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Legislative Update – Recently Enacted Law, S-82: The Governor and Legislature Have Dramatically Changed Land Use Law in New Jersey

On May 5, 2010, Governor Christie signed into law S-82. This law, which goes into effect on May 5, 2011 and is already being described as the “Time of Application” rule, requires a municipal land use board to rely on the municipal land use regulations in effect *at the time the application was filed* rather than allowing the board to rely on the applicable land use regulations in effect *at the time of the board’s decision*. Currently, in accordance with the Supreme Court’s “time of decision” rule in *Manalapan Realty v. Township Committee*, a municipality can attempt to change its land use regulations during the pendency of an application to prohibit or thwart the subject development. For example, a municipality may rezone a property during the pendency of the application so that the proposed development is no longer a permitted use. In such a case, the land use ordinances in effect at the time of the decision control.

This new law gives municipalities a year to revise and update their land use regulations. Beginning May 5, 2011, developers will be protected from changes in development regulations after an application has been filed. S-82 is being heralded by the development community as providing substantial cost savings and greater predictability and efficiency to the development process in New Jersey. Critics of the new law, which include municipal leaders and environmental advocates, worry that the concerns of local residents and other special interests will be compromised as a result of this new law. S-82A/A-437 was opposed by a broad coalition of organizations including the League of Municipalities, the Sierra Club, the Environmental Federation, the Conservation Foundation, the New Jersey Planning Officials and the Association of New Jersey Environmental Commissions.

S-82/A-437, which has not yet been assigned a chapter law, and which amends New Jersey’s Municipal Land Use Law (MLUL), states in full: “1. Notwithstanding any provision of law to the contrary, those development regulations which are in effect on the date of submission of an application for development shall govern the review of that application for development and any decision made with regard to that application for development. Any provisions of an ordinance, except those relating to health and public safety, that are adopted subsequent to the date of submission of an application for development, shall not be applicable to that application for development. 2. This act shall take effect one year next following enactment.”

The Governor and the Legislature have dramatically changed land use law in New Jersey. In doing so, they have given the development community, environmental advocates, municipalities and the citizens of New Jersey much “food for thought” in the coming year. ▲

For information on land use law, please contact Nilufer O. DeScherer at ndescherer@hertenburstein.com

The New Credit Card Act Rules Mean More Information and Rights for Consumers

By LisaAnne R. Bicocchi

On February 22, 2010, the second stage of the Federal Reserve’s Credit Card Accountability Responsibility and Disclosure Act of 2009 (the “Credit Card Act”), which was enacted in May 2009, was implemented. Consumers have received some key rights from their credit card issuers as a result of these new rules. The following is a highlight of just

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some of the changes that you may have noticed and the rights that consumers can expect to receive.

Billing Statement and Payment Term Changes

Credit card issuers must deliver their statements at least 21 days before any payment is due, and the payment must now be due on the same date each month. The periodic credit card statement must clearly state, in plain language, the due date and any late payment penalties. It must also disclose the period of time it will take a consumer to pay off the outstanding balance if the consumer pays only the minimum amount due, as well as how much the consumer needs to pay each month to pay off the balance owed in three years. When a consumer pays more than the minimum payment due, the credit card issuer must apply the excess payment to the balance with the highest interest rate. "Two cycle billing" is now prohibited, which means that credit card issuers can only impose interest on charges made in the current billing cycle and may not look to the balance in an earlier cycle to calculate the present interest due.

Interest Rate and Other Significant Credit Changes

Credit card issuers cannot raise interest rates in the first twelve months or on existing balances unless: (1) the consumer has agreed to a variable rate agreement; (2) an introductory rate period, which must be no less than six months, comes to an end; (3) a minimum payment is not received within 60 days after the due date; or (4) the consumer fails to make a payment due under a workout agreement. After the first twelve months, a credit card issuer can raise interest rates but only on new charges, and then only after 45-days advance notice of the rate increase. The interest rate on any old balance, however, must remain fixed unless one of the four exceptions applies. The credit card issuer must also provide 45-days advance notice of any significant changes it makes to the terms of the credit card, including changes to annual fees, cash advance fees or late fees. In addition, the credit card issuer must give the consumer the option to cancel the card before the fee increases or changes take effect. However, under certain circumstances, the credit card issuer will be permitted to close the account and increase the minimum monthly payment due when the consumer exercises the option to cancel.

