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SEPTEMBER 2011

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FLOOD DAMAGE: ASSISTANCE AND OPTIONS

Tropical Storm Lee and the unprecedented flooding which followed left a devastating mark on the Southern Tier. While we know that this has been an emotionally trying time for many, we are cautiously optimistic that those affected will be able to recover. We also know that you may need help. In addition to the dozens of pro bono consultations the firm has done for Southern Tier families and small businesses, we also offer this guide to help our clients identify the main forms of aid available to those affected by the flood.

Aid Available to Individuals

1. FEMA Aid

The first stop for any individual or family suffering a hardship caused by the flood is to apply for aid from the Federal Emergency Management Agency. FEMA provides direct aid to individuals who live in an area declared a disaster by the President (currently Broome, Chemung, Chenango, Delaware, Otsego, Tioga, and Schenectady counties).

This aid comes in two forms. Housing needs aid consists of money to repair or replace a home damaged by the flood. FEMA will send an inspector to your home to assess the damage, and then a determination of eligibility will be made. FEMA then will transfer money slated for repairs or to permit the owner to find a new place to live.

FEMA also provides aid for “needs other than housing”. This aid is for serious needs that are necessary to allow a person to live. It can include things like personal belongings, clothing, home furnishings and, in some cases, a vehicle. FEMA aid for such items will only be available if a person is not eligible for any other sources of aid, including loan programs.

There are some limitations that apply to all forms of FEMA aid. FEMA does not provide enough money to completely repair

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FLOOD DAMAGE: ASSISTANCE AND OPTIONS

(Continued from page 1)

the home; only enough to make it safe to live in. There is a maximum of \$30,200 on all combined FEMA aid. All FEMA aid must be used in accordance with specific limitations given in the grant letter, or it must be repaid. FEMA aid is not available to businesses or owners of rental property. If losses are covered by insurance, FEMA aid is not available.

2. SBA Loans

Individuals are also eligible for Small Business Administration Home and Personal Property Loans. These are loans for up to \$200,000 for a home and up to \$40,000 for personal property. Most borrowers are eligible to borrow at 2.5%, payable up to 30 years. Unlike FEMA aid, these loans are intended to allow a property owner to restore their home to its pre-disaster state, but they are only available for an owner's primary home. The SBA will also look at every application to determine whether refinancing an existing mortgage is desirable.

All FEMA aid applicants are also given an SBA loan application. It is important to complete this application. Among other things, unless the SBA denies a loan application, no "other than housing needs" aid from FEMA is available. If this is the case, the SBA will refer the applicant back to FEMA. Otherwise, the only FEMA aid the applicant will be considered for is housing needs aid.

Aid Available to Businesses- SBA Loans

Unlike the aid available to individuals, the aid for businesses is largely in the form of loans. The SBA provides loans to all businesses that have suffered a physical disaster, and provides loans for economic disaster for small businesses. These loans can be for up to \$2 million, with loan terms of up to 30 years, and interest rates can be as low as 4%. The SBA automatically considers refinancing existing loans when it reviews the application.

SBA loans to cover physical disaster can be used for broad purposes. They are intended to allow the business to replace or repair real property, machinery, equipment, fixtures, or inventory. SBA loans for economic disaster are not as widely available and have a more limited scope. They are available only to businesses that have suffered a substantial economic injury as a result of a disaster, and they provide the business the funds to pay its necessary operating expenses and obligations as they come due.

Flood Insurance

The National Flood Insurance Program affords businesses and homeowners a reasonably-priced way to protect themselves from losses to buildings, property or contents caused by a flood. Policies are sold by local insurance agencies, but the federal government's participation means the terms and pricing of these policies are largely standardized. Private flood insurance also exists, but is much less common. As such, the discussion which follows pertains only to NFIP flood insurance.

Some businesses and homeowners are required to purchase flood insurance as a condition of their mortgage or a condition of past FEMA aid, but nearly all are eligible to electively purchase it. All communities in the seven counties declared a disaster (except the Village of Roseboom and the Village of Milford) participate in the National Flood Insurance Program, making businesses and homeowners eligible to purchase flood insurance. As recent events have shown, you do not need to be in a previously affected or high-risk flood area to suffer flood damage. Nearly 20% of all flood losses annually come from areas that are medium or low flood risk areas.

Flood insurance does have limitations. Flood insurance does not take effect for 30 days after the purchase. There are also limitations on what is covered in basements or areas below grade under both the building



Photographer: Peter Morgan

property coverage and contents coverage policies. Flood insurance never protects anything outside a building, currency, precious metals, or most vehicles. Flood insurance also does not protect against groundwater seepage. There is a maximum coverage amount for building property and for contents that differs based on whether the coverage is for a dwelling or a business property.

Finally, under certain circumstances, your homeowners or casualty insurance policy may afford coverage for some losses. That unfortunately, is the exception rather than the rule.

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FLOOD TAX ISSUES

Businesses and individuals affected by federally declared disasters may be eligible for certain tax relief. The main form of tax relief for both state and federal taxpayers is postponement of payment or filing of certain taxes and returns. For most state and federal payments and returns, deadlines that fall on or after September 7 and before October 31 have been extended to October 31. Extensions of school tax payments may also be available on a per-municipality basis.

