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ANNOUNCEMENTS

WE ARE PLEASED TO ANNOUNCE THAT
KEVIN B. GRAHAM
BECAME A PARTNER IN THE FIRM EFFECTIVE JANUARY 1, 2009

THE TAXMAN COMETH

The opening song on the Beatles' Revolver starts like this: "Let me tell you how it will be: there's one for you, nineteen for me. 'Cause I'm the taxman'." It's as if George Harrison owned property in upstate New York.

In a perfect world, and according to New York law, all property within a taxing jurisdiction is supposed to be assessed at the same percentage of full value. In other words, if a municipality assesses at 100% of full value, a \$100,000 house should be assessed at \$100,000, and a \$1 million strip mall should be assessed at \$1 million. But this is not a perfect world. When it comes to tax assessments, it is often very far from perfect. As this year's tax Grievance Day approaches (May 26, 2009), here are a few things to think about.

Generally speaking, in order to determine whether or not you should grieve your assessment, you need three pieces of information: (1) your current assessment; (2) the current equalization rate for the town or city in which you are located; and (3) an accurate estimate of the value of your property. Indicators of value can include a recent sales price, an appraisal, or an income-stream analysis. To check the validity of your assessment, simply multiply your full value by the equalization rate. If your

assessment is higher, you should consider filing a tax assessment grievance. Ultimately, the question will be whether or not your property has been properly valued by your Assessor. If not, your taxes will be reduced and/or you will receive a refund of tax overpayments.

If your property is located in the Town of Vestal, which is currently undertaking its first revaluation since 1965, you should pay particularly close attention to anything you receive from the Assessor. By now, the Town should have sent out preliminary assessment determinations, together with information on informal assessment review hearings. If that process fails, a formal complaint can be filed with the Board of Assessment Review on or before Grievance Day. If the BAR does not afford relief, the final step is to file either a tax certiora proceeding or, in the case of residential property, a Small Claims Assessment Review (SCAR) case. Bear in mind, however, that the procedures attendant to tax assessment review are often complex and time sensitive, so vigilance is generally a prerequisite to success.

In 1965, when the Beatles recorded "Taxman", they were in England's ninety-five percent (95%) income tax bracket, prompting

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this sarcastic lyric: "Should five percent appear too small, be thankful I don't take it all." So, as bad as your property taxes are, they could be worse. But, hey, that doesn't mean that you shouldn't take every opportunity to "make it better."

Article written by Paul T. Sheppard, Esq. Mr. Sheppard is the head of HHE&K's Real Property Tax Assessment and Condemnation Practice Group and a Beatles fanatic. He may be reached via email at sheppard@bhk.com.

TAX CREDIT FOR FIRST TIME HOME BUYERS

The new economic stimulus package, also known as the American Recovery and Reinvestment Act of 2009, provides an opportunity for first time homebuyers to receive a tax credit of ten percent (10%) of the purchase price of a home, with a maximum credit of \$8,000. Individuals or married couples who are considered first time homebuyers, and who purchase a principal residence between January 1, 2009 and December 1, 2009, are entitled to this credit.

A "first time homebuyer" is defined as a person who did not have an ownership interest in a principle residence within the past three years. A "principal residence" includes

single-family homes, newly constructed homes, townhouses, condominiums, manufactured homes, and houseboats.

Individuals with incomes of up to \$75,000 and married couples with joint incomes of up to \$150,000 qualify for the full credit, and partial credits are available to homebuyers who exceed these income limitations. The credit is refundable, meaning taxpayers whose credit exceeds their tax liability will receive a payment for the difference between the amount of their credit and the amount of taxes owed. Taxpayers

will be required to return the credit if they do not own the principal residence for three years, subject to limited exceptions.

The credit can be claimed on either the taxpayer's 2008 or 2009 tax return by using Form 5405 (<http://www.irs.gov/pub/irs-pdf/f5405.pdf>). If the taxpayer has already filed his or her 2008 tax return, it can be amended to include the credit.

Article written by Megan E. Curinga, Esq. Ms. Curinga may be reached at (607) 231-6929 or via email at mcuringa@hbh.com

NEW POSTING REQUIREMENTS FOR EMPLOYERS

New York employers are already well aware of the state's prohibition on considering or asking questions about prior arrests of an applicant or employee, and the state's law prohibiting blanket discrimination in hiring based on criminal conviction. Effective February 1, 2009, the Labor Law has been amended to require employers to give additional notice to job applicants and employees about these prohibitions.

