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FINEMAN & BACH, P.C.

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LEGALNOTES

INFORMATION FOR OUR BUSINESS AND CORPORATE CLIENTS

IN THIS ISSUE

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Things to Consider When You Have Local Zoning Matters

Property and business owners planning expansion and/or conversion of buildings and change of uses should follow the practice of seasoned real estate developers in assembling a development team in advance of seeking zoning relief from local officials.

Bringing together the right mix of architects, contractors and legal counsel at an early concept or design stage may help property owners anticipate not only the physical planning hurdles, but also the real politics of getting a plan through the municipal approval process. One obstacle may be expected and unexpected community opposition. While addressing the needs of the business or tenant, it is important not to overlook the measures that should be taken to blunt, defuse, deflect and, perhaps, convert the reaction of neighbors and civic groups to a proposed change in zoning.

• **Meet with the zoning officer.** As part of a competent team of professionals, the architect will, no doubt, have obtained copies of applicable zoning ordinances and building codes. The architect (and the owner, if he chooses) should meet with the zoning officer or code compliance officials to determine just what are the zoning problems that will be raised by particular design and how to deal with those issues from a design perspective. While it doesn't make sense to ask for more zoning relief than is needed, it is critical to ask for all the relief that is necessary in order to complete the project. There is a lesson in the story of the hard fought-for variance to operate a retail store in a residential building where the owner subsequently discovered that he was required to sprinkler the entire building at prohibitive costs.

• **Contact local officials.** Reaching out to local officials is a cost-efficient method of determining what the municipal and community reaction might be to a given project. While not always reliable, this can be a barometer of any potential and/or historical animosity toward a project, business or owner. A developer may be surprised and even offended about what he learns, but can capitalize on this information to garner political and municipal support at early stages. Also, a design can be altered before the offending portions become widely known.

• **Meet with the neighbors.** When the project is sufficiently along and certainly prior to an application for municipal body approval, an effort should be made to meet with the neighbors, community groups and civic leaders. Establish a meeting place, serve refreshments, if possible, and

(a) listen to questions, suggestions and complaints with a view to sensing community apprehensions;

(b) do not over react to criticism - a sincere "we will consider that" may be sufficient;

(c) find out whether the people with whom you meet are representative of all groups in the community or are "one song" interests that have little wide-spread influence among others

(continued on page 3)

WE'VE GOT THE POWER!
New Rules for Power of Attorney

Power of Attorney is a document by which certain authority to act is granted by a Principal to his or her designated Attorney in Fact. It is relied upon by third parties as written evidence of a person's authority to do certain things on behalf of the named Principal when that Principal is absent, unavailable or unable to act for himself or herself. Many of us have signed such a Power of Attorney or been named in such a document as an Attorney in Fact. Sometimes such documents are signed but not delivered or presented for use until a later date, so it is possible you may be unaware that you have already been named by someone as an Attorney in Fact. There are different types of Power of Attorney, such as General, Limited, Medical, Financial, etc. A durable Power of Attorney is one that remains effective even after the disability or incompetency of the Principal. Of course, a Power of Attorney becomes void upon the death of the Principal.

The Power of Attorney law in Pennsylvania was changed late last year. Certain changes were broad and sweeping in their effect, while other changes related to more technical details. The new law has changed the required terminology from "Attorney in Fact" to "Agent." Also, there is now a statutorily mandated Notice to Principal and Acknowledgment by Agent that must be printed in a specified format in a new Power of Attorney. (Interestingly, the actual name of the new law and the new document has not been changed from "Power of Attorney" to "Power of Agent".)

Most of the changes became effective December 12, 1999, and the remaining changes take effect April 12, 2000. Although this new law technically applies only to a Power of Attorney signed on or after those effective dates, it is possible that third parties relying on a Power of Attorney will now require or at least prefer a new document that fully complies with the present law. Since Power of Attorney documents are often signed well in advance of their actual delivery and use, getting new documents prepared and signed quickly just when they are needed may prove quite difficult, especially if circumstances have changed or the Principal is away or ill. Indeed, if the Principal is disabled or incompetent at the time a third party insists on a new form, and then legally unable to sign a new document, the very purpose of the Power of Attorney may be impractical or impossible to achieve without a potential legal battle. Obviously, the risk of such uncertainty dictates that everyone who has previously signed a Power of Attorney should now sign a new document complying with the present law.

The Fineman & Bach Corporate and Estate Department is now fully prepared to perform this professional service for our clients. Please call us to prepare your new Power of Attorney, as well as review your other estate planning documents.

