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Legal Notes

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THE IMPORTANCE OF MAINTAINING YOUR COMPANY'S BUSINESS RECORDS

By: Burt J. Blustein, J.D., Senior Partner
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Our law firm recently reviewed more than 200 corporate books we have in our custody to ascertain their status. This count does not include the limited liability companies (LLC) we have formed for clients because they typically do not obtain formal company kits which are traditionally procured for corporations.

In examining these corporate books, it became evident that very few clients have kept their records up-to-date since the formation of their company. Most small business owners or clients who hold land in a corporation or LLC give little thought to the necessity of maintaining their company's records on an annual basis. Indeed, some companies never do anything to maintain their company records. **While it may seem to require an unnecessary expenditure of time, effort, and money, the failure to update and maintain company records can have serious consequences.**

Two recent examples include:

- A corporation formed in 1982 had by-laws that required that the company's board of directors have six directors, with four directors being a quorum to conduct business. After the organizational paperwork to establish the corporation was prepared, no subsequent meetings of the directors were held. When it recently came time to sell a substantial asset of the corporation, there were only two surviving directors. Under the Business Corporation Law, a sale of substantially all the assets of the corporation requires the approval of the shareholders and the Board of Directors. This mandate of the Business Corporation Law was not considered, and the action of the board of directors approving the sale was invalid because there was no quorum of the board. In the absence of a quorum, the contract that was signed between the corporation and the buyer was deemed null and void.
- A corporation was formed to buy real estate. The owners did not maintain their corporate entity and failed to file annual franchise tax returns and biennial statements. As provided under New York Law, the Secretary of State deactivated the company by proclamation. Now, 25 years after purchasing the property, the owners are seeking to sell it. However, because title is held in a corporation that no longer legally exists, our firm will need to reactivate the company, which will require the payment of 20 years of franchise taxes, along with interest and penalties.

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As long as your company is active, either as a business entity or as a holding company for real estate, do not neglect the filing of your annual franchise tax reports. Additionally, every two years, the New York State Secretary of State sends out a form for a biennial report to update information in the Secretary of State's database. The form should be filled out and returned to the Secretary of State with the minimal fee of $9.00.

Failure to file a biennial report can result in serious consequences. For example, it is customary for attorneys suing a corporation or a limited liability company to effectuate service by sending the summons and complaint to the Secretary of State. The Secretary of State will forward the served documents to the company at the address designated in its records for the service of process on that company. If the person or company originally designated is no longer in existence or has changed address, this could result in a default judgment being taken against your company. You have an affirmative obligation under all existing case law to notify the Secretary of State of any change in address for service of process; if you fail to do so, you cannot use the fact that you failed to obtain a copy of the summons and complaint as an argument to open up the default judgment.

If you hold real property in a corporate or limited liability company name and you wish to sell or refinance your property, the title companies will require a Certificate of Good Standing from the New York Secretary of State to proceed with the closing. A failure to file your biennial statement or pay your franchise taxes could result in the Secretary of State refusing to issue a Good Standing Certificate, which could cause a significant delay in your transaction.

> "To avoid these pitfalls, we strongly urge that on an annual basis you consult with us about updating your corporate and company records."

With corporations, annual minutes should be prepared for the election of officers and directors. For limited liability companies, there should be an operating agreement in place. For corporations having more than one shareholder, there should be a shareholders agreement with buy-sell provisions.

To help clients keep their business entities compliant with all legal and regulatory requirements, we are pleased to introduce the BSR&B Corporate Shield Business Maintenance Program. We will be sending notices to all active entities for which we hold the corporate kits inviting them to participate in the Corporate Shield™ Business Maintenance Program. For all other business owners, we invite you to contact us to learn more about this innovative program.