Employers in New York are now required to post the entire text of Labor Law §23-A in the same place they normally post information for employees, such as a break room, job board, or payroll office. Employers who conduct background checks are also required to provide a copy of the law to the employee at the time a background check is requested. Additionally, should the background check return a criminal conviction, employers must provide a paper or electronic copy of the law again. Employers who fail to abide by the law may be subject to a private action brought either in state court or, more likely, the Division of Human Rights. The Division's new Commissioner has indicated that he will seek to increase the Division's enforcement actions related to criminal conviction discrimination. Consequently, employers should seek to minimize liability by complying with the posting and notice requirements and ensuring that their hiring practices do not involve a blanket refusal to hire on the basis of criminal conviction.

Employers will be pleased to know that the new law provides a rebuttable presumption

to employers in civil cases in favor of excluding evidence of prior conviction of an employee where the employer made a good faith effort to evaluate the employee in light of the factors contained in Labor Law §23-A.

Under Labor Law §23-A, an employer must consider the factors enumerated in the statute prior to disqualifying a person from employment on the basis of conviction. Those factors include 1) the specific duties and responsibilities of the job; 2) the bearing the criminal offense will have on fitness or ability to perform the duties of the job; 3) the time which has elapsed since the conviction; 4) the age of the person at the time of conviction; 5) the seriousness of the offense; 6) any information produced by the person regarding rehabilitation and good conduct; and 7) the legitimate interest of the employer protecting property and the safety and welfare of specific individuals or the general public. The law also creates a presumption of



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rehabilitation where the person convicted presents a certificate of relief from disabilities.

Article written by Dawn J. Lanouette, Esq. Employers seeking more information about the Labor Law §23-A or the posting and notice requirements are advised to contact Ms. Lanouette at (607) 231-6917 or via email at dlanouette@hbh.com.

OIL AND GAS LEASING IN THE SOUTHERN TIER

Last Summer, one of the biggest local news stories was the XTO gas lease deal signed at the Regency Hotel in Binghamton. XTO signed lease agreements with property owners in the Deposit area, leasing in excess of 40,000 acres and spending over \$90 million. Last year, other property owners were solicited by other gas companies or by land agents and some property owners signed oil and gas leases. Many gas leases or memoranda of leases have been recorded in County Clerk's Offices throughout our area.

Although there have only been a few recent producing gas wells in the Southern Tier, the recent technological advances in horizontal drilling, coupled with the construction of the Millennium Pipe Line and (last year) the relatively high price of natural gas, all combined to create the real possibility of gas companies drilling gas wells in our area which could translate into significant royalty payments to landowners. Last year, Cabot Oil & Gas Company drilled several wells in the Dimmock, Pennsylvania area (Susquehanna County) and newspaper reports indicate that the results of the Cabot wells were very impressive and that Cabot and property owners could expect lucrative returns.

The bonus prices being offered by gas companies to lease gas and oil rights increased, from \$100 an acre in the beginning of 2008, to as much as \$3,000 an acre in the Summer of 2008.

Many property owners banded together and formed "coalitions" to educate landowners and to present a united front for negotiation purposes with gas companies. Public informational meetings were held by coalitions, by the Chenango County Farm Bureau, by the New York State Attorney General's Office and by other organizations or companies.

Then, in late Summer and early Fall of 2008, several events occurred which dramatically changed gas leasing not only here, but elsewhere.

Initially, Governor Paterson, in signing a new statute amending the New York State Environmental Conservation Law (which, ironically, was

pro-industry and facilitated permit issuance for horizontal gas wells), asked the Department of Environmental Conservation (which is responsible for issuing drilling permits) to cease issuing any new permits for horizontal drilling into the Marcellus Shale unless a complete environmental impact statement was completed for the particular permit, or until the DEC revised its generic gas drilling environmental impact statement. Subsequent to the Governor's "executive moratorium," several gas companies submitted horizontal well applications to the DEC, but these applications have been put on hold, and it appears that the DEC is continuing to follow the "executive moratorium".

Another significant factor was the financial institution crisis and the stock market problems that started in September and October of last year. Like many industries, the gas industry has been significantly affected by the economic downturn.

The last factor affecting oil and gas leasing is the market price of natural gas. The price of natural gas has fallen significantly from its level a year ago and has remained relatively depressed. Naturally, the amount of profit that a gas company can make is dependent upon the market price of natural gas and, with the depressed market price, gas companies are not as anxious to spend a lot of money on new leases.