For further information, contact
GARY KRIMSTOCK Email
at 215-893-8722

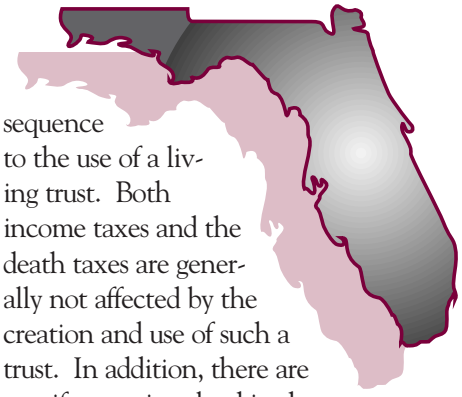
Living Trusts — A Must for Florida Residents

Warm weather and easy living have drawn lots of people to Florida. Many of those people are retirement age and they find a much softer attitude in Florida towards taxation, with no personal income tax and with virtually no state inheritance tax.

Unfortunately, the families of those who establish residency in the state of Florida and who die there are faced with an impossible probate process. Out-of-state relatives appointed as executors have discovered delay in appointments, surety bond requirements, and restrictions on the ability to use the cash in the estate to pay creditors or beneficiaries during the five month period after they have been appointed. The executors need to apply for frequent court approval of normal estate management transactions, and legal fees mount quickly.

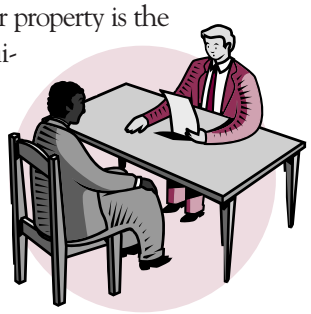
The solution for Florida residents is the use of living trusts. The trusts are easy to prepare and easy to use. Typically the client also serves as trustee and maintains complete control of the property transferred in trust. If all property otherwise held in the client's name is properly transferred into the name of the trust, Florida probate delays and expense will be avoided. All of this requires a significant effort and great attention to detail to transfer bank accounts, brokerage accounts, real estate, automobiles, and all other personal property to the trust.

Keep in mind that there is no tax consequence to the use of a living trust. Both income taxes and the death taxes are generally not affected by the creation and use of such a trust. In addition, there are no gift taxes involved in the transfer of assets to the trust.



For further information, contact
MICHAEL KREKSTEIN Email,
a member of the PA and
Florida Bars, at 215-893-8740

Representations and Warranties in An Acquisition Agreement



The acquisition agreement in the sale of a business or property is the cornerstone document. Each provision of the acquisition agreement incorporates separate, but interrelated provisions which define the terms and structure of the transaction. In an acquisition agreement the "Representations and Warranties" section is typically vital to the buyer. In most cases, more time is spent negotiating and revising the Representations and Warranties Section than any other section in the agreement.

The Representations and Warranties Section has several objectives. It enables the buyer to maximize disclosure by the seller of information about the business or asset being acquired before the buyer commits to the purchase. Of almost equal importance is that it provides the buyer with a factual position for the buyer's ability to decline to proceed with the transaction; or a framework for the indemnities after the closing of the transaction. Some may also argue the most important aspect is protecting the buyer against a deceitful or forgetful seller regarding items which are not easily uncovered by a buyer's due diligence examination.

SELLER — The seller's representations and warranties are much more extensive than the buyer's. Typically, the representations and warranties found in a stock acquisition agreement are much more extensive than those found in an asset acquisition agreement. Often the representations and warranties of the seller are impacted by the presence or absence of certain information. For instance, the type of financial statements that the seller has prepared may affect the financial representations and warranties. Additionally, the level of knowledge of the buyer about the asset or business being acquired is another variable which affects the content and degree of representations and warranties required. This is particularly true where the buyer is an employee or part owner of the business being acquired.

The seller's representations and warranties are often very detailed, in order to avoid a claim of misrepresentation. Generally, the seller prepares various schedules which contain information in sufficient detail so that the buyer can analyze the underlying documents. Among other things, the representations and warranties disclose what consents, approvals, filings, etc. may be required of the seller to complete the transaction. The buyer thereby gains knowledge concerning the timing of the transaction as well as the hurdles to overcome for closing.

BUYER — The buyer's representations and warranties are typically much more limited than a seller's. Such representations and warranties will primarily focus on the due organization of the buyer, and the validity and binding effect of the agreement on the buyer. The seller may also seek some comfort concerning the financial capabilities of the buyer to complete the transaction. The seller may be concerned about the buyer's source of funding, or what commitments from lenders the buyer has obtained. If the consideration for the asset being sold is something other than cash (i.e. a promissory note or stock of the buyer), the seller may want representations and warranties concerning the financial condition of the buyer.

