Sidebar

THE NEWSLETTER OF COURTER, KOBERT & COHEN
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GEORGE F. SWEENY, ESQ.

The Firm of Courter, Kobert & Cohen, P.C. is pleased to announce that George F. Sweeny has become of counsel to the firm. Mr. Sweeny joins the firm after a long and established private practice at the Law Offices of George F. Sweeny, P.C. located in Sparta, New Jersey. Mr. Sweeny concentrates his practice in the areas of estate planning and administration, elder law, wills, corporate and commercial law, real estate, zoning and planning.

As head of the firm's Wills, Trusts and Estates Department, Mr. Sweeny specializes in estate planning matters dealing with the management of personal affairs and the disposition of property in anticipation of one's incapacity or death. Such planning requires a careful evaluation of testamentary devices such as wills, taxes, insurance, personal and real property, and trusts so as to gain maximum benefit of all laws while faithfully carrying out a person's wishes.

Mr. Sweeny is an expert in preparing and reviewing all types of estate documents including wills, living wills, guardianships, revocable and irrevocable trusts, charitable and special needs trusts, philanthropic bequests, powers of attorney and advanced medical directives.

In addition, Mr. Sweeny is experienced in probate and estate administration and elder law. These services include all aspects of the probate process as well as non-probate transfers of a deceased's assets. Mr. Sweeny's probate practice overlaps with a rapidly developing area of law known as elder law. This type of law deals not only with estate planning but also other issues that face the elderly, such as home care, long term care insurance and social security or disability benefits.

Mr. Sweeny continues practicing business and commercial law, real estate, civil litigation and appellate practice. He represents clients in every level of the New Jersey Court system as well as the United States District Court for the District of New Jersey.

Mr. Sweeny has actively practiced law in northern New Jersey for the past thirty years. He is a graduate of Rensselaer Polytechnic Institute and Fordham University School of Law where he earned his Juris Doctor and graduated in the top ten percent of his class. Mr. Sweeny is also a 1971 graduate of the Columbia University Graduate School of Business, where he earned his Masters of Business Administration and was President of the student body and recipient of the Roswell McCrea Prize. Mr. Sweeny is admitted to the Bars of the State of New Jersey and State of New York.

EMPLOYMENT LAW ALERT

By Howard A. Vex

The So-Called "Employee Free Choice Act"

The battle over the so-called "Employee Free Choice Act" has been one of the nastiest fights of President Obama's still young first term. The bill has two main elements. First, it would give workers the option of forming unions by simply getting a majority of workers to sign cards to join, without having to hold a secret ballot election. Current law leaves it up to employers to decide whether their workers must hold a secret ballot election or can organize via a card check. In addition, the Act will mandate that--if the employer and new union cannot reach a contract within 120 days--a government arbitrator will intervene.

Supporters of organized labor claim the first provision is critical because employers can intimidate workers in the run-up to elections, making elections something other than a true democratic vote. They assert that the second provision is also vital, because employers sometimes go years without agreeing to a contract, often breaking the back of the new union. Employer groups counter that the first provision would unfairly expose workers to abusive union intimidation, with no opportunity for a secret ballot, and that the second provision would allow yet more government interference in how they run their business.

Both sides of the debate raise excellent points and it is abundantly clear that, if adopted, the Employee Free Choice Act will have a significant and lasting impact upon the American workplace.

Right to Post-Employment Health Coverage Dramatically Expanded

The American Recovery and Reinvestment Act of 2009 (ARRA), the financial stimulus law signed by President Obama on Feb. 17, 2009, included significant changes to the COBRA post-employment health coverage rules. In general, the ARRA:

- Provides for a 65 percent federal government subsidy of COBRA continuation coverage premiums for a maximum of 9 months following a covered employee's involuntary termination of employment.

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COAH's Scarce Resource Restraint

By Robert B. McBriar, Esq.

On November 12, 2008, the Council on Affordable Housing ("COAH") adopted a resolution imposing a scarce resource restraint ("Restraint") on all municipalities in the Highlands Region under COAH's jurisdiction. This restraint has become a formidable legal barrier to residential and non-residential development within Highlands municipalities. The restraint essentially imposes a de facto building moratorium on new development until the municipality receives substantive certification or demonstrates that appropriate measures have been taken to preserve scarce resources, thus ensuring same remains available to support the municipality's fair share obligation.