The dramatic downturn in gas leasing activity that started in September and October has continued, relatively unchanged. It is currently anticipated that the DEC will complete the new generic environmental impact statement either this Spring or Summer and that the "executive moratorium" will then be lifted. However, there are no guarantees as to exactly what the State of New York will do with respect to future Marcellus well permits and it is unclear as to exactly when the State will take action. Because many gas companies desire to drill horizontally into the Marcellus Shale, most of these

companies are taking a wait and see attitude and are not going to spend significant resources in New York State until such time as the permitting process is clarified. Obviously, the state of the economy will also have a significant effect on the future of gas leasing. That is, if the economy continues to be poor, even if the moratorium is lifted, there may not be a dramatic increase (or any increase) in gas lease activity, because the gas companies still will not be able to afford to spend significant resources. The price of natural gas, the moratorium, and the economy will together determine the extent to which gas leasing activity will increase in the Southern Tier.

Remember, an oil and gas lease is a significant matter relating to your property title and, because there are many complicated issues relating to an oil and gas lease, it is highly recommended that a landowner seek competent legal advice before signing a lease. Attorneys experienced in the oil and gas leasing area, and in related areas such as estate planning, which can become relevant if your gas lease results in valuable royalty payments, are indispensable to effective representation.

*Article written by Robert H. Wedlake, Esq.
Mr. Wedlake may be reached at
(607) 231-6855 or via email at
rwwedlake@hbh.com.*



Photographed by Marvin E. Newman

ADVERSE POSSESSION: THIS LAND IS YOUR LAND, THIS LAND IS MY LAND

Adverse possession is one of the most misunderstood principles of land ownership. When the law addresses “squatters’ rights”, as adverse possession is sometimes called, it traditionally disfavors claims of ownership to a property without legal documentation of ownership. Additionally, a new law passed last summer has made the acquisition of property through adverse possession even more difficult.

Under New York law, adverse possession allows a person to claim ownership of another’s land without a contract or compensation. There are six elements to any claim of title by adverse possession: (1) a person must actually use and/or improve the land; (2) the adverse possessor must inhabit the land to the exclusion of all others; (3) the possession must be hostile, meaning it is done without the permission of the land’s true owner; (4) the possession must be under a claim of right, meaning that the possessor must actually believe he or she already has title to the property; (5) the possession must be open and notorious, meaning that the land’s true owner has or should have knowledge that someone else is inhabiting his land; and (6) the possession must take place continuously for at least ten years.

Adverse possession of large areas of property is no easy feat, and is almost always

an uphill legal battle. A landowner usually notices if a person is using or improving acres of property without his permission, especially over a decade, and brings a suit for ejection or trespass. Historically, however, adverse possession has been used to settle boundary disputes between neighbors. For example, one neighbor could inadvertently set up his shed on a yard he believed to be his own, and maintain the area around the shed for decades. Upon retiring and selling his home, he might discover that the lawn upon which the shed sits is not his own, and bring an action to quiet title by claiming that he now owns the land by adverse possession. Alternatively, a neighbor could mow, plant and maintain a strip of field adjacent to her home for twelve years, only to discover a “For Sale” sign placed upon it one day. She could then bring an action to obtain title by adverse possession.

However, the traditional notions of adverse possession changed on July 8, 2008, when Governor David Paterson signed Senate Bill 7915-C into law. New York’s new Real Property Law Section 543 states, in pertinent part, that at a boundary line, an adverse

possessor’s placement of fences, hedges, shrubbery and even sheds on the property is now considered permissive and non-hostile, and thus will not establish a claim for ownership by adverse possession. Additionally, lawn mowing and similar maintenance is also deemed permissive, even if it is done without the landowner’s knowledge.

Under the new law, in order for a claim of adverse possession to be successful, the possessor must make “substantial improvements” to the land. The New York State Bar Association opposed this law as hastily drawn and overly vague. What exactly makes an improvement “substantial”? If a shed is permissive, is a greenhouse hostile? Surely, lawsuits will test the breadth of this law in the near future.

For our clients, in light of this change in the law, we stress the importance of being sure of your boundary lines now. If you believe a dispute may arise, please contact us with any questions or concerns.

Article written for publication by Jacqueline A. Bain, Esq. Ms. Bain may be reached via email at jbain@bbk.com.

