

HERTEN BURSTEIN

HERTEN BURSTEIN SHERIDAN CEVASCO BOTTINELLI LITT & HARZ LLC
Counsellors at Law



Insights and Developments in the Law

Summer 2008

News from Herten Burstein

- Consistent with Herten Burstein's commitment to participate in programs which are designed to improve the knowledge and skills of the legal profession and the public in New Jersey, on March 29, 2008, **Jason T. Shafron** and **Nilufer O. DeScherer** were speakers at the Annual Municipal Land Use Symposium sponsored by the Bergen County Bar Association and the Bergen County Bar Foundation. Jason Shafron presented the most recent land use cases in a lecture "Hot Topics in New Jersey Land Use." Nilufer DeScherer spoke about the Municipal Master Plan as part of the basic course in land use law, which is required attendance by government land use officials.

- On May 15, 2008, a number of attorneys from the firm participated in the Bergen County Bar Association's presentation by its General Equity division. The well-attended presentation, entitled "The Foreclosure Fight" provided the bar with an overview of how to assist clients in navigating the growing number of foreclosure actions that are being filed as a result of the recent credit crisis and downturn in the housing market. Among the presenters from the firm were **Retired Judge Gerald C. Escala**, **Thomas J. Herten**, **Michael I. Lubin**, **Scott D. Jacobson** and **Daniel Y. Gielchinsky**.

Judge Escala and Tom Herten discussed clients in distress who sought out their attorneys' advice when they fell behind on the mortgage payments of the investment property they had purchased with a sub-prime mortgage and were now facing foreclosure. Scott

Jacobson gave an overview of the predatory lending practices that have led to many situations involving borrowers who were lulled into using financing instruments they did not understand to purchase real estate, and how those predatory lending practices can become the basis for a lawsuit against the lender. Michael Lubin argued a simulated application to the Court that would occur if a mortgagee attempted to stay an impending Sheriff's sale. Daniel Gielchinsky con-

cluded the lecture with an overview of how to attempt to workout a borrower's debt with a lender, and when to consider filing for bankruptcy.

The attorneys at Herten Burstein are well-versed in real estate, foreclosure and bankruptcy law, and are able to assist our clients with a variety of related issues.

- **Michael I. Lubin** has been selected to organize and mentor a team

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N.J. Supreme Court Ruling Favors Developers

By Nilufer O. DeScherer

In March 2008, in *Toll Brothers Inc. and Laurel Creek, L.P. v. Board of Chosen Freeholders of the County of Burlington*, the Supreme Court of New Jersey found that municipalities and counties cannot require a developer to pay for the cost of off-site improvements merely because such obligations are set forth in an executed developer's agreement. The Court stated that a developer's agreement that includes an obligation to pay for the cost of off-site public improvements that are beyond what would be needed in connection with the specific project that the developer proposes to develop are at odds with the Municipal Land Use Law.

New Jersey courts have taken the position for years that a local land use board could not require a developer to pay for more than its pro-rata share of off-site improvements as a condition of approval. This recent New Jersey Supreme Court opinion makes it clear that even where a developer, or successor in interest to the original developer, signs an agreement to undertake certain off-site improvement costs, if the scope of the developer's project changes is reduced, the developer is no longer contractually obligated to pay for the same amount.

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Toll Brothers involved a dispute as to whether a developer was still required to pay for major road improvements that it had agreed to pay for before its project was drastically scaled back. The developer's obligation to pay for the road improvement on a county road had been memorialized in an executed developer's agreement. Burlington County argued that the developer was still bound by the terms of an executed developer's agreement despite a downsizing of the project. The developer, Toll Brothers Inc., objected. It argued that

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due to the change in the nature and scope of the developer's project, for which the developer was seeking an amended site plan approval, its obligation to pay or be responsible for certain off-tract improvements needed to be revised and recalculated.

Focusing on the text of the New Jersey Municipal Land Use Law, N.J.S.A. 40:55-1 *et seq.* ("MLUL"), and the principles of fairness in imposing responsibility for off-tract obligations, the Court ruled in favor of the developer. The Court explained that requiring developers to pay anything more than a pro-rata share would be contrary the Municipal Land Use Law's "nexus" requirement, which requires a "causal nexus between the conditions imposed [on the developer] and the needs created by the development" to justify an exaction. The Court held that where the nature and scope of a project had changed, the developer could not be required to perform cer-

tain terms of the executed agreement which were not longer related to the amended project, pointing out that a developer's agreement is not an "independent contractual source of obligation," but rather it "exist[s] solely as a tool for the implementation of the resolution establishing the conditions."

While not germane to its analysis of the facts of the dispute before it, the Court further stated that allowing voluntary payments by developers for off-tract improvements would amount to a "pay-to-play" system "where developers are rewarded for their philanthropic gifts." The impact on future relations between public entities and developers of this statement by the Court cannot be known at this time, and will likely be discussed by the

government and developer community for some time to come.