DEALING WITH AN ANNOYING NEIGHBOR UNDER TOWN LAW § 268

By: Gardiner S. Barone, J.D.
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Unfortunately, there is usually one in every neighborhood: the pyromaniac who is obsessed with burning their yard waste and trash; the compulsive hoarder (packrat) who burns nothing and saves everything, and puts others at risk of fire, poor sanitation, and other health concerns; and, finally, the neighbor whose dog suffers from a pathological barking disorder. **While most town codes contain laws that regulate open fires, outside storage, and excessive noise, too seldom does the local town board or code enforcement officer enforce these laws.**

When all non-legal remedies fail and the local authorities refuse to take action, § 268 of the NYS Town Law may serve as a viable vehicle to maintain the lawsuit the local township refused to commence.

Town Law § 268 authorizes what is commonly known as a "taxpayers' action" to enforce the provisions of a town zoning law, if a town fails or refuses to do so. The statute provides that "upon the failure or refusal of the proper local officer, board or body of the town to institute any such appropriate action or proceeding [to enforce the zoning law] for a period of ten days after written request by a resident taxpayer of the town so to proceed, any three taxpayers of the town residing in the district wherein such violation exists, who are jointly or severally aggrieved by such violation, may institute such appropriate action or proceeding in like manner as such local officer, board or body of the town is authorized to do."

There are other forms of taxpayer actions. For example, the **General Municipal Law** permits a taxpayer action to address waste of public property. A taxpayer action to redress waste of public property can be brought against any level of state or local government.

However, the right to seek relief under Town Law is unique to residents of a town, as neither the Village Law, nor the General City Law specifically authorizes such action by a taxpayer within a city or village.

A taxpayer action under § 268 has been used by neighbors of a church to enjoin (stop) the church from operating a drug center on the third floor of the parish house, by owners of land adjacent to a proposed construction site for a radio broadcast tower, and to enjoin the operation of a sand and gravel pit on the grounds that it violated the local zoning ordinance.

However, in order to maintain a taxpayer action under § 268, there must be a violation of the town zoning code. If the local officials determine no zoning violation exists, but you still feel aggrieved, then you must either seek to overturn the official's determination that no violation exists, or pursue another remedy against the offensive neighbor.

In those instances where the town already issued a building permit or certificate of occupancy to the annoying neighbor, you can still pursue legal action to undo the perceived wrong, but you need to act swiftly because in some instances the time to seek legal action is limited to thirty (30) days after the issuance of the permit, certificate, or local approval.

Before commencing a taxpayer action under § 268, a resident taxpayer must first make a written demand on the proper local officer, board, or body of a town to act, and only after they have failed or refused to proceed for 10 days after the written demand can the taxpayer action be commenced.

To bring the action, a taxpayer must be a taxpaying resident of the particular township where the offensive conduct is occurring. Merely living in an adjoining township is insufficient. While a person may have more than one residence, a corporation can have only one, which is deemed the county in which its principal office is located.

A taxpayer action under § 268 is not the only potential remedy. For example, a common law nuisance claim is also available, and it has the advantage of not being limited to instances where the local zoning codes are being violated. However, it is much easier to obtain an immediate injunction in a taxpayer action under § 268.

Glossary:

Town Law § 268: authorizes what is commonly known as a "taxpayers' action" to enforce the provisions of a town zoning law, if a town fails or refuses to do so
General Municipal Law: permits a taxpayer action to address waste of public property

BLUSTEIN, SHAPIRO, RICH & BARONE, LLP
Gives Back to the Community

Always eager to support local non-profit endeavors, BSR&B contributed nearly $5,000 to community events in the month of May alone. Several of those who benefited included:

- Temple Sinai
- Inspire Foundation
- 2013 Walk to End Alzheimer's Orange/Sullivan Walk
- Goshen's Great American Weekend

LIFE INSURANCE WITH LONG-TERM CARE ACCESS: COVERING ALL THE BASES

By: Richard J. Shapiro, J.D.
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Most people begin thinking about long-term care insurance – if they think about it at all – once they reach their 60's (or even later). Unfortunately, by that age the cost may seem to be prohibitive to many of those interested in purchasing the product, or health conditions may render an applicant uninsurable. **And frankly, most people believe the need for long-term care will only apply "to the other guy."** So, the reasoning goes, "if I don't use the insurance, then all of my premium payments will be 'wasted.'"