Federal taxpayers may also be eligible to claim casualty losses on an accelerated basis by amending a previous year's return. Taxpayers can use IRS Form 4506 to retrieve a previous year's return, and use IRS Form 4684

to claim casualty losses, including for previous filing years. Talk to your tax preparer or HH&K attorney to make sure your payment or filing deadline has been extended or to see whether you qualify for an accelerated casualty loss filing.



Photo from Enhanced Buzz.com

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ASSESSMENT OF FLOOD DAMAGED PROPERTIES

In New York, real property is assessed by local assessors annually. Each year, each parcel is to be assessed based upon its condition as of the taxable status date (March 1), valued as of the preceding July 1. Events “occurring after the taxable status date, including the destruction of improvements, do not affect the assessed value of the property for that tax year.” *Spiegel v. Board of Assessors*, 161 A.D.2d 627 (2d Dept. 1990).

Procedurally, on or before May 1 of each year, the assessor is required to file a tentative assessment roll. If a property owner is dissatisfied with his tentative assessment, he has the right to file a grievance with the Board of Assessment Review (“BAR”) on or before Grievance Day. The grievance complaint must contain certain information, including the asserted “respect in which the assessment is excessive, unequal or unlawful, ... and the reduction in assessed valuation ... sought.” The grievance must also contain an “estimate of the value of the real property” at issue.

Following the hearing, and before the filing of the final assessment roll on or about July 1, the BAR issues its determinations on all grievances. The BAR must, for all grieved properties, “determine the final assessed valuation” for the property. If the property owner remains dissatisfied with the BAR’s determination, he has the right to seek judicial review of the assessment in an RPTL Article 7 proceeding.

In 2007, following the 2006 floods, the Legislature passed the Flood Assessment Relief Act of 2007, which provided a different, special procedure for certain property owners: those whose property was “catastrophically impacted” as a result of flooding during the summer of 2006. For all such property owners, the Act effected a number of specific changes to the “usual” procedure:

It permitted all such owners to seek a retroactive reduction in their 2006 assessments, whether or not they timely filed a grievance complaint on or before Grievance Day in May 2006;

It altered the “taxable status date” for such properties from March 1, 2006 to August 1, 2006 (thus altering the rule of cases such as *Spiegel*, supra); and

It altered the requirements for a grievance complaint by specifying, inter alia, that the complaint need not “suggest” the correct value (thus altering the general requirement for an estimate of value in all grievances).

The intent of the legislation was clear: in order to “provide tax relief to property owners who sustained significant damage from last summer’s floods,” the Act casts BARs “which normally serve as arbiters of assessment disputes—in the role of assessors for determining post-flooding reduced assessments.”

Although not a model of clarity, the Act required a two-step analysis by the BAR: (a) first, it was supposed to determine whether or not a property had been “catastrophically impacted”; and if so, (b) it was to determine the assessed value of the property as of August 1, 2006. The Act defined the term “catastrophically impacted” as follows: “A property there is cause to believe *the value of which* was diminished by 50 percent or more as a result of the” June 2006 flooding.

The Act seemed to require an analysis of a property’s pre-flood value and its post-flood value. The Act did not specify that this analysis be undertaken by comparing the existing assessed value (the Assessor’s March 1, 2006 value) with the value of the property as of August 1, 2006. Instead, this threshold question required the BAR to compare the value of the property immediately prior to and



Photographer: Elissa Jun

immediately following the flooding.

If the “value” of the property was “diminished” by 50 percent or more, the property qualified for relief under the Act. The BAR would then have to make a determination as to the assessed value of the property as of August 1, 2006. While the State recognized that it “may be difficult retroactively to assess the value of flood-damaged property to reflect the condition of those properties on August 1, 2006, particularly in the case of properties that have since been repaired,” that was nonetheless the responsibility of the BAR.

Finally, the Act provided for two options for submitting these issues to the BAR: (1) at the initiative of the Assessor; or (2) upon a complaint filed by a property owner.

We handled a number of these claims in May 2007. We submitted 2006 Flood Grievance Complaints along with our 2007 grievances and argued the issues to the BARs in Union, Conklin, Vestal and Kirkwood. As of today, only one of those complaints is unresolved, and none of the legal or procedural issues was ever litigated.

The Legislature is now considering new legislation providing similar relief for the victims of the 2011 floods. The proposed legislation contains many of the same provisions as the 2007 Act, although it does contain an odd May 1, 2012 deadline for filing complaints. In addition, the legislative memorandum accompanying the legislation suggests that the retroactive assessment reductions would only apply to County, City, Town and Village taxes, and then only to those municipal entities which “opt in” to the program. While the draft bill does not expressly carve out school taxes, the implication is that owners of flood-damaged properties would have to pay their school taxes—typically the largest component of the property tax obligation—in full.

Even if school taxes are not reduced for affected properties, there is proposed companion legislation which would allow for the payment of school taxes in installments.

