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A Note about the Organization of this Outline

The case summaries contained in this outline were prepared by the editors of the Local Government Law Review, and have been reprinted here by permission of the Institute of Local Government Attorneys. The summaries cover the period November 2010 through October 2011.

All categories are organized in alphabetical order by topic, then (inadvertently) in reverse alphabetical order by sub-category. Within each category or subcategory, the cases are further sorted by issuing court. Please note that this outline contains both published and unpublished decisions.

All of the cases summarized in this outline are listed in alphabetical order in the Index of Cases located at the back of the outline (pp. 161 *&c*.).

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AFFORDABLE HOUSING

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- **USE VARIANCE**

Conifer Realty, L.L.C. v. Township of Middle Zoning Board of Adjustment (Unpub. App. Div., September 9, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a6268-09.opn.html

The board of adjustment of Middle Township denied use, height and bulk variances to a 90-unit affordable housing project in a town that has a 700-unit obligation. The Appellate Division, following *Homes of Hope, Inc., v. Eastampton Township Land Use Planning Board, 409 N.J. Super. 330 (App. Div. 2009)*, held that such housing was an inherently beneficial use and that the board had erred in not following that precedent. The matter was remanded to the trial court for balancing of benefit and the negative impacts under *Sica v. Board of Adjustment of Wall, 127 N.J. 152, 160-167 (1992).* (10/2011)

AFFORDABLE HOUSING

- **SUBSTANTIVE CERTIFICATION; RULE MAKING**

In re Substantive Certification of Blairstown Township (Unpub. App. Div., May 23, 2011)

The Council on Affordable Housing (COAH) granted substantive certification to Blairstown. Fair Share Housing Center claimed that COAH violated the Administrative Procedures Act, *N.J.S.A.* 52:27D-301 *et seq.*, in approving Blairstown's petition because COAH had changed its policy without proper rulemaking. More specifically, COAH had provided guidance to municipalities about new standards for meeting very-low-income household needs under *P.L.* 2008, *c.* 46 but, in approving Blairstown's petition, COAH had not followed that guidance. The court agreed with Fair Share, reversed COAH and remanded the matter for further proceedings. (7/2011)

AFFORDABLE HOUSING

- **REGIONAL CONTRIBUTION AGREEMENT**

In re Denial of Regional Contribution Agreement Between Galloway Twp. and City of Bridgeton, 418 N.J. Super. 94 (App. Div. 2011)

Galloway Township and the City of Bridgeton entered into a regional contribution agreement (RCA) that had been approved by COAH. Fair Share Housing Center challenged the approval, and the Appellate Division held that COAH had failed to make proper findings of fact supporting its approval. Accordingly, the matter was remanded to COAH for such findings. In the meantime, the Fair Housing Act, *N.J.S.A.* 52:27D-301 *et seq.*, was amended to prohibit the use of RCAs. As a result, when COAH acted on the remand it determined that it no longer had the

authority to approve RCAs and therefore denied approval of the Galloway-Bridgeton RCA. Galloway Township and Bridgeton's affordable housing developer appealed. The court sustained COAH. It held that COAH's initial failure to provide findings of fact supporting the RCA was a matter of substance, and not a mere technicality. When the court set aside COAH's initial approval of the RCA, it became subject to further review and the new law. The court rejected the arguments that setting aside the RCA would be fundamentally unfair and a manifest injustice. (4/2011)

AFFORDABLE HOUSING

- **MORTGAGES**

U.S. Bank, N.A. v. Nikia Hough, 416 N.J. Super. 286 (App. Div. 2010), certif. granted, 205 N.J. 184 (2011)

