



News from HertenBurstein.Com

- In January, **Andrew Fede** was re-appointed as the Norwood Borough Attorney for 2008. Mr. Fede also published an article in the October 2007 edition of the *New Jersey Lawyer* magazine titled "The Clock is Ticking: Why the Courts or the Legislature Should Prohibit Adverse Possession and Easement by Prescription Claims in Municipal Land."
- **Terry Paul Bottinelli** was re-appointed as Borough Attorney in Alpine, and as Judge in Cresskill and Closter. He was sworn in as Judge by former Herten Burstein partner, and current Superior Court Judge, Menelaos W. Toskos.
- **Thomas J. Herten** and **Craig Bosson** were reappointed Borough Attorneys in Waldwick.
- **Terry Paul Bottinelli's daughter** is expecting a baby, giving the Bottinelli's their first grandchild.
- **Daniel Gielchinsky** was appointed as Special Counsel to the Mayor and Council in Saddle Brook.

The firm is pleased to welcome **Gianfranco A. Pietrafesa** to the firm. Mr. Pietrafesa is a business lawyer and litigator. As a business lawyer, he represents clients in corporate, business, employment and real estate matters. His extensive experience includes the formation of business entities, the purchase and sale of businesses, the preparation and negotiation of various business contracts and advice to clients on general employment matters. He also handles real estate matters for his corporate clients, including the purchase and sale of commercial real estate, land

use applications, the preparation and negotiation of leases, and commercial mortgage lending.

Mr. Pietrafesa has been a director of the Business Law Section of the New Jersey State Bar Association and a member of the Inn of Transactional Counsel since 2002. He is listed among The Best Lawyers in America in the area of Corporate Law.

Mr. Pietrafesa received his J.D. from Seton Hall University School of Law, where he was an editor of the Seton Hall Legislative Journal. He received his B.S. in accounting, summa cum laude,

from Fairleigh Dickinson University, which better enables him to provide advice to business clients. Prior to entering private practice, Mr. Pietrafesa served as a Law Secretary to the Honorable Nicholas G. Mandak, the Assignment Judge for the Passaic County Vicinage of the Superior Court of New Jersey.

Mr. Pietrafesa is actively involved in his community. He coaches baseball, softball and soccer, and has been a member of the Hawthorne Board of Education for many years. He has also

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New COAH Regulations

By Nilufer O. DeScherer

In accordance with the directive of the Appellate Division in *In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing* (and related cases), 390 N.J. Super. 1 (App. Div. 2007), the Council on Affordable Housing ("COAH") has published a new set of third round regulations. This new set of rules was published in the January 22, 2008 edition of the New Jersey Register and can be reviewed on COAH's website at www.nj.gov/dca/coah/dec07proposal.shtml.

The COAH website also provides a general summary of the major changes in the proposed rules. Notable changes are (1) a significant increase in

COAH's determination of what the affordable housing need is for the state (115,000 affordable units instead of 52,000 based on the original set of third round rules that was adopted); (2) an increase in development fees for new construction from 1% of equalized assessed value to 1 1/2 % of equalized assessed value for residential development and from 2% to 3% for non-residential development; (3) establishment of a payment in lieu standard averaging \$161,000 per affordable unit; and (4) an increase in the cost of an RCA (Regional contribution Agreement) from \$35,000 per unit to

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The Power of a Power of Attorney

A power of attorney is an instrument that authorizes an “agent” to act on behalf of someone else (the “principal”) in a legal or business matter. When an elderly woman executed a power of attorney that gave her younger sister certain powers, a dispute arose when the younger sister used her power to name herself as the beneficiary of the elderly woman’s life insurance policy. The dispute was with the elderly woman’s children and grandchild, who had been beneficiaries under the policy until the younger sister with the power of attorney put herself in their place.

A power of attorney can be a valuable tool in estate planning, but it should be properly drafted to ensure that the powers contained therein are appropriate.

The children and grandchild argued to no avail that the terms of the power of attorney instrument did not give the younger sister the authority to name herself as the beneficiary of the life insurance policy. Unfortunately for them, the instrument language was broad enough to authorize the agent to change the beneficiaries of the principal’s policy, where it authorized the agent “to transact all insurance business on [principal’s] behalf, to apply for or continue policies, collect profits, file claims, make demands, enter into compromise and settlement agreements, file suit or actions or take any other action necessary or proper in this regard.”

It was significant that the power of attorney did not incorporate by reference the various powers listed in the Uniform Durable Power of Attorney Act. In cases in which the powers listed in the Act are incorporated by reference into the power of attorney, an

agent is not authorized to change the beneficiary of the principal’s life insurance policy unless the principal has expressly authorized the agent to do so within the power of attorney. Since there was no mention of the Act in the instrument in question, but only a broadly worded grant of authority, the sister had not exceeded her powers.

