequities in the current system of property taxation, ensure greater uniformity in the application of property taxes, reduce property taxes as a share of overall public revenue, provide alternatives which lessen the dependence of local government on property taxes, and provide alternative means, including possible increases in other taxes, of funding local government services. The convention shall be limited to considering and making

continued on page 12

To Collect or Not to Collect—A Mortgage Lender's Quandary

by Dakar R. Ross

It has long since been well settled that our courts will enforce the customary attorney-fee clause in a mortgage note to the extent that the attorney fees requested as part of the foreclosure judgment on the note are reasonable. Nevertheless, the right of mortgage lenders to recoup from its defaulting mortgagor/customer the various fees and costs associated with litigation involving defaulted mortgage loans continues to be a contentious issue between the banking industry and consumer advocates. Recent New Jersey court rulings, however, now provide some further guidance, albeit somewhat conflicting, as to the parameters governing the collection of attorney's fees in foreclosure actions.

"Recent New Jersey court rulings…provide some further guidance…as to the parameters governing the collection of attorney's fees in foreclosure actions."

Banks Have Right To Collect Fees

In *National City Mortgage v. Smith,* a case handled by Hill Wallack as attorneys for the lender, the foreclosing bank successfully defended its right to collect full attorneys' fees from a defaulting mortgagor who cured/reinstated the default prior to the entry of final judgment. The focus of the case was the application of New Jersey Court Rule 4:42-9, which allows lenders in a foreclosure action to recoup legal fees based upon a percentage of the mortgage debt which the court determines is owed by the borrower. At issue was whether the Fair Foreclosure Act, N.J.S.A. 2A:50-53 to -68, required that the statutory counsel fee, as fixed under New Jersey Court Rule 4:42-9, be calculated based upon the actual amount of the mortgage arrearage or upon the amount of the fully accelerated total mortgage debt. The court in that case determined that the allowable counsel fees should be calculated based upon the higher total mortgage debt figure.

Consumers Have Rights Too

In *Luciani v. Hill Wallack,* a case decided nine months after *National City Mortgage,* the court introduced one limited caveat relating to the standard by which these counsel fees in a mortgage foreclosure action are calculated. In that case, the question was whether R. 4:42-9 permits the court to exercise discretion to downwardly adjust the amount of the award. There, the court again reaffirmed the general principle that contractual provisions relating to an award of counsel fees are generally enforceable if the fees being sought are part of an award in a mortgage foreclosure action; and in a mortgage foreclosure setting, the quantum of the attorneys' fees award that may be included in a judgment or charged as part of the sum needed to cure a default prior to judgment, is governed by R. 4:42-9. The court, however, determined that while the formula set forth in *National City Mortgage* for calculating the maximum award allowed under R. 4:42-9 may be proper, it was not mandatory that the court automatically apply said calculation across the board, in every default situation. This court also determined that a deciding court had recourse to exercise its discretion to reduce the fee award against a mortgagor where the imposition of such a charge would undermine public policy and constitute a penalty in a particular factual circumstance.

But Banks and Consumers Don't Have the Same Rights

As one would expect, in the wake of the *Luciani* decision, which gave courts limited discretion to downwardly adjust fees in favor of mortgagors, another case would emerge seeking to expand the court's discretionary powers under R. 4:42-9 further. In *Stewart Title Guar. Co. v. Lewis,* the court was confronted with the "alter ego" of the *Luciani* case—whether a mortgagee bank, having been aggrieved by the baseless machinations of its mortgagor/customer, was equally entitled to an upward adjustment of attorney's fees above the calculated maximum pursuant to R.4:42-9. Although acknowledging that the imposition of an upwardly adjusted fee award would constitute a most equitable and desired result in that particular case, the court questioned the strength of the legal underpinning of *Luciani* and determined it was indeed bound by the strictures of the Court Rule and thus was without any authority to enhance attorney's fees beyond the specific parameters of R. 4:42-9.

Attorney Input Remains Important

For the time being, reconciling these seemingly conflicting case

continued on page 10

State Commission on Investigation... cont. *(continued from page 2)*

Those so accused may file written responses. However, the SCI decides what portions of its own report are "critical of a person's conduct." Thus, the SCI may deprive a person of the right to rebut damaging accusations by simply declaring the accusation to be insufficiently critical to merit a rebuttal. Moreover, reports and communications of the SCI and its agents are "absolutely privileged," unless made with actual knowledge that they are false in reckless disregard of the truth.

Thus, the SCI has free reign to make accusations against people whom it investigates without the inconvenience of (1) keeping such accusations secret (like grand juries), or (2) actually proving its accusations. A typical SCI report is likely to begin with an introduction of inflammatory accusations of corruption and illegality for which one would assume there would be a supporting factual basis. Unfortunately, such factual support is not required.

Fifth Amendment Rights?