The scarce resource restraint applies broadly to "any and all municipal actions associated with development approvals, water allocation and wastewater allocation." However, there are a number of exemptions. For example, the restraint does not apply to construction of single-family or duplex units on existing lots; any residential development that includes at least 20% set-aside on-site for affordable housing; improvements to single or two-family homes in existence as of November 12, 2008; or any activity that is formally determined to be exempt from the Highlands Act or is formally granted a waiver under the Highlands Act or the Regional Master Plan.

Recently, COAH narrowed the scope of the Restraint. On March 12, 2009, COAH adopted a resolution lifting the Restraint on those Highlands municipalities that submitted third round housing elements and fair share plans subject to the following conditions: (1) COAH has formally deemed the petition complete; and (2) the petition does not request any adjustments. Although this resolution will free a number of municipalities from the Restraint, it nonetheless will continue to affect municipalities that have not submitted a revised Housing Element and Fair Share Plan.

Highlands municipalities affected by the Restraint may continue reviewing development applications for completeness and ascertain whether they meet local requirements for approval. However, pursuant to *N.J.S.A.* 40:55D-22, municipal approvals remain subject to directives and orders issued by State agencies (i.e. the Restraint). Accordingly, removal of the restraint is a condition precedent for final development approval and requires an exemption or grant of waiver from the Council.

Any person seeking a waiver from a specific requirement of the Council's rules may do so as part of a municipal petition, by motion in conformance with *N.J.A.C.* 5:96-13, or in such other form as the Council may determine. The Council may grant waivers from specific provisions of its rules pursuant to *N.J.A.C.* 5:96-15.2 if it can be demonstrated that strict application of the rule would create an "unnecessary financial, environmental or other hardship." A waiver may also be granted if it fosters the production of affordable housing; remains consistent with the intent of the Council's rules; and the municipality's Housing Element and Fair Share Plan provide a mix of housing options. Highlands municipalities and applicants affected by the Restraint must further demonstrate that appropriate measures have been taken to preserve scarce resources and ensure that land, water, and sewer resources are available to meet the municipality's Fair Share Obligation.

Employment Law Alert
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- Requires employers to pay the 65 percent portion upfront, and then allows them to deduct those costs from their Social Security and Medicare taxes.
- Retroactively allows workers who became jobless as early as September 1, 2008, and rejected COBRA coverage to reconsider and receive COBRA benefits.

The new COBRA provisions established by the ARRA require employers and plan administrators to take prompt action including, but not limited to, the following:

- Identifying all potential employees who were covered by the group health plan whose employment was involuntarily terminated (other than for gross misconduct) beginning September 1, 2008 (and their covered spouses and dependents) - and their last known addresses.
- Identifying which of these individuals are currently receiving COBRA coverage and which are entitled to the special enrollment period.
- Developing and providing the notices required by the ARRA.

All employers and plan administrators who have not yet addressed these changes should begin coordinating their responses immediately.

The Americans with Disabilities Act on Steroids

The Americans with Disabilities Act Amendments Act of 2008 (the "Act") took effect on January 1, 2009. The Act emphasizes that the definition of disability should be construed "in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis."

The Act significantly expands the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of EEOC's ADA regulations. The effect of these changes has been to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA. These changes and the new EEOC regulations will significantly alter the ADA landscape. How far the EEOC and courts will ultimately go in interpreting the expansion of coverage remains to be seen. Unfortunately, as with many new statutes and regulations, clear and easy to follow guidance from the government remains elusive.

NJ Supreme Court Holds that Non-Bidder Has Standing to Challenge Public Bidding Specifications

By Amanda L. Mulvaney, Esq.

On March 4, 2009, the New Jersey Supreme Court overturned the unanimous Appellate Division decision in *Jen Electric, Inc. v. County of Essex*, holding non-bidders who can demonstrate that they have a "clear, identifiable, substantial, and real interest in the outcome of [the] challenge" have standing to challenge bid specifications. This decision clearly presents some difficult challenges for municipalities and other governmental entities that are subject to the Local Public Contracts Law.

The Defendant County had publicly advertised for bids for a street renovation project that included a traffic control system and a car video detection system. Jen Electric was a distributor that sold traffic control systems and openly objected to the county's specifications on the basis that the bid did not allow bidders to propose the use of its equipment and software even though it was equivalent to the specified brand name products. Representatives for Jen Electric communicated with the County a number of times arguing that the county's specifications violated both federal and state law, but the County ultimately refused to change its bid requirements and Jen Electric commenced its lawsuit.