We have submitted comments on the proposed legislation and are hoping that some changes are made. However, it seems clear that there will be an avenue for affected property owners to secure some measure of real property tax relief.

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CAUTIONARY UPDATE FOR INSURERS, BROKERS AND USERS OF
SURPLUS LINES INSURANCE

On March 31, 2011, Governor Cuomo's budget bill was passed by the state legislature. It contained several provisions intended to bring New York law into compliance with the new federal Nonadmitted and Reinsurance Reform Act, which was part of the Dodd-Frank Wall Street Reform and Consumer Protection Act passed July 21, 2010.

The NRRA, in short, breaks the historic federal silence on state insurance regulation and imposes five significant changes to the nonadmitted insurance marketplace:

(1) The newly defined "home state" of the insured now has exclusive authority to impose and collect premium taxes for nonadmitted insurance. The home state now also has sole authority to regulate the placement of nonadmitted insurance including requirements of excess lines broker licensing.

(2) States must now permit excess lines brokers to place nonadmitted insurance with a nonadmitted insurer domiciled outside the United States if the insurer is listed by the International Insurers Department of the National Association of Insurance Commissioners.

(3) The states are now permitted to enter into compacts or similar agreements to allocate premium taxes that are collected by the home state of the insured. It is important to note that states which do not enter into such an agreement are actually prohibited from imposing eligibility requirements for nonadmitted insurers.

(4) The NRRA creates a new category of insured called an "Exempt Commercial Purchaser." Excess lines brokers can now place nonadmitted insurance for an ECP without conducting the previously required due-diligence search for coverage from an admitted insurer, so long as the broker makes disclosure to the ECP that the insurance may or may not be available from an admitted insurer and the ECP requests in writing that it wants insurance from a nonadmitted insurer.

(5) The states will be required to participate in a national producer database by July 21, 2012. States not participating in the database will not be able to collect fees related to licensing excess lines brokers.

Three substantial issues are presented for excess lines brokers by this new legislation and by New York's new law implementing it. First, brokers will have to ascertain the "home state" of their insured. The NRRA defines "home state" as the place where the insured maintains its principal place of business, if it is a business, and as "principal residence" if the insured is an individual. The act does not define "principal place of business" or "principal residence." If there is no insured risk in the principal place of business, then the home state changes to the state that has the largest percentage of insured risk. This definitional gap will likely encourage imaginative brokers to facially allocate risk in order to take advantage of the tax laws of the state offering the most advantage to the transaction.

New York has, effective July 21, 2011, amended Insurance Law § 2101(x)(4) by adding definitions of "principal place of business," "principal residence," and "insured's home state." Note that other states may have defined these terms differently or may not have

defined them at all. Brokers must carefully analyze placement of excess and surplus risks to be sure they are not underpaying, overpaying, or failing to pay premium taxes that may be assessed by a state claiming the insured as amenable to its rules.

New York has adopted the principal place of business notional approach recently articulated by the Supreme Court in *Hertz Corp. v. Friend*. Section 2101(x)(4) directs the analysis to "where the insured maintains its headquarters" and "where the insured's high level officers direct, control, and coordinate the business activities." If the insured's high level officers act in more than one state, or if the insured's principal place of business is outside any state, then the "principal place of business" is the state to which the largest percentage of taxable premium for that coverage transaction is allocated.

Fifty-seven of the Fortune 500 companies are headquartered in New York, the largest share of that list of any state. It is worth noting that New York's proportion of total tax revenue derived from insurance premium taxation is among the smallest of the states with substantial premium tax revenue. Hence, as it controls a vast swath of excess and surplus (E&S) taxation revenue, yet relies very little on that revenue stream, it is no surprise that New York was so quick to adopt the "nerve center" approach of *Hertz Corp.* as its test for its entitlement to tax revenues. Not incidentally, in using the increasingly old-fashioned and vaguely-defined geographic term "headquarters," New York signals to brokers that it intends to aggressively characterize corporations as being "headquartered" there for purposes of insurance premium taxation. E&S brokers should thoroughly document their legal analysis in each placement involving contacts to New York.

In compliance with the NRRA, New York has also amended Insurance Law § 2102(a)(1) to eliminate the requirement that E&S brokers have a New York license when the home state of the insured is not New York. The State has announced plans to participate in a national producer database by July 21, 2012 in order to continue to collect licensing fees.

E&S brokers must also exercise heightened caution in placing coverage under the new Commercial Purchaser Exception. The NRRA exemption from the prior requirements that the brokers execute and document a diligent search in the admitted market before placing a risk in surplus lines, while an important step toward national uniformity, requires brokers to:

- (1) Ascertain that the insured is an Exempt Commercial Purchaser by confirming that the insured:
 - (a) employs or retains a Qualified Risk Manager;
 - (b) has paid at least \$100,000 in commercial P&C premiums in the preceding twelve months; and
 - (c) meets at least one of three criteria intended to financially qualify the insured as one that can tolerate the risk inherent in nonadmitted placement of coverage. These criteria include minimum net worth, minimum annual revenues, and minimum number of employees. Not-for-profits or public entities with an expense budget of at least \$30 million, and municipalities with a population of more than 50,000 also qualify.