Although the children and grandchild lost on the issue of how to interpret the agent’s powers, they were still free to raise other arguments if they had factual support. These included arguments that the elderly woman did not have the mental capacity to execute the power of attorney, that her execution of the instrument was not of her

own free will but was rather the result of the duress, coercion, control, and/or undue influence exercised by her sister/agent, and that the sister/agent’s action in changing the beneficiary of the policy to herself was a violation of her fiduciary duty to the principal.

A power of attorney can be a valuable tool in estate planning, but it should be properly drafted to ensure that the powers contained therein are appropriate. Always consult with a qualified professional before executing a power of attorney.

For more information on powers of attorney or any other estate planning issue, contact Andrew J. Cevalco or Louis C. Tomasella.

News

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served as general counsel to the St. Anthony Education Foundation, and the Hawthorne Education Foundation, New Jersey Nonprofit Corporations.

- **Mr. Pietrafesa** will be one of three speakers at the “Purchase, Organization and Sale of a Small Business” seminar (NJICLE) on March 25 and the moderator of the 2008 Business Law Symposium on April 29 (NJSBA Business Law Section and NJ ICLE).
- **R.J. Contant** and **Eimi Thompson** presented a lecture at Friendship House on the contribution of real estate to a charitable organization qualified under IRC sections 501(c)(3) and 170.

For those individuals who are charitably inclined and wish to donate real estate, there are a variety of reasons and methods to do so. A gift of real estate may be transferred to a charitable organization qualified under IRC sections 501(c)(3) and 170 as a lifetime outright gift, by retaining a life estate in the property, through a charitable gift annuity, through a split interest with an IRS

recognized trust, through a bargain sale, or a testamentary transfer.

Gifts of real estate has advantageous income and estate tax consequences. Transferring real estate as an outright lifetime gift is advantageous since the donor will avoid the payment of capital gains tax and may take a charitable contribution deduction. Donating real estate can also minimize estate consequences by removing the value of the property from the decedent’s gross estate.

Friendship House is dedicated to serving and assisting individuals with mental, developmental or physical disabilities by providing pre-vocational and vocational training, transitional and supported employment programs, psychiatric evaluations, medication management and support groups. Currently the organization supports 131 people in a variety of community jobs including janitorial and grounds maintenance, food services, clerical duties and packaging and assembly work. The staff at Friendship House is committed to assisting individuals become functioning members of society and developing a sense of purpose and self-worth.

Real Estate Roundup

Flood Zone Fraud

A jury recently gave a hefty damages award to homeowners who sued a real estate company for falsely representing that the home they were buying was not located in a flood zone. When the rains came after the homeowners had moved in, the front yard, backyard, and a patio were under three feet of water. The house itself was never flooded. While this was fortunate, it limited the economic damages that a lawsuit would yield, prompting the homeowners to use an unusual legal theory.

The company and, in particular, its manager knew about the flooding problem and kept that fact from the home buyers.

The homeowners successfully argued that the realty company had committed fraud. The use of fraud as a cause of action allowed the homeowners to recover noneconomic damages of the kind not commonly awarded in litigation between the buyers and sellers of real estate. In addition to recovering damages for the difference between what they paid for the property and its real value, the homeowners also received a significant award for mental anguish, and an even larger amount as punitive damages.

The company and, in particular, its manager knew about the flooding problem and kept that fact from the home buyers. There was evidence that others who bought nearby property from the same company had battled flooding and had complained about the

flooding to the realty company. Moreover, real estate agents testified that sales contracts with prospective buyers for the very property that was in dispute had fallen through when those buyers became aware of the potential for flooding.

The failure to disclose continued in the time after the purchase, when the company manager unsuccessfully tried to get the new homeowners to sign a drainage release, which would have absolved the company of liability for any damage from flooding.

Condemnation Action Dooms Business

When the District of Columbia condemned property on which it planned to construct a municipal office building, the corporation that owned the land received an award compensating it for the property, "including all interest therein." The quoted phrase was relevant, because the property had been occupied by the owner of a gas station and convenience store business under a franchise agreement with the landowner. Unfortunately for the holder of the franchise, the agreement's terms heavily favored the landowner insofar as the impact of a condemnation was concerned.

First, in the event of a condemnation, the agreement would terminate 10 days before the effective date of the condemnation. This meant that the agreement ended before the condemnation, leaving the business with no remaining legal interest in the property for which it could receive compensation. Second, the agreement provided that the landowner would receive all of the money awarded in the condemnation proceedings.