http://lawlibrary.rutgers.edu/courts/appellate/a5623-08.opn.html

Hough purchased a condominium unit that was part of the Township's affordable housing stock and subject to the mortgage limits of the Uniform Housing Controls of the New Jersey Housing and Mortgage Finance Agency (MHFA) at *N.J.A.C.* 5:80-16.1 to -26.26. The initial mortgage amount was $61,329 based upon a purchase price of $68,143 and was compliant with those regulations. Hough later refinanced the mortgage, borrowing $108,000 from Mortgage Lenders Network USA, Inc., at a time when the maximum resale price permitted by the regulations was $68,735. In addition to paying off the first mortgage and other debts, she netted approximately $20,000 from the refinance. Hough defaulted on the loan. The Appellate Division held that the Mortgage Lenders mortgage was void under *N.J.A.C.* 5:80-26.18(e).because it was greater than the amount permitted by *N.J.A.C.* 5:80-26.8(b). Only the mortgage was voided, not the underlying debt. This conclusion was based upon an administrative ruling by the MHFA which was given due deference and not disturbed by the court. ***[Editor's note: The Supreme Court has granted certification.]*** (4/2011)

AFFORDABLE HOUSING

- **MEADOWLANDS**

Linque H.C. Partners, LLC v. New Jersey Meadowlands Commission (Unpub. App. Div., July 6, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a0398-10.opn.html

The New Jersey Meadowlands Commission has a responsibility to plan and zone for affordable housing similar to other local government entities. *In re Adoption of N.J.A.C. 19:3, 19:4, 19:5 & 19:6 by N.J. Meadowlands Comm'n, 393 N.J. Super. 173, 182-83 (App. Div. 2007), certif. denied, 194 N.J. 267 (2008).* However, under that ruling, the commission was allowed to stay its efforts until the latest round of rule-making by COAH had been completed. The rulemaking by COAH has bogged down. After COAH issued new third round regulations, dozens of appeals were filed. Plaintiff nevertheless sought relief against the commission because of the

commission's inactivity on its planning for affordable housing elements. The court refused to require the commission to plan for affordable housing in a legal environment in which most of the COAH regulations had been invalidated. However, the court provided limited relief by ordering the commission to address those regulations which had been approved and were no longer in litigation. The court further allowed plaintiff to re-file the appeal after the outstanding regulations had been finalized by COAH and the courts. (10/2011)

AFFORDABLE HOUSING

- **COAH REGULATIONS**

In re the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 416 N.J. Super. 201 (App. Div. 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a5404-07.opn.html

Twenty-two challenges to the revised third round rules promulgated by the Council on Affordable Housing (COAH) were decided in this case. The original third round rules had been previously invalidated. Judge Skillman, writing for the Appellate Division invalidated the use of the "growth share" methodology for determining prospective fair share housing needs for municipalities. COAH was therefore ordered to develop new rules based upon the first and second round methodologies. The remand to complete new rules was to be completed within five (5) months. *N.J.A.C.* 5:97-3.2(a)(4)(iv) concerning municipally sponsored developments was also invalidated because it did not require information as to the identities of developers or specific locations of projects. The provisions of *N.J.A.C.* 5:97-3.5 and *N.J.A.C.* 5:97-3.18 concerning bonus credits for prior round compliance were also invalidated. COAH's calculation of present and prior need was upheld. The court declined to issue a blanket stay while the new rules were formulated, but did allow individual municipalities to seek a stay from either the courts or COAH depending upon jurisdiction. The criterion for any such stay is to be based upon history of compliance. Although the decision was approved for publication on October 8, 2010, COAH has not yet begun substantive work on new rules. Fair Share Housing Center has filed a motion seeking the appointment of a special master to draft the rules. There is further uncertainty because, as of this writing. Senate Bill S-1 is undergoing revisions. That bill, if adopted, could abolish COAH and create a new methodology for calculating need. (1/2011)

AFFORDABLE HOUSING

- **COAH REGULATIONS**

In re Adoption of Regional Affordable Housing Development Program Guidelines by the Council on Affordable Housing,418 N.J. Super. 387 (App. Div. 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a0970-09.opn.html

In a sharp rebuke to the Council on Affordable Housing (COAH), the Appellate Division invalidated "Guidelines" which had been issued by that agency. It remanded the matter to allow COAH to adopt rules and regulations in conformity with the procedural requirements of