Photographer: Steven Puetzer

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(2) The broker must disclose to the proposed insured that coverage may be available from the admitted market, which may provide greater protection with more regulatory oversight; and

(3) The exempt commercial purchaser must request, in writing, that the broker place the coverage with a surplus lines carrier.

The details of these requirements are spelled out in the statute

and must be followed exactly in order to access the exemption. In light of these new rules, the landscape for brokering, buying and selling E&S coverage has begun a substantial shift. As each state has engaged its participation in those rules differently, brokers, buyers, and sellers must use great caution in the marketplace.

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NEW YORK'S LONG JOURNEY TO YES: HYDROFRACTURING IN THE MARCELLUS SHALE

Many are wondering what the future holds in our region for oil and gas drilling. No one can state with certainty when or if New York will issue permits for horizontal drilling and high-volume hydraulic fracturing (also referred to as "fracking"), but the New York Department of Environmental Conservation ("DEC") has recently taken steps that may advance the time-frame for issuance of drilling permits. It should be noted that traditional vertical drilling permits are still available, but because almost all gas companies desire to drill horizontally into the Marcellus Shale, this article focuses on the potential for granting permits for horizontal drilling and high-volume hydraulic fracturing. The DEC is undertaking an exhaustive evaluation process as to whether or not drilling permits should be granted for wells using high-volume hydraulic fracturing and, if so, how this type of drilling will be regulated. Understanding this review process provides some guidance as to the earliest date that permits could be granted.

An "Environmental Impact Statement" ("EIS") is a document intended to evaluate and analyze the environmental, socioeconomic and other concerns involved with any project requiring governmental approval. The same State Environmental Quality Review Act ("SEQRA") that requires a Planning Board to review the environmental impacts of an application to approve a car wash also governs the DEC's environmental review of gas drilling permits. Rather than requiring an individual SEQRA review for each gas well, the DEC has issued a "generic" environmental impact statement that governs all similar drilling permit applications.

In 1992, the DEC issued the first Generic Environmental Impact Statement ("GEIS") to govern vertical drilling permits, and has been issuing permits for vertical drilling pursuant to the GEIS ever

since. In July of 2008, then-Governor Paterson determined that the GEIS did not adequately address the impacts of the newer processes involved in horizontal drilling and high-volume hydraulic fracturing, and the DEC has been working to supplement the original GEIS ever since. In 2009, the DEC issued a draft of the Supplemental GEIS ("SGEIS") and received over 13,000 comments in response. It has been reviewing the comments and revising the SGEIS since December 2009. The DEC released most of the 2011 Draft Revised SGEIS to the public in July. The complete 2011 Draft Revised SGEIS was released on September 7, 2011.

This revised SGEIS is subject to a public comment period that ends on December 12, 2011. After the public comment period the DEC will consider the comments received and whether or not further revision of the SGEIS is warranted. The DEC will ultimately issue a Final SGEIS when it concludes that no further revision is needed. Although some speculate that the final draft will be completed in the spring of 2012, it should be pointed out that the DEC spent over two years revising the initial SGEIS after receiving 13,000 comments to the first draft.

The DEC has made it clear that it considers its role to be to thoroughly review as much information from various sources as possible regarding any potential concerns with horizontal drilling and hydraulic fracturing. New York has the benefit of seeing what other states have done to regulate fracking, and reviewing other states' decisions in hindsight to see what works well and what does not.

The DEC will grant permits based on a combination of the findings in the SGEIS and regulations prepared and implemented by the DEC. The proposed regulations were just issued by the DEC for public review and comment. The public

comment period expires on December 12, 2011, the same date that the public comment period ends for the revised SGEIS. There has already been some criticism that the DEC should not have drafted the regulations until after the SGEIS has been completed and accepted.

Current and potential lawsuits may also impact the time frame for the issuance of horizontal drilling permits utilizing fracking. Some municipalities have issued ordinances or regulations that will effectively ban drilling in their area and lawsuits have already been commenced to challenge the authority of municipalities. Also, both gas companies and landowners may challenge the process by which the DEC grants or denies permits. These lawsuits could further delay the date when horizontal drilling may actually be permitted.

Taking all of this information into account, the earliest that permits may conceivably be issued is early 2012. The large number of interested parties on both sides of the issue, both for and against horizontal drilling and hydraulic fracturing, is a wild card that makes it impossible to accurately predict how long this process will take and what its conclusion will be. The only thing that is completely clear is that New York is embarking on a journey into uncharted areas of oil and gas law that will continue to evolve and have a major impact on the state's future.

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The “Land Bank Act” [LBA] was passed by the Legislature in June of this year and, as of this writing, awaits the Governor’s signature; it will be codified as NPC Art. 16. This law will have an impact on the health and economic vitality of local governments and on their attractiveness to investors and developers.