Left without a share of the condemnation award for the property itself by

the terms of its agreement, the owner of the business argued that, as part of the condemnation action, it nonetheless should receive compensation for the business's losses, for its goodwill, and for other consequential damages that flowed from the condemnation. The argument failed.

It could have been within the power of the District of Columbia to authorize such an award for nonowners situated on condemned property but, in fact, the relevant statute contained no such provision. As a result, the claim by the business fell under the rule, announced by the United States Supreme Court in a previous case, that "absent a statutory mandate the sovereign must pay only for what it takes, not for opportunities which the owner [or, in this case, franchise holder] may lose."

For more information on these issues or any other real estate or real estate litigation matter, contact Arnold D. Litt or Jason T. Shafron.

COAH Regulations

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\$67,000 to \$80,000 per unit (by COAH region). The deadline for submitting to COAH written public comments to the proposed rules is March 22, 2008. According to the Council on Affordable Housing, these new rules are scheduled to become effective June 2, 2008.

For more information on the impact of the proposed rules on the development community in New Jersey, contact Nilufer O. DeScherer.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Intrafamily Loans Subject to Tax Laws

For parents with the financial means to do so, there may be a natural impulse to help a child get started in his or her adult life by making a loan to the child, on terms that are favorable to the child. Notwithstanding the virtues of such generosity, the cold reality is that, if the terms are too favorable to the child, the loan could end up with some undesirable tax consequences.

The better choice may be to go forward with the loan, but with the child repaying the loan with enough interest to avoid the tax bite. Think of this approach as generosity tempered with practicality and as a borrowing position for the child that is closer to the “real world” marketplace.

For a loan from a parent to a child, the IRS measures the interest rate on the loan against a benchmark interest rate, the “applicable federal rate” (AFR), which it sets each month. Currently, that rate is about 5%. To the extent that the interest due on the loan is less than the interest calculated with the AFR, that amount will be “imputed” income to the parent, even though it was not in fact collected by the parent. The IRS will also treat the same amount as a gift to the child, requiring the filing of a gift tax return. (There would be no gift tax due, however, unless the parent had used up the \$1 million lifetime gift tax exclusion.) From the standpoint of the child’s taxes, he or she may be able to deduct the amount of the imputed interest on a loan secured by a residence.

Exceptions

There are two important exceptions to this scenario. If the amount of the loan to a relative does not exceed \$10,000, and the loan is not used for an income-producing investment, the IRS will not impute any interest. In addition, loans of up to \$100,000 do not lead to imputed interest if the borrower’s net investment income in a given year does not exceed \$1,000.

To avoid the income tax or gift tax ramifications for all kinds of intrafamily

loans, the simplest approach is to use an interest rate that is at least as high as the AFR. Also, although it may seem unduly formal among relatives, it is advisable to set forth the terms of the loan in a written agreement, signed by all parties. Not only does this protect against faulty memories, but it decreases the odds that the IRS will consider the entire transaction to be a gift rather than a loan.

For more information on intrafamily loans or other planning issues, contact R.J. Contant or Andrew J. Cevasco.

Quotable

A pessimist sees the difficulty in every opportunity; an optimist sees the opportunity in every difficulty.

Winston Churchill

Careful What You Click

A Texas online purchaser used her daughter-in-law’s credit card to order some automobile seat covers and have them delivered to the daughter-in-law in Alabama. When they were delivered, it was discovered that the covers were the wrong color. The daughter-in-law sent them back to the company and reversed the charge on her credit card. The company claimed that it never received the seat covers, and eventually sued the purchaser and the daughter-in-law for breach of contract.

The lawsuit against the customers was reason enough for heartburn, but adding to the problem was the fact that the action was filed in a state court in Indiana, far from either of the defendants’ homes. The defendants’ attempt to avoid having to defend the suit in Indiana failed. The “clickwrap” agreement that the customer had accepted with a click of the mouse when she purchased the items included a requirement that any legal proceeding between the purchaser and seller had to be filed in Indiana and governed by Indiana law.

It may be that most customers only skim the language in a clickwrap

agreement, if they read it at all, while looking for the “I accept” button. However, the agreement, and everything in it, is no less binding because of that. Both the customer and the owner of the card she used were bound to litigate the dispute in Indiana.

The court emphasized that the online agreement gave reasonable notice of its terms. Its full text was immediately visible to the customer, who had to take the affirmative step of clicking on the “I accept” button. Not only that, but the heading for the “litigate only in Indiana” section was in bold print and capital letters.

In most cases and for most people, the legalese in clickwrap agreements is of little practical consequence, but online customers should be on notice that agreeing to buy a product may also entail agreeing that any dispute will be litigated on the other side of the country and be decided according to another state’s laws.

For more information on this case or any other related matter, contact Patrick Papalia or Carolyn B. Hand.