

[THE MINUTES]

NOVEMBER 2012

INSIDE THIS ISSUE:

Review: New Jersey's Revised Recording Act. By: Teresa Munson, Esquire	2
Challenging an Award Under Local Public Contracts Law By: Desmond O'Neill, Esquire	3
Relying upon an Unofficial Municipal Tax Statement. By: Stephen McNally, Esquire	4
Decoding the Mystery of Professional Licensing Board Actions. By: Ashley Buono, Esquire	5-6

TIME TO REGROUP.

The election of 2012 has officially ended. Regardless of one's political views, the government's role in our lives was a predominate issue that played endlessly on many of our televisions and in social media. For many of our clients, their practice has required an encounter, or two, with the government (state or federal). Therefore, we decided to jump on the bandwagon and make this Edition of The Minutes government-centric. Unfortunately, since the start of the compilation of this Edition, Hurricane Sandy struck and devastated a majority of the tri-state area. Because the government has played a critical role in the rebuilding efforts of those affected by the storm, we feel that this Edition is even more appropriately centered.

From all of us at Chiumento McNally, LLC, we extend our sincere condolences to all who experienced a loss due to the storm.

-Ashley H. Buono, Editor and Senior Associate Attorney

WE ARE MOVING!

Please note, effective December 3, 2012, Chiumento McNally, LLC's office will be located at:

One Echelon Plaza
227 Laurel Road, Suite 100
Voorhees, New Jersey 08043

Our telephone and fax machine numbers will remain the same.

UPCOMING EVENTS:

- 11/30/12 Moving Day! The staff of Chiumento McNally, LLC are busy moving the office to its new headquarters in Voorhees, NJ.
- 12/3/12 First day in our new headquarters. All contact information remains the same.
- 12/5/12 Gary Chiumento will be speaking at Whitehorn Financial Business Roundtable. See the story on P. 1!
- To Be Announced. Chiumento McNally Open House at new offices in Voorhees.

GARY CHIUMENTO, ESQUIRE TO SPEAK**AT ARCHITECT/ENGINEER'S ROUNDTABLE****TOPIC: PREPARATION FOR CONSTRUCTION PROJECT RESTART
HOSTED BY WHITEHORN FINANCIAL GROUP, INC. AND VICTOR O.
SCHINNERER & COMPANY, INC.****WHEN: DECEMBER 5, 2012, 8:15AM TO NOON****LOCATION: DEL FRISCO'S STEAKHOUSE, 1426-28 CHESTNUT STREET,
PHILADELPHIA PA 19102**

Now that the election has concluded, there is some hope that the Nation will come together with a gradual return to normalcy. If we can all get past the looming financial "cliff" imposed by the January deadline, we can then focus on rebuilding the economy including the all-important construction industry. Everyone hopes that projects that have been dormant for months (or years) will come back to life. But, will you be ready when they do? On December 5, 2012, Gary Chiumento, Esquire, will present a program focusing on the things that Design Professionals need to know in "Resurrecting the Moribund Construction Project." This and several other business oriented programs will be presented at the Whitehorn Financial Business Roundtable at Del Frisco's Steakhouse (Philadelphia) on December 5, 2012. The program, moderated by noted business consultant Steve Whitehorn, will also include seminar presenters Tami Hauser, Ph.D. on using Public Relations techniques to Grow Your Business along with accounting firm, ParenteBeard, with tips on internal controls to protect yourself from fraud and theft.

Don't miss out on this opportunity to network with like-minded business professionals and hear tips and techniques on how to revitalize and restart your business.

Presenters and Topics:**Gary C. Chiumento, Esquire:**

"Resurrecting the Moribund Construction Project"

Tami Hausman, Ph.D, Hausman LLC:

"It's Not What You Do. It's Who You Tell: Public Relations for Designers in 10 Easy Steps."

ParenteBeard, LLC:

"Internal Controls and Fraud Risks Associated with Architect/Engineering Firms."

3 AIA Continuing Education Credits (pending qualification)

Continental Breakfast included.

Lunch to follow program.

Although seating is limited, space can still be reserved by contacting Whitehorn Financial Group, Inc. at (973) 564-9330, (215) 545-8505 or e-mail (steve@whitehornfinancial.com).

**REVIEW: NEW JERSEY'S REVISED RECORDING ACT.
BY: TERESA MUNSON, ESQUIRE**

In 2012, Governor Christie enacted legislation designed to bring New Jersey's document recording statutes into the modern era. As the legislative comments noted, the existing laws "date from a period when recording meant the inclusion of documents in large well-bound books of good paper." The new law recognizes technological advances such as electronic signing ("e-signing") and filing ("e-filing"), and is designed not to favor one method of recording – conventional paper or e-filing – so that the law need not be amended as new recording methods are proposed.