In the meantime, what is clear by the *Toll Brothers* decision is that: (1) the terms of a developer's agreement that require anything more than a pro-rata share of off-site improvements are unenforceable; and (2) a change in the nature and scope of a project coupled with an amended land use approval to reflect this change requires modification of the terms of an already executed developer's agreement, entitling the developer to recalculation of its pro-rata share.

In essence, when analyzing the enforceability of a developer's agreement, a basic principle of contract law

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COAH Adopts New Third Round Regulations

By Nilufer O. DeScherer

Following a 60-day comment period which included five public hearings held throughout the State, the New Jersey Council on Affordable Housing ("COAH") voted to adopt a revised set of third round rules, with minor clarifications, on May 6, 2008. These adopted rules are scheduled to be published in the New Jersey Register on the date they become effective, June 2, 2008. The adopted rules can also be reviewed on COAH's website at www.state.nj.us/dca/coah/june08/rules.shtml#adoption.

On May 6, 2008, COAH also proposed amendments to the newly adopted third round rules. A summary of these proposed amendments can be reviewed on the COAH website as well. Notable proposed changes include (1) updated household and employment growth projections based on new DEP rules, municipal zoning data and actual growth through 2006 for

each municipality; (2) revised vacant land analysis, which incorporates recently released DEP and Highlands special data; (3) addition of a one-for-one bonus for each affordable housing unit approved for municipalities that approved affordable housing projects between December 20, 2004 and June 2, 2008; (4) allowance for municipalities to subtract demolitions of non-residential buildings from the calculation of new growth in the municipality; and (5) reduction of the number of jobs generated by warehouse construction from 1.5 to 1 job per 1,000 square feet.

The deadline for submitting to COAH written public comments on these proposed amendments is August 15, 2008. If you would like more information on the impact of the proposed amendments on municipalities and the development community in New Jersey, please contact Nilufer O. DeScherer.

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of students to conduct a mock trial for the Hon. Morris Pashman American Inns of Court, Bergen County Chapter. The Inns of Court is a program modeled after the British system wherein experienced trial attorneys, designated as “masters” and “barristers”, help to train newly admitted attorneys in the skills of trial advocacy. Our firm has played an active role in the program, since its establishment several years ago. In addition to Mr. Lubin, **Thomas J. Herten** also serves as a master and **Daniel Y. Gielchinsky** serves as a barrister in the program. Tom also serves on the executive committee of the Inn as its treasurer. The student trial, which was conducted on May 21, 2008, presents a wrongful death case including a survivorship claim.

- **Gianfranco A. Pietrafesa** edited the business litigation edition of New Jersey Lawyer Magazine, published by the *New Jersey State Bar Association*. Franco also served as the moderator of the annual Business Law Symposium, sponsored by the New Jersey Institute for Continuing Legal Education and the New Jersey State Bar Association Business Law Section, where he serves as a member of its board of directors. Finally, Franco won re-election to the Hawthorne Board of Education and was elected as the Board’s vice president.

- This summer, we will have six summer associates at the firm. They are:

David Altieri, from New York Law School; **Roozbeh Ashtyani**, from Brooklyn Law School; **Allyson Kasetta** and **Kristen Miller**, from Rutgers University; **Michael Levenson**, from Albany Law School, and **Carly Skarbnik** from Seton Hall University.

- We are pleased to announce that **Scott D. Jacobson, Esq., Michael I. Lubin, Esq., Nilufer O. DeScherer, Esq.** and **Daniel Y. Gielchinsky, Esq.** have become Members of the Firm. Scott D. Jacobson, who joined the firm in 2003 as Counsel to the Firm, continues his practice in chancery, complex commercial and employment litigation. Michael I. Lubin, who joined the firm in 2006 as Counsel to the Firm, continues his practice in chancery, civil and commercial litigation and land use matters. Nilufer O. DeScherer, who joined the firm in 2003 as an Associate, continues her practice in commercial real estate, banking, municipal and land use matters. Daniel Y. Gielchinsky, who joined the firm in 2005 as an Associate, continues his practice in chancery, bankruptcy and commercial litigation, as well as land use matters.

We are also pleased to announce that **Louis C. Tomasella, Esq.** and **Cynthia Brooks, Esq.** have become Counsel to the Firm. Louis C. Tomasella continues his practice in estate planning and administration and transactional matters. Cynthia Brooks continues her practice in commercial real estate and banking law.

Finally, we are pleased to announce that retired Superior Court Judge, the **Honorable Gerald C. Escala, J.S.C.** has become Special Counsel to the Firm. Retired Judge Escala has been instrumental in developing the Firm’s growing services in alternate dispute resolution such as mediation, arbitration and complex litigation management.

Please join us all in congratulating our attorneys for their achievements and future successes at the Firm.