The LBA was designed to be a tool to be used by communities “to facilitate the return of vacant, abandoned, and tax-delinquent properties to productive use” and to help deal with the crisis caused by disinvestment in real property in many cities and their metro areas. It is a crisis because such disinvestment not only represents lost property tax revenue and added costs to local governments (e.g., for building demolition and to respond to safety hazards), but it devalues nearby properties and results in spreading deterioration. For example, studies in Philadelphia (by Temple University and the Wharton School) found that:

- a single vacant or abandoned property on a block decreases surrounding home values by an average of more than \$7,600.
- the more abandoned properties on a block, the greater the impact on surrounding property values.
- neighborhood blocks with higher concentrations of unmanaged vacant lots had home prices that were lower by about 18%
- cleaning and greening of vacant lots increase adjacent property values by as much as 30%.
- concentrations of vacant properties in particular blocks or neighborhoods can quickly reverse years of community development investments in affordable housing, community centers, and commercial corridor revitalization.
- calls for code enforcement, police and fire can easily double or triple in neighborhoods with large numbers of vacant properties.

Additional costs and losses are incurred when vacant or tax delinquent properties are sold at auction on a piecemeal basis for pennies on the dollar, often to out-of-town speculators who have no plans to rehabilitate or redevelopment them, but merely want to do the minimum necessary to “flip” them and pocket a quick profit.

The LBA seeks to counteract and reverse these negative consequences by providing for the creation and administration of “land banks” (LBs) for the restoration of vacant, abandoned, or tax-delinquent properties to productive use. Key elements of the LBA include:

- LBs, which are structured as Type C not-for-profit corporations, may be created by any “foreclosing governmental unit” (FGU) or “tax district” by passing an appropriate local law, ordinance or resolution;
- Two or more FGUs may jointly agree to create an LB;
- No more than 10 LBs may be located in the State at one time; FGUs must submit their LB-authorizing enactments to the Urban Development Corporation (i.e., ESDC—Empire State Development Corporation) for its review and approval;
- LBs will have “all powers necessary” to effectuate the purposes of the LBA, including: entering into contracts on behalf of municipalities or municipal agencies or departments; issuing negotiable revenue bonds and notes; procuring insurance (or guarantees) from the State or Federal Government and/or from private insurers; receiving grants and loans from public and private sources; and entering into collaborative relationships with public and private entities for the ownership, management, development and disposition of real property;
- The real property of an LB, and its income and operations, are exempt from all taxation by the State and any of its political subdivisions;

- LBs do not have, and may not exercise, the power of eminent domain;
- LBs would be authorized by the FGU to efficiently acquire, hold, manage and develop tax-foreclosed properties in accordance with the best long-term interests of the community;
- LBs may acquire real property from three sources: (1) political subdivisions; (2) property that is tax delinquent, tax foreclosed, vacant or abandoned; and (3) other sources, by agreement, where consistent with an approved “redevelopment plan”;
- The FGU, in establishing an LB, may specify “a hierarchical ranking of priorities” for the use of real property conveyed by an LB, such as (but not limited to): for purely public spaces and places; for affordable housing; for retail, commercial and industrial activities; and as wildlife conservation areas;
- LBs must maintain and provide for public review and inspection a complete inventory of all property received;
- If no municipality elects to tender a bid at a judicially ordered sale, an LB may tender a bid in an amount equal to the total of all municipal claims and liens which were the basis for the judgment; in the event of such a bid, the property will be deemed sold to the LB (regardless of any other bids), and it will thereafter have an absolute title to the property “free and discharged of all tax and municipal claims, liens, mortgages, charges and estates” of any kind;
- LB operations are financed by any or all of the following: (1) grants and loans; (2) payments for services rendered, rents received, insurance proceeds, investment income, and for any other asset and lawful activity; and (3) where authorized by local law, ordinance or resolution of the municipality, school district or any taxing district, 50% of the real property taxes collected for five years on “any specific parcel... identified by such entity.”

According to Dan Kildee, President of the Center for Community Progress and a leading national expert on LBs, there are four “critical elements” to successful LB programs:

- A connection to the tax foreclosure process as an alternative to the auction process;
- Formed around the largest, most diverse market possible—typically at the county or regional level;
- Policy-focused decisions that result in transparent, accessible documentation; and
- A commitment to be engaged with the community, and to encourage ongoing interaction with residents.

The LBA enacted in New York appears to embody all of these elements. Whether the program works in New York State will ultimately hinge on:

- The willingness of municipalities/FGUs to cede responsibility for delinquent properties to an LB, particularly if the LB is set up at the County level;
- The willingness and ability of the Urban Development Corporation/ESDC to impartially and expeditiously review and approve LB-enabling legislation, in accordance with objective criteria (not provided for in the LBA) free of all political influence;
- The willingness of FGUs, including school districts, to earmark a sufficient portion of their site-specific property tax revenues to sustain LBs, particularly in their early formative stages; and
- The ability of voters and taxpayers to recognize that programs like this are necessary to revitalize neighborhoods and ultimately reduce the tax burden by broadening the tax base.