If, during the course of any investigation or hearing, a witness refuses to answer a question or produce evidence on grounds that the answer or evidence might incriminate him, the Commission may ***order*** the person to answer the question, or produce the requested evidence and grant the individual immunity. *Immunity* for an individual means the ordered testimony or evidence will not be used to expose the individual to criminal prosecution. However, many individuals find themselves in a quandary. The quandary stems from the fact that the office of the Attorney General and local prosecutors receive notice of the proceeding, and the prosecutors maintain sole discretion whether to initiate criminal prosecution. Further, the State has the right to gather evidence independently from that which is compelled at the SCI hearing.

Conclusion

Although New Jersey courts have held that the SCI operates within proper legal boundaries, the continuing practices of the SCI raise the question of whether the SCI has gone beyond its fact-finding function and has redefined its mission to try in the court of public opinion individuals and businesses unlucky enough to be called as witnesses before it.

Andrew T. McDonald *and* ***Len F. Collett*** *are associates in the* ***Administrative Law/Government Procurement Practice Group.*** *They concentrate their practice in Administrative Law and Corporate Litigation including Public Procurement and Environmental Litigation with a particular emphasis on administrative, environmental and regulatory compliance.*

Mold Claims... cont. *(continued from page 3)*

knowledge of the potential hazard that may exist when a building design does not adequately deal with, or in fact, completely eliminate avenues of moisture infiltration. Aside from incorporating all available moisture reduction technologies and materials in the design, architects and engineers can take other steps to limit their exposure to mold claims. Design professionals can attempt to utilize their design contracts to limit their liability for mold related claims. Contracts can be drafted using limitations of warranties, indemnification clauses, disclaimers, and other methods so that no representations against water infiltration and subsequent mold are being made. While this article makes no representations as to the effectiveness of such drafting techniques, it is clear that such provisions could only be effective against the contracting parties, which may not be the party bringing the claim. Requirements of notification, an opportunity to remedy, and the enforcement of arbitration clauses may result in keeping such claims from being litigated if made part of the design contract.

Architects and engineers should design with a very cautious estimate of time needed for proper installation of component parts of buildings. Adequate time for drying of building systems, such as fire walls, before they are wrapped or otherwise closed in, must be afforded through the design process, and establishment of a completion timetable for the owner. Design professionals with construction administration duties should carefully define their duties to limit the claims that defective installation creates liability because they may have had an opportunity to observe the defective installation.

In fact, a report of a leak should not necessarily be handled as a minor punch list type repair. Steps should be taken to document the locations and conditions reported by the owners, and in particular, the dates when such reports are made. We should ascertain and document the cause of the leak, and the efforts made to remediate it. Hill Wallack is active in loss prevention for design professionals, and we would be happy to provide legal advice on dealing with any mold related situation.

Joan H. Osborne *is an associate of* ***Hill Wallack*** *where she is a member of the* ***Litigation Division*** *and the* ***Construction Industry Practice Group.*** *She concentrates her practice in the representation of architects, engineers and design professionals and their professional liability insurance carriers.*

To Collect or Not to...

cont. *(continued from page 9)*

rulings must wait action by the upper level courts to determine whether the calculation of attorney's fees under R. 4:42-9 is imperative or discretionary. In the interim, mortgage lenders should always consult with their attorneys regarding the propriety of assessing attorneys' fees against their defaulting borrowers. As part of any such assessment, lenders should confirm with their attorneys that the bank's disclosure forms and loan documents contain the proper language and necessary disclaimers which will secure the lender's legal entitlement to recoup its reasonable attorney fess and costs, and that such language is in compliance with statutory and case law guidelines.

Dakar R. Ross *is an associate of* ***Hill Wallack*** *where he is a member of the* ***Litigation Division*** *including the* ***School Law*** *and* ***Municipal Law Practice Groups.***

The Greening of Brownfields... cont.

(continued from page 4)

requirements, and broadening the scope of potential reuses of brownfield sites. For example, in some cases, the DEP will permit brownfield developers to begin construction where they have addressed soil contamination, but not groundwater. The DEP will not seek compensation from innocent developers for historical natural resource injuries at a brownfield site, and where contamination has multiple sources, brownfield developers may be allowed to contribute to an environmental cleanup trust to be used for future cleanup of groundwater. A Brownfield Reuse Office has been created at DEP to work with Green Acres, municipal officials, and community and environmental leaders to expand the reuse of contaminated sites.

Of particular interest to builders, DEP's Brownfields Policy Directive provides that the state's efforts in this area will focus on identifying brownfield sites suitable for residential projects. One notable brownfields residential development is Port Liberté on the Jersey City waterfront, where luxury condominiums have been built on an old contaminated industrial site. In North Wildwood, a 92 unit luxury resort community is now planned on the site of an old sanitary landfill. With new regulatory policies in place and advancements in science and engineering controls, the list of successful residential development projects on brownfields is growing.