Administrative Procedures Act (APA). In 2008, the Legislature had amended the Fair Housing Act to require regional planning agencies to identify and coordinate regional housing opportunities in cooperation with municipalities within the regional planning areas. This affected 181 of the 566 municipalities in the State located within the areas of the Meadowlands Commission, Pinelands Commission, Highlands Council and similar regional entities. Over a year later, COAH promulgated what it termed "Guidelines" for implementation of the FHA Amendment. On appeal, Fair Share Housing Center, a public interest organization, challenged the Guidelines as invalid because they had not been adopted in conformity with the rulemaking procedures of the APA. The Court held, in reliance upon *Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984),* that an agency determination must be considered to be an administrative rule when all or most of the attributes, as enunciated in *Metromedia*, of administrative rules are present. In response to the arguments of COAH that the Guidelines represented non-binding recommendations of an informal advisory nature, the Court found that the Guidelines 1)set forth standards intended to have wide coverage, 2) were intended to apply generally and uniformly to the municipalities under jurisdiction of the regional planning entities, 3) prescribed a legal standard not provided in or clearly inferable in the enabling statute, 4) reflected policy not previously enunciated, and 5) reflected regulatory policy in the nature of the interpretation of law. The Guidelines were therefore a regulation. (4/2011)

AFFORDABLE HOUSING

- **HIGHLANDS ACT**

In re Highlands Master Plan, Executive Order 114, 421 N.J. Super. 614 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1026-08.opn.html
A public interest group advocating for affordable housing challenged Executive Order 114 of the Highlands Water Protection and Planning Council (Council) and a Memorandum of Understanding between the Council and the Council on Affordable Housing (COAH) about affordable housing within the highlands region. For the most part, the challenge was rejected. The Regional Master Plan (RMP), adopted by the Council in strict conformity with the Highlands Water Protection and Planning Act (the Highlands Act), *N.J.S.A.* 13:20-1 to -35, is not required to have been adopted in conformity with the Administrative Procedures Act (APA), *N.J.S.A.* 52:14B-1 to -15. Executive Order 114, which requires the Council and COAH to work jointly to implement affordable housing regulations within the Highlands Region, does not direct either body to take action that is inconsistent with its enabling legislation or its own rules and regulations. Likewise, the Memorandum of Understanding entered into by the two agencies is valid. However, the August 12, 2009 COAH resolution that "waived" parts of the COAH revised third round regulations as applied to municipalities in the highlands region and directed those municipalities to follow the procedures and standards promulgated by the resolution, are invalid because they are rules that must be properly adopted under the APA. (10/2011)

AFFORDABLE HOUSING

- **FORT MONMOUTH REDEVELOPMENT**

In re Fort Monmouth Reuse and Redevelopment Plan (Unpub. App. Div., Oct. 28, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a0924-08.opn.html
This is an appeal by Fair Share Housing Center (Fair Share) from the adoption, on September 3, 2008, of a resolution by the Fort Monmouth Economic Revitalization Planning Authority (Authority) approving the Fort Monmouth Reuse and Redevelopment Plan (Plan). The resolution was adopted pursuant to the Fort Monmouth Economic Revitalization Planning Authority Act (*N.J.S.A.* 52:27I-1 *et seq*.) (Act) passed by the Legislature to address the conversion and revitalization of Fort Monmouth in light of the prospective base closure. Amendments to the Fair Housing Act (*N.J.S.A.* 52:27D-301 *et seq*.) (FHA) adopted on July 17, 2008 required the Authority to address regional affordable housing needs. Although the Plan provided for 1,585 residences with 20% set aside, the Court reversed, and remanded in part, because the Authority had not complied with procedural requirements of the FHA, including the formation of a housing advisory committee and the requirement to consider a report from that committee. It rejected the Fair Share arguments that the Authority's action had been a rulemaking not meeting the requirements of the Administrative Procedure Act (*N.J.S.A.* 52:14b-1 *et seq*.) as well as a claim that a vote cast in favor of the Plan had been impermissibly conditional. Finally, it held that that Fair Share's arguments -- that the Plan constituted fiscal zoning in minimizing the potential for school age children and discriminated against families -- were not ripe for review because Fort Monmouth is still a federal facility and no zoning regulations have been adopted to implement the Plan. (1/2011)