Although every transaction has its own significant issues requiring negotiation, in dealing with representations and warranties, the key negotiating issues typically deal with the concepts of "materiality", and "knowledge".

In the final analysis, the negotiation of the representations and warranties reflects, to some degree, the level of risk allocation among the parties. Careful thought and detail should be provided in preparing and negotiating these provisions.

For further information call SCOTT MUSTIN Email, at (215) 893-8741

(continued from page 1)

Zoning Matters

- it is wasteful to settle with a raccoon when there is a bear waiting over the hill;

(d) do not promise anything that you are not ready, willing and able to do only to discover, on reflection, that it cannot be accomplished - going back on a promise does not play well before a zoning board.

• **Compile a list.** Prepare a list of reasonable design changes and concessions (i.e., reconfiguring parking areas, alternative green buffer or changes in signage) that allows preservation of the essential project but also allows substantial opposition to walk away with a sense that they exchanged their support for some real accomplishment.

• **Get an agreement.** If an agreement can be reached with neighbors and/or civic groups, put it in writing, something short of a contract. Something in writing demonstrates to a municipal board that the property owner made good faith efforts to meet with objectors and that those good faith efforts resulted in a negotiated agreement. With a writing, an owner can rely upon certain terms and avoid being sandbagged by later claims of other representations and terms. Ideally, this writing can be offered to the municipal board to be made conditional to any grant of relief, since there is no reason to agree with neighbors to do anything if municipal authority does not grant approvals.

There is an art to drawing lines in the sand. NEVER give up too much. No effort is worth all the fuss if the result is unworkable.

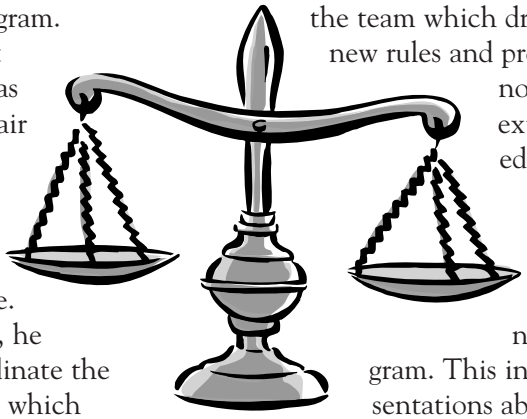
As expected, we attorneys believe that, being made part of the development team at an early stage, we can be instrumental in guiding a project through the land mines of community opposition and the maze of municipal approvals. Our goal is always to help in assuring that "Not In My Back Yard" does not make our client's project the next "Locally Unpopular Land Use".

For further information on land use and zoning matters, call JOSEPH GRACE Email at 215-893-8720

New Philadelphia Common Pleas Court Program Will Improve Commercial Dispute Resolution, Lower Costs

The Philadelphia Court of Common Pleas has just initiated a Commerce Case Management Program which applies to cases filed after January 1, 2000. Virtually all of our clients' local business litigation for which there is no federal jurisdiction will be part of this new Commerce Program. We believe this program will improve the system for resolution of commercial disputes.

Senior partner Mitchell L. Bach played a key role in the organization and planning for this new Commerce Program. During the past two years, he has served as co-chair of the Philadelphia Bar Association's Business Litigation Committee. In this capacity, he helped to coordinate the lobbying efforts which resulted in the establishment of the Commerce Program, and he led the team which drafted the Court's new rules and procedures. He is now coordinating extensive efforts to educate the Philadelphia business and legal communities about all aspects of the new Commerce Program. This includes formal presentations about the program to business groups and to in-house counsel at area corporations, as well as continuing legal education programs to attorneys under the auspices of the Pennsylvania Bar Institute.



There are many benefits of this new program. For the first time, commercial cases will be assigned to the individual calendar of an experienced judge. We expect this innovation to result in more predictable results, faster disposition time and significant savings in litigation costs for our clients and the entire Philadelphia business community. It is also a significant benefit that the rules and procedures which were drafted under Mr. Bach's direction have provided for mediation and other forms of sophisticated and specialized alternative dispute resolution.

Mitchell Bach has worked closely during the past several months with Judge Herron and Judge Sheppard who are assigned to the Commerce Program, and we are confident that they are committed to operating the program expeditiously and efficiently.

For further information about this revolutionary Commerce Case Management Program, contact MITCHELL BACH Email at 215-893-8708

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