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Business owners and managers have their hands full running their firms in a challenging, competitive economy and rapidly changing technological environment. Understandably, while attending to marketing, production, finances and other daily business, owners and managers often lose sight of the need to adopt and maintain basic corporate practices. However, for businesses organized as corporations and limited liability companies, adherence to sound corporate housekeeping and governance practices is important for several reasons:

- **Protection of personal assets:** Proper documentation of corporate affairs maintains the corporation's or LLC's separate identity, which is critical to protecting owners' personal assets from the company's creditors- the primary advantage of operating in these business forms.
- **Owners' Rights and Obligations:** Complete, updated, and accurate agreements among owners that clearly set forth owners' rights and obligations provide clear guidance for ongoing operations and major events.
- **Transactions:** Proper corporate records facilitate business transactions. For sellers, a good set of records conveys a sense of competence and professional operation. For buyers and their advisers, clear records provide the needed roadmap for financial and legal due diligence.
- **Regulatory Oversight:** Corporate compliance is particularly important for regulated companies like insurance agencies and mortgage brokers. Regulators regard good corporate practice, including record-keeping, as consistent with safe and sound operation. We have responded to many regulatory concerns about deficient business books and records.

Good corporate practices include:

1. **Corporate formalities:** Compliance with the formalities of the corporate or LLC form provides evidence of the business's separate identity. These include the creation and retention of accurate meeting minutes; holding at least an annual board of directors and shareholder meeting; issuance of stock certificates; adoption of

appropriate resolutions; and safekeeping the certificate of incorporation, bylaws and shareholder agreement (for corporations) or articles of organization and operating agreement (for LLCs). These are not "just technicalities" or things that only lawyers and giant companies care about. They have real world consequences. Granted, they can be annoying, but we have seen plenty of situations where failure to do the basics threatens hard earned wealth.

2. **Adequate capital:** The business should **have** capital adequate to address its needs; most importantly, the need to pay wages and bills as they come due. You

need not build up a huge surplus or deny yourself reasonable profit distributions. But you should not run with minimal capitalization because, in litigation, courts look at capitalization as an important factor in deciding whether to pierce the corporate veil and let creditors reach your personal assets.



Photographer: David and Les Jacobs

3. **Financial records:** Financial records must be kept separately from personal tax and accounting records. Again, **separation** of personal and business finances is important evidence of legitimate corporate existence. Document all transactions with owners, officers and directors.

4. **Self-dealing:** Directors, officers or managing members owe fiduciary duties to corporate shareholders and other LLC members. These include the duties of good faith and loyalty. Either avoid or disclose to your co-owners transactions and situations that could cast doubt on your conduct. **For** example, a mortgage broker in his personal capacity should not make a mortgage loan to a borrower generated by the business. This would be usurpation of a corporate opportunity.

5. **Shareholder agreement/operating agreement:** In a perfect world, all business would be done on a handshake. In **the** real world, these agreements are critical documents that establish rights and obligations of owners and managers regarding a host of important matters, including taxes, admission, withdrawal, death and disability of a member, capital contributions, buyout provisions, allocation of profit and losses and distributions, voting rights, and indemnification and dissolution procedures.

We know it looks like drudgery. But if you attend to these chores now, it will save you from aggravation, and perhaps worse, down the road.

Article written by Clifford S. Weber, Esq. For more information, contact Mr. Weber at (914) 694-4102 or via e-mail at cweber@bhk.com.



Photographer: Daniel Kulinski

**MARCELLUS GAS DRILLING: DEALING
WITH HYDROFRACKING WASTEWATERS**

Everyone in upstate New York and Pennsylvania is familiar with high-volume hydraulic fracturing (“fracking”), which is used to extract natural gas from shale deposits thousands of feet below ground. The practice has its supporters and opponents. Supporters cite the economic and fiscal benefits and the opportunity to reduce dependence on foreign oil. Opponents highlight concerns about damage to water supplies and other impacts on the environment. Both sides recognize that effective, reasonably-priced, and legally permissible means must be found to treat and dispose of fracking wastewaters—including “frac flow back” (the 5 to 20% of injected fracking fluid that returns to the surface) and “produced waters” (water from the shale gas reservoir that flows to the surface with gas during the life of the well) resulting from gas drilling.

A number of wastewater disposal methods for frac fluids have been used in the Marcellus region; however those used thus far have yet to capture the proper balance of effectiveness (in terms of treatment and compliance) and cost. Frac wastewater can be managed by disposal or treatment, followed by discharge to surface waters or reuse. Underground injection is the primary disposal method used in all the major gas shale plays except the Marcellus. This can be problematic because of limited capacity, transportation costs, and concerns about groundwater impacts. “Closed loop recycling” is a form of underground injection, which re-injects flowback water into the drilling site or, more commonly, to a nearby pad site, generally after storage, filtration, and some blending with fresh water. While desirable from many standpoints, this technique will still require treatment for considerable amounts of

wastewater (especially produced waters) and may reduce the yield of extracted gas. Discharges to groundwater as well as surface waters require a permit under New York’s State Pollutant Discharge Elimination System (SPDES) program. The EPA administers the Safe Drinking Water Act’s Underground Injection Control Class II program for New York.