AFFORDABLE HOUSING

- **NON-RESIDENTIAL DEVELOPMENT FEE; REFUND; ECONOMIC STIMULUS ACT**

Beta Realty Unit 6 LLC v. Township of Randolph (Unpub. App. Div., March 16, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3910-09.opn.html
A commercial recreational tennis center which is open to the public but charges a substantial fee is not "available" to the public pursuant to the New Jersey Economic Stimulus Act, *N.J.S.A.* 40:55D-8.8 as amended, and is not an exempt use. Further, a developer receiving a final approval prior to July 17, 2008, is not entitled to a full refund of fees paid under the Non-Residential Development Fee Act, *N.J.S.A.* 40:55D-8.1 to -8.7, where a requirement to pay fees existed at the time of the approval. Neither a separate developer's agreement nor a specific reference in a resolution is necessary to have created the commitment to pay. (7/2011)

ALCHOLIC BEVERAGES

ALCHOLIC BEVERAGES

- **DENIAL OF NEW LICENSE**

North Star Saddle Brook Management LLC v. Governing Body of Township of Saddle Brook (Unpub. App. Div., March 22, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3009-09.opn.html

The Director of the Division of Alcohol Beverage Control affirmed the denial by the Township of Saddle Brook of plaintiff's application for issuance of new plenary retail liquor consumption license. Plaintiff argued that it was entitled to the new license under the hotel/motel exception in *N.J.S.A.* 33:1-12.20. The director found that even though the hotel/motel exception allowed issuance of a greater number of licenses than would be warranted by the municipality's population, it did not create an absolute right to such a license. The municipal governing body must still determine that the public interest warrants the issuance of a new license. Granting full deference to the determinations of an administrative agency, the Appellate Division affirmed. (7/2011)

ALCOHOLIC BEVERAGES

- **SUSPENSION; SALE TO INTOXICATED PERSON**

Deep Dev. LLC v. Municipal Bd. of Alcoholic Beverage Control of Camden (Unpub. App. Div., March 25, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a5346-09.opn.html

The Division of Alcoholic Beverage Control (ABC) suspended appellant's plenary retail distribution license for 15 days after appellant sold beer to a visibly intoxicated person. Applying the requisite "highly deferential" standard of review applicable to administrative agency decisions, the court held that the ABC's findings were well supported by substantial credible evidence in the record and therefore the decision was not arbitrary, capricious or unreasonable. (7/2011)

ALCOHOLIC BEVERAGES

- **ORDINANCE; BYOB**

Club 35, L.L.C. v. Borough of Sayreville, 420 N.J. Super. 231 (App. Div. 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a5932-09.opn.html

Sayreville's ordinance regulating the practice commonly known as BYOB (bringing your own bottle of alcoholic beverage to consume at an establishment that sells other drinks or food, but is not licensed to sell alcohol) is preempted by *N.J.S.A.* 2C:33-27b. The Sayreville ordinance (1) prohibited BYOB in all commercial establishments that are not "restaurants" as defined in the

ordinance; (2) specified what an owner or operator of a restaurant may not do or allow and what patrons may and may not do in all areas of the establishment; and (3) set hours for permissible consumption of alcohol independent of those applicable in licensed premises. *N.J.S.A.* 2C:33-27(a) made it a criminal offense for the owners of a non-licensed premises to do certain things, including allowing BYOB. However, *N.J.S.A.* 2C:33-27(b) reserves the right of the municipality to prohibit BYOB either in all unlicensed premises or in all but an objectively and rationally defined exempted class of unlicensed premises. A municipality may enforce an ordinance prohibiting BYOB. But if a municipality permits BYOB, it may not enact any ordinance that regulates BYOB where it is permitted or punish violations of *N.J.S.A.* 2C:33-27. Because this ordinance attempted to regulate, and the regulations were integral to the ordinance, the entire ordinance was struck down. (10/2011)

AMERICANS WITH DISABLITY ACT

AMERICANS WITH DISABLITY ACT

HIP (Heightened Independence & Progress) Inc. v. The Port Authority of New York and New Jersey 2011 U.S. Dist. LEXIS 101558 (D. N.J. 2011)