IMMEDIATE ACTION NECESSARY UNDER THE NEW COBRA REQUIREMENTS FOR GROUP HEALTH

The American Recovery and Reinvestment Act of 2009, commonly referred to as “The Economic Stimulus Act”, was signed by President Obama on February 17, 2009. Among other things, the law creates new rights under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) that allow terminated employees and their families to continue their health coverage under the employer’s group health plan at a sixty-five percent (65%) discount of the cost of premiums. In essence, the terminated employee is responsible for thirty-five percent of the premium and the remaining sixty-five percent of the premium is subsidized by the IRS through dollar-for-dollar reduction of the employer’s payroll tax liability. Generally, this means the subsidy is initially paid by the employer, who then applies to the federal government for reimbursement. Employers who are entitled

to reimbursement are allowed to take a credit on Form 941 (Employer’s Quarterly Tax Return), which has recently been revised to take these changes to COBRA into account.

Individuals terminated between September 1, 2008 through December 31, 2009, are generally eligible for this COBRA subsidy for a period of nine (9) months. In addition, certain former employees (and their qualified beneficiaries), who did not elect COBRA coverage at the time of their termination, may be eligible for an extended sixty (60) day election period to receive COBRA coverage.

Under the old COBRA rules, employers were required to provide terminated employees and their qualified beneficiaries with a timely

COBRA notice explaining their rights to continued participation in the employer’s group health plan, how they could elect coverage, the duration of the coverage, the cost of the coverage, and the specifics about the timing of the payment. This notice must now be amended to include the new rules regarding the availability of the premium reduction subsidy.

The new rules pertaining to COBRA coverage are complex, not just with respect to satisfying the notice and reporting requirements to terminated employees and other qualified beneficiaries, but also with respect to the administrative, payroll and other changes that must be addressed quickly in order to ensure timely compliance with the Act. For

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COBRA (CONTINUED)

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most employers whose group health plans have elections effective the first of the month, new forms and revised notices to previously and newly terminated employees had to be in place by March 1, 2009. Recognizing the difficulty employers face in implementing the sixty-five percent subsidy in time for March or April COBRA billings, the new law permits employers to charge the full premium amount to terminated employees (or their qualified beneficiaries) for two (2) billing periods following February 17, 2009. However the employer must then either reimburse the terminated employees (or their qualified beneficiaries) for the amount equal to the premium subsidy that

they overpaid or credit the amount toward future COBRA premium payments.

We would be very happy to provide you with more detailed information specific to your Company's group health plan. We can also assist you in implementing this critical federal mandate in the most efficient and manageable way possible.

Article written by Thomas A. Conlon, Esq. Please contact Mr. Conlon in the Binghamton office (607-231-6744 or taconlon@hbk.com) or Miriam Schindel, Esq. in the White Plains office (914-694-4102 extension 226 or mschindel@hbk.com).

SOCIAL SECURITY NUMBER CONFIDENTIALITY

New York recently enacted a Social Security Number Protection Law (SSNPL) regulating how businesses must protect social security numbers, or any identifying number derived therefrom. The law applies to the use and communication of social security numbers in a broad range of business activities, including mail and internet correspondence, as well as the storage of such information. Businesses should assess their current procedures and policies, because they may be required to take affirmative steps to ensure compliance with the regulation. Failure to comply with the new SSNPL may result in stiff penalties and/or prosecution by the New York State Attorney General.

The new law regulates six realms of communication to minimize the interception of the Social Security number (SSN) by unauthorized persons:

1. Communications to the public
2. Access cards used for services
3. Transmissions over the internet
4. Internet access and authorization
5. Mail correspondence
6. Communications to governmental bodies

The protections of the SSNPL cannot be waived by any person. Failure to comply may result in fines of \$1,000 for a single violation and up to \$100,000 for multiple violations. Repeat offenders can face fines of \$5,000 for single and up to \$250,000 for multiple violations. These penalties can be imposed even though there was no actual hardship suffered by the individual whose SSN was exposed or compromised.

To comply with the SSNPL, we suggest that you review your current business practices to determine the use of SSNs. Suggested compliance strategies would include the following steps:

1. Audit current business practices to determine how SSNs are gathered, stored and used.
2. Determine whether the use of SSNs is necessary and, if so, implement procedures and controls to comply with the SSNPL.
3. Take steps to employ current security technology with respect to SSNs.

Businesses are encouraged to initiate compliance strategies quickly to ensure that the systems are in place prior to enforcement.

Article written by Ryan M. Mead, Esq. Mr. Mead may be reached at (607) 231-6929 or via email at rmead@hbk.com.



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FOR MORE INFORMATION

Hinman, Howard & Kattell, LLP
700 Security Mutual Building
80 Exchange Street
P.O. Box 5250
Binghamton, New York 13902-5250

Phone: (607) 723-5341
Fax: (607) 723-6605
www.hhk.com

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