- **Jason T. Shafron** was successful in obtaining a trial verdict in Superior Court, Law Division, in favor of a developer for whom the firm had ob-

tained variances to build a 7-story multi-unit condominium complex in Ridgefield, New Jersey. As reported in *The Record*, in a 27 page written opinion issued on April 29, 2008, the Court upheld the granting of the variances by the Zoning Board.

- **Andrew T. Fede**, as the Borough attorney for Norwood, obtained a Superior Court, Chancery Division judgment vesting Norwood with title to an historic abandoned burial ground, pursuant to a little-known statute. This judgment allows Norwood and its historical society and committee to restore and maintain the property, which, as reported in *The Record*, was once part of a farm that was owned by one of the early Dutch families that settled the area. Mr. Fede obtained a Superior Court, Law Division decision voiding a joint planning/zoning board resolution denying our firm’s client a variance. The court reversed the board because it failed to consider a 1995 variance that was granted in favor of a prior owner of the property. He was also successful in obtaining a Superior Court, Appellate Division decision reversing a trial judge’s decision affirming another zoning board resolution because the board and the trial judge decided in error that our firm’s client could not include two tax lots on one site plan.

- **Thomas J. Herten** and **Andrew T. Fede** obtained an arbitration decision voiding a mayor and council’s resolution terminating our client’s tax abatement agreement. The arbitrator found that our client did not breach the agreement, and that the municipality failed to treat the taxpayer fairly when it attempted to void the agreement. He reinstated the agreement and the agreement’s tax benefits, saving the taxpayer many hundreds of thousands of dollars in taxes.

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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.

Lawyer's Approval for Acceptance of Offer

When the owners of a party store received an offer to purchase not the entire property, but only their liquor license and fixtures, they accepted the offer, but on the condition that their attorney approve the deal. Before the attorney's review of the first offer, the owners received a better offer from another potential buyer, this time for

The disappointed party that had made the first offer sued the owners to enforce what it regarded as a completed contract for the sale of the license and fixtures.

the entire property, including the license, the fixtures, the real property, and the business itself.

The second offer was for about five times as much money as the first offer. The owners also accepted this offer, but again conditioned acceptance on approval by their attorney. The owners' attorney then reviewed both offers at the same time and, not surprisingly, approved the second, more favorable one.

The disappointed party that had made the first offer sued the owners to enforce what it regarded as a completed contract for the sale of the license and fixtures. It contended that the sellers had waived the requirement of attorney approval by their bad faith in simultaneously submitting to the attorney two competing purchase agreements, both of which conditioned ac-

ceptance on approval by the attorney. The disappointed party further argued that, by procuring the second offer and prospective agreement, the sellers had wrongly hindered the fulfillment of the only condition remaining to be fulfilled on the first agreement—attorney approval.

A court disagreed that there was any bad faith and upheld the contract formed when the second offer was accepted and approved by the sellers' attorney. While the plaintiff had been the first to make an offer of any kind, nothing in its potential contract prohibited the sellers from considering other offers. Nor were the sellers obliged to take the property off the market pending review of the first offer by legal counsel. Consideration and eventual full acceptance of the second offer was not legally impermissible where the first offer had been only conditionally accepted.

There was no limit on what aspects of the first agreement were subject to the attorney's approval. He was free to disapprove it, as he did, simply because there had been a better competing offer made by a competing prospective buyer. Moreover, the sellers had not interfered with their attorney's actions, such as by instructing him to disapprove the first offer. In short, the sellers had not acted in bad faith. They were guilty of nothing more than shrewd business moves during what the court described as a period of "dickering" that preceded the formation of an enforceable contract.

For more information on this case or any other commercial litigation issue, please contact Scott D. Jacobson or Jason T. Shafron.

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which presumes that two parties have knowingly and freely negotiated the terms of a contract, and are therefore bound by its terms, is trumped when such terms are inconsistent with the MLUL and the body of case law interpreting the MLUL. This is a central message of the Supreme Court in *Toll Brothers*.

For more information on this case or other land use issues, contact Nilufer DeScherer.

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- Our **Real Estate and Banking Departments** are in the process of closing or have closed this year a number of out-of-state acquisitions and sales for our commercial real estate clients, aggregating over \$20,000,000, some of which were part of Section 1031 tax-free exchanges.
- The firm was pleased that **Thomas J. Herten, Steven B. Harz, Arnold D. Litt, Terry Paul Bottinelli** and **Michael I. Lubin** were designated as 2008 Super Lawyers. Tom Herten, Steven Harz and Arnold Litt were also designated New Jersey Top Attorneys for 2008.
- As co-chair of its capital campaign, **Jason T. Shafron** announced that Reed Academy has now raised over \$3,000,000 for the building of their new school in Oakland, New Jersey.
- In other non-profit activities, **Arnold D. Litt** continues to serve as a Board member of Friendship House in Hackensack.