Summary judgment was granted to the plaintiff to compel the Port of New York Authority to implement a plan for making the Grove Street Station of PATH accessible to persons with handicaps under the Americans with Disabilities Act (ADA) 42 *U.S.C.* §12132. The Port Authority planned an alteration to the station which, under the ADA, required it to make the facility accessible "to the maximum extent feasible." The fact that the Port Authority had to acquire additional property from third parties did not make the schemes it proposed unfeasible. In making this decision Judge Chesler followed the Third Circuit decision in *Disabled in Action of Pennsylvania v. Southeastern Pennsylvania Transportation Authority, 635 F.3d 87 (3d Cir. 2011).* (10/2011)

ATTORNEYS FEES

ATTORNEYS FEES

- **TANGIBLE ECONOMIC BENEFIT**

Porreca v. City of Millville, 419 N.J. Super. 212 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1185-09.opn.html
Plaintiff, a resident and taxpayer, claimed attorney's fees from a "fund in court" he had allegedly created in his two suits against the City of Millville. Although expressing skepticism as to the plaintiff's entitlement to recover fees, the Appellate Division nevertheless remanded the matter to the trial court for further proceedings and a final disposition. The suits alleged financial irregularities in connection with the administration and management of tax abatements; failure to charge review and inspection fees to major developers; failure to place certain cell tower facilities on the tax rolls; and failure to properly administer the payment of fees to a bank in connection with Urban Enterprise Zone Contracts. Even before the suits began the City had taken remedial action on many of the matters. Not satisfied, the plaintiff nevertheless persisted in the suit until, after two years, a settlement was reached. In the settlement agreement there was a mutual release "of all claims for damages". Thereafter, Plaintiff moved for counsel fees on grounds that it had been the prevailing party and had secured prospective financial benefit for the taxpayers of the city under a "fund in court" theory. Plaintiff also asserted that the release did not encompass attorney's fees. The Appellate Division held that the "fund in court" approach was applicable and that there was a basis for the court to have considered whether results achieved by plaintiff (both before and following suit) conferred a benefit on others. As to the possible waiver of fees by the release, the court found that ambiguity in the terms of the settlement agreement required a review of the circumstances surrounding it. (4/2011)

ATTORNEYS FEES

- **CIVIL RIGHTS; FEE SHIFTING**

Jones v. Hayman, 418 N.J. Super. 291 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3173-09.opn.html
Female prisoners were transferred from the all-female Edna Mahan Correctional Facility to the all-male State Prison because of limited capacity in the female prison. They claimed unconstitutional and discriminatory violations of law, and secured a preliminary injunction against the transfer of any more female prisoners to the State Prison. While the litigation was pending, the women were transferred back to Edna Mahan. The State and the Department of Corrections asserted that the transfer back to Edna Mahan had been unrelated to the litigation and had occurred only because capacity had become available. As a result, the court dismissed the complaint as moot. Plaintiffs then sought counsel fees claiming that, as the catalyst for

change, they were the prevailing parties under the New Jersey Law Against Discrimination *N.J.S.A.* 10:5-1 (NJLAD) and the New Jersey Civil Rights Act, *N.J.S.A.* 10:6-1. The Appellate Division reviewed the "catalyst theory" adopted in *Mason v. City of Hoboken, 196 N.J. 51, 70-79 (2008)*, and more recently explained in *D. Russo, Inc. v. Township of Union, 417 N.J. Super. 384 (App. Div. 2010)*. Under the "catalyst theory" a party in an action brought under a fee-shifting statute, such as NJLAD or the Civil Rights Act, is entitled to recover such fees if the suit achieves the desired result by bringing about a voluntary change in the defendant's conduct. Under *Mason*, the applicant for counsel fees as a catalyst must show (1) that there was a factual causal nexus between the litigation and the relief ultimately achieved; and (2) that the relief ultimately secured by plaintiff had a basis in law. On the "factual causal nexus" prong, the court here went beyond *Mason* and held that the burden of proving no causal nexus became the defendants' once the plaintiff had shown that the extent and timing of the interim relief obtained by them strongly suggested a causal link between their suit and the State's actions in returning the women to Edna Mahan. Further, the second, "basis in law" prong is to be construed in a way that promotes the public policy underpinning fee-shifting statutes: to afford "access to the judicial process to persons who have little or no money with which to hire a lawyer by providing an incentive to lawyers to undertake litigation," [citing case] and to ensure that plaintiffs who have *bona fide* claims can attract competent counsel in cases involving statutory rights. (4/2011)