The new law eliminates the requirement that local county recording offices maintain separate "Grantor" and "Grantee" indices and separate "Deed," "Mortgage," "Assignment" and "Miscellaneous" books. Finally, the Division of Archives and Records Management is now tasked with implementing regulations designed to promote uniformity in document formatting and e-filing, and must assess whether New Jersey should adopt a standard, per document, recording fee as opposed to the current system of charging a per page recording fee.

The new law also eliminates duplicative provisions found in the old law. For example, previously two separate provisions addressed the impact of unrecorded documents upon subsequent judgment creditors, mortgagees and bona fide purchasers. Those sections have been repealed and recodified in *N.J.S.A. 46:26A-12, Effect of recording*. Subsection (c) of the new law provides that unrecorded deeds or other conveyances have no effect against subsequent judgment creditors, bona fide purchasers and mortgagees without notice and whose conveyance or mortgage is recorded. Additionally, under the old law, *N.J.S.A. 46:16-1* set forth a list of documents which could be recorded and a series of subsequent provisions listed additional documents eligible for recording. The new law endeavors to codify in one section, *N.J.S.A. 46:26A-2*, all documents eligible for recording.

The new law also amended the *Notice of Settlement* provisions of the recording act. A *Notice of Settlement* is a statutory

creation which allows purchasers and lenders to provide notice of pending transactions, thus preserving their position as against any intervening interests in the property. Further, the new law extends the effective period of the Notice from 45 days to 60 days and allows the Notice to be extended for an additional 60 day period by filing a second Notice prior to the expiration of the original Notice.

Two unintended consequences of the new law may be the repeals of *N.J.S.A. 46:21-2* (which addressed instruments with missing or defective acknowledgments which nonetheless had been recorded) and *N.J.S.A. 46:21-3* (which addressed actions on recorded agreements of sale). Under *N.J.S.A. 46:21-2*, any instrument which was of record for at least six years, notwithstanding the absence of, or informality, defect or imperfection in the acknowledgment, would provide notice to subsequent judgment creditors, mortgagees and bona fide purchasers of the outstanding interest. Similarly, under *N.J.S.A. 46-21-3*, a purchaser of real property who recorded a copy of the purchase agreement would enjoy, as under the *Notice of Settlement* provisions, priority over intervening interests. However, the purchaser would lose that priority if the purchaser failed to take action to enforce the agreement within three months of the date fixed in the agreement for closing. The legislative history is silent as to why these provisions were repealed. Questions as to the effect of the repeal will now have to be addressed either by future legislative enactments or by the courts.

As noted above, the new law endeavors to modernize and streamline New Jersey's recording statutes. Many of the changes are welcomed by real estate and title insurance professionals; however as with any major legislative enactments, issues will no doubt arise which will require clarification by the legislature or by the courts.

This is article not intended to provide an exhaustive discussion of any particular provision of the Recording Act and is not intended to impart legal advice. If you have questions or concerns regarding recording laws, please feel free to contact Chiumento McNally, LLC to discuss your matter.

CHALLENGING AN AWARD UNDER THE LOCAL PUBLIC CONTRACTS LAW.

BY: DESMOND O'NEILL, ESQUIRE

In New Jersey, the purchase of goods and services by municipalities and counties is regulated by the Local Public Contracts Law (LPCL), as well as regulations adopted by the Department of Community Affairs. Often, an unsuccessful bidder wonders if there are any steps that they can take to challenge the award, particularly if they have sufficient reason to believe that the award process did not comply with the LCPL. This article discusses the possible recourse available to an unsuccessful bidder.

Generally, the LPCL establishes the specific procedural and substantive criteria for each type of contract to which a municipality is a party. With certain exceptions, all contracts costing more than the bid threshold must be awarded through a public bidding process established in the LPCL. Every publicly bid contract awarded by the governmental entity must thereafter be awarded by resolution of the governing body to the lowest responsible and responsive bidder.