No More Automatic Overdraft or Over the Limit Protection

Customers must now inform their credit card issuer that they want the credit card issuer to permit charges or debits that will put the consumer over a card's credit limit, and the consumer must be permitted to revoke the opt-in to overdraft or over the limit protection at any time. If the consumer has not opted in to overdraft or over the limit protection and makes a charge in excess of his or her available line of credit, the charge must be declined. And if the consumer has not opted in and a charge in excess of the limit is permitted to go through, the credit card issuer is not permitted to charge the consumer a fee. Where the consumer has opted in to overdraft or over the limit protection, the credit card issuer can impose only one over the limit fee per billing cycle.

Limits on Credit to People Under the Age of 21

People under the age of 21 now have to prove that they have the financial resources to pay their credit card or have a co-signer in order to open an account. Where a co-signer has agreed to the issuance of a credit card to a person under the age of 21, the co-signer must agree in writing to any increase to the credit limit.

Limits to Application Fees and Annual Fees

Credit card companies cannot charge more than 25% of the initial credit limit for an application fee or annual fee.

The remaining provisions of the Credit Card Act are scheduled to go into effect on August 22, 2010. These include provisions for restoring interest rates to original levels where the consumer makes timely payments for six months. ▲

For more information on the Credit Card Act or New Jersey's Gift Card Act, please contact LisaAnne Bicocchi at 201-342-6000, ext. 211, or lbicocchi@hertenburstein.com.

News from Herten Burstein

Based on the firm's expertise in defending national and international firms against class action claims, Founding Member **Thomas Herten** was recently retained by Golfsmith, a national retailer of sporting equipment. Tom, Member **Thomas McGuire** and Senior Associate **Lisa Bicocchi** continue to defend class action claims filed against Fuddruckers, a national restaurant retailer, and against Pfizer, Inc. Tom's group continues to represent Pfizer and Merck in the defense of pharmaceutical mass tort claims, as well.

Through the collaborative efforts of Managing Member **Steven Harz**, Member **Thomas McGuire** and Founding Member **Thomas Herten**, the firm has been retained by Evonik DeGussa Corporation, a leading specialty chemicals manufacturer. Through the efforts of Member **Gianfranco Pietrafesa** and Associate **Anthony Hope**, the firm also welcomes Atlantic Stewardship Bank as a client.

The Superior Court, Appellate Division reversed a trial judge's decision in a land use/zoning case argued to the court by Member **Andrew Fede** and presented to the planning board by Member **Richard Jon Contant**. The appeals court sustained our position, and that of the planning board, which granted our client permission to build a hotel. The court held that our client was not required to obtain use variances to permit it to use a small portion of adjacent property for a driveway for access to the proposed hotel property. The property next to the hotel contains a nonconforming use. The appellate court found that the proposed driveway was not an impermissible expansion of the nonconforming use, and that it did not create a second principal use that required a variance.

During the last quarter, the Corporate Department represented the sellers of a food manufacturing and distribution enterprise in a \$110 million transaction, selling to a publicly traded company. Among other deals, the Corporate Department also represented purchasers in the acquisition of the assets of a nationally recognized bakeware company. During the same period, the Real Estate Department, under the leadership of Member **Arnold Litt**, participated in the acquisition, sales or financing of multiple parcels of commercial real estate throughout the United States, both on behalf of current clients and new clients, Canadian investors. These transactions exceeded \$100 million in the aggregate.

The Superior Court Appellate Division in *Gregory v. Acker Drilling, et. al.* recently affirmed the grant of summary judgment which had been won by Senior Associate **Lisa Bicocchi** and Member **Jason Shafron** on behalf of a manufacturer of a hydraulic drilling machine which, it was claimed, caused catastrophic injuries to the operator of the machinery.

The Federal District Court upheld a decision of the New Jersey Bankruptcy Court that had been appealed. The case involves a finding of fraud by a former attorney who had embezzled her client's trust fund monies. In a case tried by member **Michael Lubin** in Superior Court, a number of findings had been made concerning the attorney's fraud. After the Superior Court entered judgment against the former attorney, she filed for bankruptcy protection. Member **Daniel Gielchinsky** obtained a decision from the Bankruptcy Court determining that the attorney's fraud was a non-dischargeable debt, and therefore excepted from bankruptcy protection. The former attorney appealed to the District Court, and the decision was affirmed.

Member **Gianfranco Pietrafesa** coordinated and moderated the annual Business Law Symposium, co-sponsored by the Business Law Section of the New Jersey State Bar Association. The Symposium was attended by more than 165 business lawyers.

Founding Member **Thomas Herten** conducted a seminar for the Justice Morris Pashman Inn of Court on Appellate Practice, along with Appellate Judge Joseph Yannotti. The seminar was attended by sitting judges and attorneys.