Market Considerations

New government land use policies tell only part of the story. The real estate marketplace also is operating to encourage builders to take a closer look at brownfield redevelopment options. The Whitman administration trumpeted the goal of preserving one million acres of open space for posterity. In the newspapers, one regularly reads accounts of another parcel of land dedicated to farmland preservation, public open space or the protection of natural resources. With each property taken off the market for such purposes, the supply of land available for residential development shrinks further. Together, the decline in lands available for building and the pressure of increasing restrictions on sprawl are pushing remaining development farther out and inward toward existing population centers.

Redevelopment of brownfields is coming of age. Modern regulatory trends and the diminishing supply of land in New Jersey point to the same result—prime developable land in New Jersey for housing is growing scarce. As realistic opportunities for building housing on greenfields erode, and regulatory incentives for redeveloping contaminated properties grow, investment in brownfields offers an increasingly serious development alternative for builders. To properly investigate and evaluate this option, land developers should consult with qualified professionals and do their due diligence.

Nielsen V. Lewis *is a partner of the firm where he is a partner of the* ***Environmental Practice Group*** *and a member of the* ***Land Use Division.*** *He concentrates his practice in the areas of environmental law, insurance law and land use, with an emphasis on prosecuting and defending complex environmental litigation.*

Home Inspectors Beware... cont.

(continued from page 5)

Further, when dealing with individual home buyers, the inspectors took the "balanced" approach to report that the good and the bad aspects of the home essentially balanced out; while with relocation companies, it was to "nitpick" potential deficiencies in an effort to possibly reduce the price of the property. In addition, the home inspector company's brochure failed to disclose that the 90-day guarantee lapsed 90 days from inspection rather than closing.

Based on these and other findings, the court found that the home inspection company had committed an unconscionable commercial practice in violation of the Consumer Fraud Act. The court noted that "the purpose of such a home inspection is to give a consumer a rational basis upon which to decline to enter into a contract to buy, to provide lawful grounds to be relieved from a contractual commitment to buy, or to offer a sound basis upon which to negotiate a lower price." The court found that the buyers anticipated a report which indicated the "physical conditions of [the home] which could reasonably affect the health, safety and welfare of its occupants," and that a report should indicate conditions in the property which could prove costly to the buyer. Essentially, that which the Herners were looking for in a home inspection was diametrically opposed to that which they received from Housemaster. Certainly, the "balanced" report issued to the Herners did not meet the criteria which the court specified should be present.

Home inspection companies and home buyers alike should be mindful of the *Herner* decision. Home inspection companies must be aware that a cocktail of issues will dictate the possibility of liability under the Act. Among other things, the source of their business, their policies in terms of disclosure and reporting and the facts surrounding each inspection are subject to close scrutiny. Home buyers should be cognizant of this recent decision when hiring a home inspection company and reviewing a report issued by that company.

Meridith F. M. Mason *is an associate of* ***Hill Wallack*** *where she is a member of the* ***Creditors' Rights/Bankruptcy Practice Group.*** *Ms. Mason concentrates her practice in all matters of creditors' rights and bankruptcy, including workouts, foreclosures, replevin actions and collections. Her extensive client list includes secured creditors, creditors' committees, debtors in possession and debtors and trustees in liquidation and reorganization proceedings.*

Is There Tax Relief on the Horizon... cont. *(continued from page 8)*

recommendations in regard to the aforesaid matters and the implementation thereof." If successful, the proposed amendments and revisions will help to alleviate the terrible tax burden that many experience.

The drafters of the bill recognized the importance of including as many citizen participants in the decision-making process as possible. "The Legislature, when considering proposals for broad restructuring of revenue sources, recognizes that there is great political risk in making recommendations which the general public might perceive as increasing taxes. *S.478, 210 Leg. 2002 (NJ)*. It is therefore essential that the citizens of New Jersey are fully engaged in the effort to restructure taxes." The bill provides for an approval process wherein the voters in the general election have the opportunity to decide whether the populace is in favor of convening the limited constitutional convention. Upon approval in the general election to move forward with the convention, a special election would be held to elect two delegates from each legislative district for a total of 80 delegates to participate in the convention. An individual who seeks to be elected as a delegate need only be required to be a registered voter in the district that he or she seeks election in and must be a citizen and resident of the State for not less than two years. Other government officials are deemed delegates to the convention as well, as more fully set forth in the bill, and shall include the Governor and each former Governor of the State. Upon proposals of amendments to the Constitution reforming property taxation being prepared by the delegation, the proposals shall be submitted to the voters for approval at the general election following the convention.

Thus, the time has come to seek a more comprehensive property tax reform that negates the unequal and inequitable effects of the current system. The proposal and approval of amendments to the current State Constitution and statutes may not prove to be an immediate cure, but may prove to be more successful in the long term. Throughout the State, many municipalities have come out to support the implementation of tax reform through amendments to the State Constitution and other statutes. The Senate Judiciary Committee has scheduled the Bill for consideration this fall. Maybe the time for change has come.

Nicole Perdoni-Byrne is an associate at **Hill Wallack** where she is a member of the ***Real Estate Division*** and the ***Banking & Secured Transactions Practice Group.*** She 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.

HILL WALLACK
ATTORNEYS AT LAW