As a preliminary matter, if a bidder has been unsuccessful in obtaining an award, they should obtain as much information regarding the award process itself as quickly as possible. This includes obtaining copies of the bids that were submitted, as well as any other publicly available documents regarding the bid process and the award itself. Typically, the best avenue to pursue this course of action is through submitting a request under the Open Public Records Act (OPRA). OPRA is used when the requestor wants to gain access to government records and wants to invoke the OPRA statute, which provides a statutory right of access to government records and holds a records custodian to a response deadline. When submitting an OPRA request to a particular governmental entity or agency, to avoid potential delay or confusion, one should use that entity/agency's specific OPRA Request form, if one exists. Such forms are usually available on the entity/agency's website

Presuming that there is a reasonable basis to question the bid process and resulting award (an analysis that will be highly sensitive to the facts of your individual case), an unsuccessful bidder must take quick action in order to stay the contract award through injunctive relief granted by the Courts. Typically, in order for an application for a stay to be successful, the applicant must show: that they will suffer irreparable harm, that there is a reasonable probability that they will succeed on the merits, and that a balancing of the equities favors preserving the status quo. Generally, the probability of success on the merits will turn on the specific facts surrounding the bid process and the purportedly wrongful denial of the contract award. However, the other two criteria will likely be satisfied by demonstrating that if the court does not intervene, the contract may be substantially performed by the "winning" bidder, which will deny you the right to perform on the contract. New Jersey Courts have found that monetary damages are generally not available for the improper rejection of an otherwise qualified bid.

Thus, prompt and decisive action is required by a party who wishes to challenge an award under the LPCL. Any party wishing to challenge an award should also conduct as thorough an investigation as possible, including obtaining relevant documentation, in an effort to bolster their argument that a bid was improperly awarded. *If you have questions or concerns regarding your contract award and bidding process, please feel free to contact Chiumento McNally, LLC to assist you.*



**RELYING UPON AN UNOFFICIAL MUNICIPAL TAX STATEMENT.
BY: STEPHEN MCNALLY, ESQUIRE**

It is a common practice for title agents to order “unofficial” real estate tax lien statements from the municipal taxing authority when calculating the taxes due for a real estate closing. The taxing authority will then provide a written uncertified statement. Current case and statutory law, however, suggests that this statement cannot bind the taxing authority even if the agent relies upon it to his/her detriment. This conclusion is reached from a review of the Appellate Division Decision Simon v. National Community Bank, 282 N.J. Super. 447 (App. Div. 1995) and N.J.S.A. 54:5-11 to 18.

In Simon, a title agent telephoned the tax collector for Egg Harbor Township to acquire information on delinquent taxes. An employee from the tax collector’s office provided the incorrect information significantly underestimating the amount due. A closing occurred and the title agent issued a title policy to the Lender, National Community Bank (NCB) without exception for open taxes. When the holder of a tax sale certificate sought to foreclose, the title underwriter and NCB filed a third party complaint against the Township for negligent dissemination of the tax information. The trial court granted summary judgment for the Township concluding that the title agent had failed to comply with N.J.S.A. 54:5-11 to 18 which sets forth the procedure for the ordering of official tax statements and, therefore, the complaint was dismissed. NCB appealed the dismissal.

The New Jersey Superior Court, Appellate Division, affirmed the trial court’s ruling and concluded that the New Jersey Tort Claim Act, N.J.S.A. 59:1-1 et seq. immunized the Township. It further found that the only remedy for a party who relies upon tax information provided by a taxing authority is found in N.J.S.A. 54:5-17, wherein it provides that a “bona fide purchaser, lessee or mortgagee...” who relies upon an official search takes the property free and clear of such liens. If the procedure for ordering an official search is not followed, however, the liens remain attached to the property.

For a title agent, compliance with N.J.S.A. 54:5-11, et. seq., can be impractical. N.J.S.A. 54:5-12 grants a municipal tax collector 15 days after delivery of a fee and a written application to provide the official tax statement. The title agent must have the wherewithal to complete the necessary application, pay the fee and deliver same to the tax collector allowing enough time for issuance of the official tax statement before closing. The procedure requires a lead time of at least three weeks while burdening the agent with the risk that the closing falls apart and he/she is out of pocket for the application fee. The agent can opt to use a private tax service which will provide the tax information for a fee but the tax service will acquire the information from the same source, the taxing authority and therefore it is subject to the same errors. Additionally, to the extent an error is made on the tax statement, the agent may then look to the tax service for indemnification. Such remedy, however, only has value if the company has assets from which a recovery can be made.

While the procedure set forth in N.J.S.A. 54:5-11, et. seq. offers a level of protection, the title agent finds himself/herself balancing this comfort level against the possible lost time while awaiting the statement. Ultimately, the title agent and the title underwriter must appreciate the risk in going forward without an official tax statement. The risk would need to be weighed against such factors as the urgency to close and the size of the transaction. Once the risk is properly analyzed an informed decision can be made on proceeding with a closing.

“For a title agent, compliance with *N.J.S.A. 54:5-11, et. seq.*, can be impractical.”