But the fact is that approximately 50% of all seniors will need at least some form of long-term care. With the costs for care increasing by leaps and bounds – in the Hudson Valley, the cost for in-home care will run approximately $250 per day, and nursing home care is at least $350 per day – very few people have sufficient resources to cover the costs for any extended period.

> "With governmental budgets shrinking, it is unlikely that Medicaid will continue to be available to cover a large chunk of long-term care costs for the ever-growing Baby Boomer population."

A possible solution for those reluctant to buy long-term care insurance is the availability of a growing number of **"hybrid" life insurance policies** that provides lifetime access to the death benefit to cover long-term health care costs. These hybrid policies have been gaining in popularity, with sales increasing by 19% in 2012 over the previous year.

The hybrid policy generally works as follows: the policy provides a fixed death benefit and includes a chronic illness rider. Should the insured become disabled – typically defined as suffering from cognitive impairment or needing assistance with two or more "activities of daily living" such as dressing, bathing, toileting, transferring, or eating – then the death benefit can be "accelerated" with payments typically of 2% of the death benefit per month to cover long-term care costs. A

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hybrid policy with a $500,000 death benefit, for example, would provide up to $10,000 per month for 50 months for long-term care needs. To the extent that long-term care is not needed, the remaining death benefit would be paid to the surviving spouse or other heirs.

A potential downside is that ownership of a life insurance policy in your individual name would cause the death benefit to be includable in your taxable estate, which could result in estate taxes being owed on the death benefit. For example, if an unmarried person added a $500,000 hybrid life insurance policy to an existing $1 million estate, the resulting $1.5 million taxable estate would require payment of a New York estate tax of approximately $65,000.

One strategy to minimize the likelihood that the life insurance will result in an increase in estate tax liability is to utilize a "Special Needs Irrevocable Life Insurance Trust" established by the insured's children to own the policy. The parent would make cash gifts to the children, who would use the cash to pay the premiums for the life insurance policy owned by the trust. Should the insured require financial assistance to pay for long-term care, the accelerated benefit can be triggered, with the trustee (usually the children) having discretion to use the benefits to contribute towards the parent's long-term care needs. If the parent is Medicaid eligible, the children would not be forced to distribute money from the insurance policy to cover the parent's long-term care costs, and the death benefit can remain intact.

And the icing on the cake: since the parent has no retained ownership interest in the policy, the death benefit would not be included as part of the parent's taxable estate.

Congratulations
Once Again to Partner
RICHARD SHAPIRO

ON EARNING AN ELITE **"AV PREEMINENT"** RATING FROM MARTINDALE-HUBBELL

VISIT OUR FACEBOOK PAGE TO VIEW A SHORT VIDEO ABOUT HIS RECOGNITION!

Firm Highlights

Austin DuBois Named to OC Department of Mental Health Community Services Board

Orange County Executive Edward Diana and Orange County Department of Mental Health Commissioner Darcie Miller recently announced the appointment of BSR&B Associate Austin DuBois to the Orange County Department of Mental Health's Community Services Board.

The Board is charged with advising Commissioner Miller on mental health, developmental disabilities, and chemical dependency services. In a letter, County Executive Diana said "I am certain that fulfilling its mission will be made easier by having experienced and committed individuals such as you volunteering your time."

DuBois, who is currently chair of the Inspire Foundation Board of Directors, sees the appointment as "an opportunity to use insights gained as a professional and volunteer to help the county government more effectively serve those utilizing mental health services."

FREE EDUCATIONAL WORKSHOPS:

Estate Plans That Work™

July 16, 2013 ~ 3:00 p.m. to 6:00 p.m.
August 14, 2013 ~ 3:00 p.m. to 6:00 p.m.

We'll explain little-known pitfalls and the best methods to protect your loved ones' inheritance after you're gone.

Elder Law & Long-Term Care

July 30, 2013 ~ 4:00 p.m. to 6:00 p.m.

The above workshops and meeting will be held at the
BSR&B Education Center (1st floor)
10 Matthews Street, Goshen, New York

To register for a workshop, call Donna at 291-0011 x.242, or register online at www.mid-hudsonlaw.com by going to the "Upcoming Events" link.