Herten Burstein has created a new Executive Committee whose function is to consider and advance both long-term policy recommendations and major financial solutions affecting the growth and well-being of the firm. The Executive Committee is comprised of members **Andrew Cevasco**, **Patrick Papalia** and **Steven Harz**. Mr. Harz has been named the firm's new Managing Member, succeeding Mr. Cevasco, who was the firm's Managing Member for the past 15 years. Founding Member **Thomas Herten** serves on the Executive Committee ex officio.

Gianfranco Pietrafesa has become Chairman of the firm's Corporate Department.

Member **Daniel Gielchinsky** led a program for the Bergen County Bar Association, "Representing Creditors and Other Parties in Interest in Bankruptcy." The program featured the Honorable Rosemary Gambardella, USBJ.

Member **Albert Burstein** received a certificate from the Bergen County Bar Association at its annual dinner, acknowledging the 60th anniversary of his admission to the bar.

Six Herten Burstein lawyers have been selected by their peers as New Jersey Super Lawyers 2010: **Thomas Herten**, **Terry Paul Bottinelli**, **Arnold Litt**, **Steven Harz**,

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RENTERS BEWARE:

Brokers Found to Have No Duty to Warn Tenants of Safety Hazards

By Arnold D. Litt

In *Reyes v Egner*, A-90-08, the New Jersey Supreme Court affirmed the dismissal of a tenant's suit alleging the renting broker had a duty to warn the tenant of and repair unsafe conditions at the property; specifically, a deck railing that caused the tenant's slip, fall and injury. The property in question was a beach house, which was rented by the tenant on a short term basis after being shown the property by the broker. Of interest is the fact that with Justice Helen Hoens recusing herself, the remaining Justices split 3 to 3 on the question of whether to extend the holding of *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426 (1993), which first recognized a broker's duty of care to an open-house visitor, requiring warning of safety hazards. The 3 to 3 deadlock resulted in an affirmation of the decision below, dismissing the suit; thus, New Jersey distinguishes between the short term renter of property and an open-house visitor – or does it?

Those justices holding that the case did not warrant an extension of the *Hopkins* holding focused on the facts of the case; namely, that the tenant who occupied the property for nine days before the injury occurred, had sufficient time and opportunity to inspect and discern the physical defects, if any, at the property, unlike the open-house visitor in *Hopkins*, who had no opportunity to scope out any dangerous conditions existing at the property.

The three dissenting justices concluded that the holding set up an arbitrary class distinction respecting victims who were injured in an open-house situation relative to injured short-term tenants.

Given the Court's split decision, it is clear that there is no broad mandate regarding broker liability in a situation of this sort. Query: would the Court have held otherwise if the short-term renter was injured at the time he first went to look at the property or, say, after one day of possession, or after three days of possession? In short, we do not believe that brokers can take comfort that *Reyes* shelters them from liability in short term rental situations, and we believe that different facts may result in a different holding adverse to brokers. Accordingly, brokers should be cautious and should scope out potential safety hazards in properties to be rented to short term tenants.

For more information, please feel free to contact Arnold D. Litt, Esq., Chairperson Real Estate Department, at 201-342-6000 ext 220, or Alitt@hertenburstein.com. ▲

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Gianfranco Pietrafesa and **Michael Lubin**. Messrs. Herten, Bottinelli, Litt, Harz and Lubin have all been selected every year since the inception of Super Lawyers in 2005. Additionally, for the second year in a row, **Daniel Gielchinsky** has been named a Super Lawyer Rising Star.

Member **Andrew Cevasco** has been reelected as a Trustee of the Bergen Bar Association and also continues to serve on the New Jersey Supreme Court Committee on Character.

Associate **Lisa Bicocchi** was elected to serve a three-year term on the Borough of Ridgefield's Board of Education. Lisa continues to serve as a member of the Recreation Commission and the Ridgefield Elementary School PTA.

As a trustee of Friendship House, member **Arnold Litt** supported the recent Wellness Walk for Mental Health and

Autism. Friendship House is a non-profit organization that provides job training and support for adults suffering from mental illness and autism. It has served the mental health community for over 45 years, providing in-depth vocational and support programs with a staff of psychologists, social workers and job trainers to help provide a meaningful life to its clients.

Member **Jason Shafron** participated in "Go the Distance for Autism," a bikeathon to benefit three local schools for children with autism. Jason's team, "Noah's Troop," raised \$4,000 for Reed Academy. The event raised \$275,000 for all three schools, with almost \$100,000 going to Reed. On June 14, Reed will have a ground-breaking ceremony for its new state-of-the-art facility in Oakland. Herten Burstein has been a consistent supporter of Reed Academy.