DECODING THE MYSTERY OF PROFESSIONAL LICENSING BOARD ACTIONS.**BY: ASHLEY BUONO, ESQUIRE**

A complaint comes in from a consumer and you do not recognize the name. While reading the correspondence, it sounds like just a disgruntled customer complaint. So, you toss aside the letter. However, your professional licensing Board takes an interest and asks you to respond. Should you call the Board and explain your side because it is clearly a misunderstanding. The Board cannot possibly suspend your license if you ignore their request, or can they? Is there a discovery period, like civil litigation to find out information? If you have ever found yourself in this very situation it can be every bit intimidating as it is embarrassing. Professionals take pride in their work and the last thing they want to do is answer to the licensing board concerning the scintilla of their services. This article is aimed at discussing the procedural aspects as well as the important considerations of a professional disciplinary hearing in New Jersey. It is my intent to answer some of the questions posed above and to help one navigate through the mystery of licensing Board actions and the Administrative Process.



As with most legal-like proceedings, a licensing Board disciplinary action initiates with a complaint. Usually it is from a consumer of the professional services or another professional who has witnessed the complained of conduct. However, unlike a civil lawsuit, there is no filing fee for a disciplinary complaint and anyone can file one with the Board, regardless of whether they were the intended or contractual beneficiary of the professional services. Moreover, unlike civil litigation, the disciplinary process is not concerned with a deviation from professional standards of care and practice, but, rather, they more concerned with deviations from professional statutes, administrative code provisions and public policy directives enunciated by the Professional Board which governs one's professional license and practice. The type of penalties that can be imposed by the Board is different than what one finds with a court of law. An Administrative Board governs your professional license. Their authority relates to their licensing power and allowing one to stay licensed. They can reprimand, suspend and revoke licenses and can further order restitution, costs and fees and even order one to stop certain complaining conduct based on the degree of the violation. Clearly, if one does not abide by the Order of the Board issuing the penalty, their license and future good standing with the Board is in jeopardy. It is best to think that the Board is the gatekeeper of your professional license.

After the grievance is filed with the Board, what happens next? The Board will send a letter Notice to the Professional named in the Complaint and ask for a response within a specified time period, that is, if it chooses to investigate the matter. The Board is comprised of highly experienced like-licensed professionals and can typically see through a frivolous complaint. The Board's request to the licensee could simply ask for the files for the subject project or could ask for a written submission. Whatever the Board requests, it should not be ignored by the licensee. If one does not respond timely, and no adjournment of the specified due date has been granted, the Board could discipline the professional on this ground alone regardless of the gravity of the complained conduct. It is the best practice not to only reach out to your counsel and your professional insurance carrier once a letter notice has been received, but also, gather pertinent information which should include: project file documents, correspondence and lists of potential witnesses. Further, due to the newly imposed Continuing Education Credit requirements for some professionals, it is also important to gather all syllabi and records evincing compliance with the continuing education requirements.

Continued on page 7...

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CONTINUED FROM PAGE 6...

If the Board remains interested in the complaint after it receives your response, it can and may perform an investigative inquiry—a non-adversarial process wherein you are requested to appear before a Board, provide sworn testimony and answer pertinent questions from the Board members and its Deputy Attorney General. It is a closed proceeding and the public is not permitted to attend. Moreover, while the Board may interview the Complainant, you (even as the subject of the Complaint) will not be permitted to attend or cross examine the complaining witness. As with any legal proceeding where a record is being made, it is best to have a legal counsel by your side to protect against a waiver of certain constitutional rights against self incrimination.

After the investigational inquiry, the Board may take the following action: make a finding for Formal Discipline; send a Settlement Offer in Lieu of Formal Discipline or dismiss the action and close its file. A licensee does have the right to an appeal and contest the findings of the Board. If the matter is contested by the licensee, the case is then referred to either the Office of Administrative Law or back to the full licensing Board for formal disciplinary prosecution. It depends on the Board as to where the contested case will be heard. After the case becomes contested and docketed, a licensee is permitted to conduct limited traditional discovery, and able to present expert and fact witness testimony in support of their case during the trial and cross examine witnesses.

Because the process is daunting and confusing, it is best to retain counsel to help assist through the process. The benefits of having legal counsel, is not only to protect your legal interests and rights, but also to help communicate or negotiate with the Boards and its Deputy Attorney General in a manner they can appreciate. Moreover, we strongly encourage interested professionals to go onto the New Jersey State's website for the Department of Law and Public Safety's Division of Consumer Affairs for the individual professional licensing boards to learn more about special topics and platforms of interest as well as recent actions taken by each Board.