For well sites near population centers, wastewater treatment at publicly owned treatment works (POTWs) might seem an attractive option. However, POTWs are designed primarily to treat sewage and rely heavily on microorganisms to digest organic matter, and are ill-suited to treating high-brine-content frac fluids which are toxic to POTW microbes.

Commercial wastewater treatment facilities, sometimes referred to as centralized waste treatment facilities (CWTs), can be designed to treat the known constituents in flowback or produced water. Because of the greater flexibility of CWTs in comparison to POTWs, it is generally easier for CWTs to meet legal restrictions under the federal Clean Water Act and state counterparts.

This is illustrated by a March 16, 2011 memorandum from the EPA’s Office of Wastewater Management and an attachment entitled “Natural Gas Drilling in the Marcellus Shale NPDES Program Frequently Asked Questions”.

The document makes clear that, of all treatment and disposal methods for frac wastewaters that involve discharges to surface waters, treatment and disposal by CWTs faces the fewest regulatory hurdles.

Specifically:

- Best practicable control technology applicable to direct discharges from a well site is “no discharge”;
- Indirect discharges via POTWs are subject to stringent pretreatment requirements that preclude “pass-through” of pollutants and “interference” with POTW operations (which is very difficult for highly saline frac fluids). Pennsylvania, under its Clean Streams Law, has asked companies to voluntarily stop taking drilling wastewater to the 16 POTWs that discharge into rivers.
- By contrast, indirect discharges via CWTs are subject only to more flexible effluent limitation guidelines involving technology-based limits developed on a case-by-case basis using “best professional judgment.”

Companies engaged in gas drilling by fracking should keep these considerations in mind in evaluating and implementing wastewater treatment and disposal options. In New York, they should also be aware of the rules and regulations for oil, gas, and solution mining provided in 6 NYCRR Parts 550-559, and the additional requirements set forth in the Revised Supplemental Generic Environmental Impact Statement when finalized.

Article written by Joel Patch, a summer associate and student at Widener University School of Law and Kenneth S. Kamlet, Esq. For more information, contact Mr. Kamlet at (607) 231-6914 or via e-mail at kkamlet@hbk.com.

**RETIREMENT PLAN UPDATE - FILING DATE EXTENDED FOR 2009 AND
2010 FORM 8955-SSA**

For many years, retirement plans (both defined benefit and defined contribution) that were required to annually file the Form 5500, the *Annual Return/Report of Employee Benefit Plan*, used the Schedule SSA to report the names and deferred vested benefits of those participants in the plan who had terminated during the plan year. In 2009, the use of the Schedule SSA was discontinued, but the IRS warned that the data usually reported on that form would have to be filed once a new reporting mechanism was established.

The new reporting mechanism is the Form 8955-SSA, *Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits*. The IRS recently released that form and guidance on completing it. That guidance also indicates that the filing due date for the 2009 and 2010 Form 8955-SSA, *Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits*, will be extended. The modified due date is the later of (1) January 17, 2012 or (2) the due date that generally applies for filing the Form 8955-SSA for

2010. No extensions will be granted for the January 17, 2012 due date (in other words, this date cannot be extended by filing a Form 5558 extension request).

Plan administrators must file Form 8955-SSA with the IRS and not through the EFAST2 filing system. The general filing due date is the last day of the seventh month following the last day of the plan year, plus extensions.

Please contact your service provider and/or accountant to confirm that the appropriate 2009 and 2010 Form 8955-SSA for your retirement plan will be filed by the January 17, 2012 due date.

Please feel free to contact Tom Conlon (607-231-6744; e-mail taconlon@hbk.com), Miriam Schindel (914-694-4102; e-mail mschindel@hbk.com) or your HH&K attorney if you have questions about these or other employee benefit topics.

MARRIAGE EQUALITY IN NEW YORK

On June 24, 2011, Governor Andrew M. Cuomo announced passage of the Marriage Equality Act, granting same-sex couples the freedom to marry under the law, as well as hundreds of rights, benefits, and protections that have been limited to married couples of the opposite sex. The Act took effect on July 24, 2011. With the passage of the Act, New York became the sixth state, plus the District of Columbia, to allow same-sex marriage.

Prior to the passage of the Act, in *Hernandez v. Robles*, 7 N.Y.3d (2006), a closely-divided Court of Appeals held that the law limits marriage within New York State to different-sex couples and that any change had to be legislative, not judicial. However, in recognition of common law, other New York courts had also held that same-sex marriages performed in other jurisdictions were entitled to recognition in New York in the absence of express legislation to the contrary.

The Marriage Equality Act amends New York's Domestic Relations Law (DRL) by adding two new sections 10-a and 10-b which provide that:

- (a) A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex
- (b) No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage shall differ based on the parties to the marriage being the same sex or a different sex; and
- (c) Benevolent orders or religious corporations shall not be required to provide accommodations, advantages, facilities or privileges related to the solemnization or celebration of a marriage, and a refusal by either such organization or corporation to provide such accommodations, advantages, facilities or privileges shall not create a civil claim or cause of action.

DRL § 13 was amended to provide that no application for a marriage license shall be denied on the ground that the parties are of the same or a different sex.