The unique aspect of this case is that Jen Electric was not a bidder on the project, admitted it never intended to submit a bid, nor was it a taxpayer. Accordingly, the County asserted that Jen Electric lacked standing to bring suit and both the Trial Court and Appellate Division agreed. The Appellate Division noted that public bidding statutes are for the benefit of taxpayers and the public good, and not for the benefit of the bidders. It also noted that courts do not allow challenges to bidding specifications after the bids have been opened and that bidding statutes barred prospective bidders from challenging bid specifications three days or less prior to the opening of the bids. Jen Electric conceded that it was not a bidder, but argued that it should be considered a prospective bidder under a broad interpretation of bidding statutes.

The Supreme Court reversed, finding that nothing in the Local Public Contracts Law limits the standing of those who wish to challenge the pre-bid specifications in a public contract and, therefore, traditional notions of standing applied. It went on to find that Jen Electric had "demonstrated a substantial likelihood of harm" and, thus, sufficient financial interest to establish standing. The Supreme Court did emphasize that this holding was limited to challenges of pre-award bid specifications and did not permit a prospective bidder to challenge the award of a contract to a successful bidder. However, the Court did not explain why traditional notions of standing gave entities like Jen Electric standing in pre-bid challenges but not in post-bid challenges; nor did it explain its departure from analogous federal law.

Although the Supreme Court noted its holding was very limited and resulted from Jen Electric's active participation in the bidding process, it remains to be seen whether other distributors or suppliers may use this holding to challenge bid specifications which have identified products using a brand name or equivalent. Thus, while the Local Public Contracts Law permits specifications that identify products using a brand name or equivalent, owners who identify brand names of equipment or products in bid specifications should take caution to make sure the specifications themselves clearly state that an equivalent will be considered.

Proposed Revisions to Construction Lien Law

By Amanda L. Mulvaney, Esq.

On December 8, 2008 the New Jersey Law Revision Committee issued a tentative report outlining proposed changes to Title 2A:44A-1 through 38, known as the Construction Lien Law, in order to advise interested persons of the Commission's tentative recommendations and allowing them the opportunity to submit comments. The law became effective in 1994 and was enacted for the purpose of (1) enabling private project contractors, subcontractors and suppliers to secure payment for their labor and materials by a lien filing process; and (2) to protect property owners from exposure to double payment for work or materials for which they have already paid.

The law outlines the procedures for filing and perfecting the lien claim, establishing the amount of the lien claim, and then enforcing the lien. Since its enactment, the law has been the subject of much litigation concerning the meaning and application of key concepts—such as the lien fund and the lien claim—especially where the contractor has ceased working on the project, gone out of business, or filed for bankruptcy prior to contract completion.

While court holdings have further clarified and enhanced the statute, the Commission determined that revision to the law was both necessary and overdue. The proposed revisions focus on several areas including providing definitions of the terms "residential construction" which is used interchangeably with the terms "residential housing construction" and "home construction", "lien claim", "lien fund", and "contract". Other areas include clarification of the lien fund formula and modifying provisions that conflict with construction industry practice and are not workable or desirable.

The comment period ended March 1, 2009, so it still remains to be seen which modifications will be adopted or when such changes will take effect. Accordingly, please look for a more detailed discussion of the final modifications in subsequent newsletters.

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People in the News

Joel A. Kobert, the firm's senior managing partner, was recently named by the 2009 "New Jersey Super Lawyers" magazine as one of the top land use and zoning attorneys in the State of New Jersey. For more information go to *www.superlawyers.com*.

Lawrence P. Cohen, managing partner of the firm's litigation department, was recently named by the "Super Lawyers - Corporate Counsel Edition" magazine as one of the top business litigators in the United States and was also named by the 2009 "New Jersey Super Lawyers" magazine as one of the top business litigators in the State of New Jersey. For more information go to *www.superlawyers.com*.

Michael S. Selvaggi is now hosting a radio talk show entitled "What's Next?" on WRNJ 1510 am which commenced on March 26th at 11:00 a.m. and will air bi-weekly. The show addresses the myriad of issues confronting people in this region of New Jersey because of the nation's poor economy.

Kevin M. Hahn was recently named by the Board of Directors of Legal Services of Northwest Jersey as the Chairman of the By-Laws Committee. Mr. Hahn also serves on the Executive Committee and the Personnel and Grievance Committee for that organization and has served on its Board of Directors for the past five (5) years.

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