DRL § 11(1) was also amended and a new subdivision 1-a was added to provide that no clergyman or minister shall be required to solemnize any marriage when acting in his or her capacity under that subdivision and that a refusal by a clergyman or minister to solemnize any marriage shall not create a civil claim or cause of action.

Now, married same-sex couples will receive the same state-sanctioned protections, benefits and mutual responsibilities as different-sex married couples in such areas as health care, hospital visitation, child custody, pension benefits, property ownership, inheritance, taxation, insurance coverage, testimonial privileges, and safeguards against the loss or injury of a spouse.

What does a couple have to do to get married in New York?

There is no residency requirement for marriages in New York State. In order to get married in New York State, a couple must apply for a marriage license at the office of any town or city clerk. The license will not be issued unless the couple qualifies for the license—each party must be 18 years of age or older, unmarried, and produce documentation to prove their age and identity. If either party was previously married, he or she must provide information with respect to the prior marriage, including whether the former spouse is living, whether a divorce was granted and, if so, when, where and against whom the divorce was granted. A certified copy of the Judgment of Divorce or a Certificate of Dissolution of Marriage may be required by the clerk. There are additional requirements to obtain a license for



Photographer: Juliet White

persons under the age of 18 years old.

If the couple meets the requirements for the marriage license, the clerk will issue the license upon payment of the required fee. Once the license issued, the couple must wait 24 hours from the exact time that the license was issued before the marriage ceremony can be performed, unless a justice of the Supreme Court or a judge of the County Court of the county in which either spouse resides issues an order waiving the 24-hour waiting period. The license is valid for 60 days.

The marriage ceremony may be performed by members of the clergy and certain public officials, including mayors, judges, magistrates and others.

Will the federal government and other states recognize a New York same-sex marriage?

The Defense of Marriage Act (“DOMA”), passed in 1996, is a federal law that prohibits the federal government from recognizing legal same-sex marriages, which means that same-sex spouses are excluded from more than 1,100 federal benefits and protections available to all opposite-sex spouses, including the right to file joint tax returns and the right to receive Social Security survivor benefits. DOMA also permits states to not recognize the marital status of same-sex couples lawfully married in another state. Many states (including Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming) have also passed laws that provide that the state does not recognize same-sex marriages from other jurisdictions. Consequently, if a same-sex couple married in New York travels to another state, they may not be recognized as spouses.

A number of courts have ruled that portions of DOMA are unconstitutional, and the Obama Administration has concluded that Section 3 of DOMA—which defines “marriage” and “spouse” as excluding same-sex couples—is unenforceable. Legal challenges to DOMA have yet to reach the Supreme Court.

Article written by Jennifer M. Donlan, Esq. For more information, contact Ms. Donlan at (607) 231-6933 or via e-mail at jdonlan@bbk.com.



Presents the
**22nd ANNUAL LABOR AND
 EMPLOYMENT LAW UPDATE**

With



Thursday, October 27, 2011

7:30 – 11:00 a.m.

7:30 a.m. Registration and Buffet Breakfast

8:00 – 11:00 a.m. Program

Traditions at the Glen

4101 Watson Blvd., Johnson City

All business owners must be aware of the latest decisions and regulations in Labor and Employment Law in order to protect their business and personal assets. This is the perfect opportunity to learn how to avoid problems before they begin, to have the laws described in understandable language and to ask questions about issues of concern.

Attorneys from **Hinman, Howard & Kattell, LLP** will present the 22nd annual update on **Labor and Employment Law**. Topics will include: *Technology in the Workplace-Stored Communications Act, Computer Fraud and Abuse Act, and the DOL's new enforcement through smartphone Applications, Health Care Exchanges, Update on Health Care Reform, Worker's Compensation Update--a look at whether reforms have worked, Legal Off Duty Activities and the Impact on Employment, Same Sex Marriage in the Workplace and What every employer should know about recent Court decisions affecting Retaliation, Exempt v. Non-Exempt, and Reasonable Accommodations*. Please make your reservations by October 25, 2011. **Members: \$28 Advance/\$35 Door; "Members to Be" \$38 Advance/\$45 Door**

Labor and Law Update-October 27, 2011

Name(s) _____
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Number of members attending _____ \$28 prepaid / \$35 at the door Total \$ _____
 Number of non-members attending _____ \$38 prepaid / \$45 at the door Total \$ _____
Grand Total \$ _____

Name on card _____

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Please mail your registration and payment to: Greater Binghamton Chamber, P.O. Box 995, Binghamton, NY 13902-0995; Fax to (607) 722-4513, Attn: Kathi Murphy; E-mail to kmurphy@greaterbinghamtonchamber.com; or call Kathi at (607) 772-8860. **Payment/Cancellation Policy:** Reservations made after **October 25, 2011** are subject to "at door" pricing. If cancellation is necessary, please cancel by **October 25, 2011** for a full refund. **Cancellations after October 25th are NON-refundable.**

NOW – An Even Easier Way to Pay! Sign up and pay on-line at www.greaterbinghamtonchamber.com

FOR MORE INFORMATION

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