ATTORNEYS FEES

- **CIVIL RIGHTS; FEE SHIFTING**

D. Russo Inc. v. Township of Union, 417 N.J. Super. 384 (App. Div. 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a0763-09.opn.html
Plaintiff brought suit against Union Township challenging its ordinance regulating sexually oriented businesses. A preliminary injunction was issued against enforcement of the ordinance. The ordinance was amended twice to be less offensive and, ultimately, was repealed. The Appellate Division held that under the New Jersey Civil Rights Act, *N.J.S.A.* 10:6-2(f), plaintiff could be a prevailing party because it was a catalyst for change. While the catalyst theory was first applied by the Supreme Court in *Mason v. Hoboken, 196 N.J. 51 (2008)* to an action under the Open Public Records Act (OPRA) *N.J.S.A.* 47:1A-1 to 13, this court held that the same principles apply to an action brought under the New Jersey Civil Rights Act, *N.J.S.A.*10:6-1 *et seq*. In addition, the court found that there was no difference on the catalyst issue between cases brought under the Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq*.—as applied to a fee award in *Warrington v. Village Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000)*—and those brought under the New Jersey Civil Rights Act. The court also distinguished—as *Mason* and *Warrington* had—the decision of the United States Supreme Court in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)*, which had rejected the catalyst theory under sections of the Fair Housing Amendments Act of 1988, 42 *U.S.C.* §3613(c) (2) and the Americans with Disability Act, 42 *U.S.C.* §12205. *Buckhannon* had been relied upon here by the

trial court. In addition, the court pointed out that *Buckhannon* had also been distinguished in the federal courts in cases, like this one, in which a preliminary injunction had been issued. In those cases, attorney's fees for services rendered up to the issuance of the injunction had been allowed. So, if the trial court on remand were to find that the plaintiff had not been a catalyst for the change by Union of its policies, the court was directed to consider counsel fees up to the date of the preliminary injunction. (4/2011)

ATTORNEYS FEES

- **CIVIL RIGHTS; LODESTAR**

Dinizo v. Scotch Plains, 2011 U.S. App. LEXIS 6684 (3rd Cir. 2011)

Plaintiff got a $1,500 award in a federal employment discrimination case. The trial court subsequently awarded his counsel $141,900 in counsel fees based upon a lodestar amount reduced by 55% to account for the limited success. The Third Circuit Court of Appeals said that the award was at the high end of what is permissible, but could not say that the court abused its discretion. Accordingly it affirmed the award. (7/2011)

ATTORNEYS FEES

- **EMPLOYMENT; REIMBURSEMENT OF LEGAL EXPENSES**

Green v. Township of Deptford (Unpub. App. Div., July 21, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a1672-09.opn..html

The Township declined to pay legal fees of more than $50,000 to Officer Green's attorney for services rendered in the defense of a criminal complaint for false swearing and a subsequent police department disciplinary matter against Green. The court agreed with the Township. It held that a municipality's obligation to reimburse a police officer for legal fees incurred in a criminal matter is triggered only when the charges arise out of the officer's lawful exercise of police powers in furtherance of the officer's duties. The officer's false statement in an investigation against a fellow officer was not made in furtherance of his duties but, instead, was a perversion of those duties. In addition, the Township had not consented to the officer's retention of counsel. Such consent is required under *Twp. of Edison v. Mezzacca, 147 N.J. Super. 9, 14 (App. Div. 1977)*. (10/2011)

ATTORNEYS FEES

- **EMPLOYMENT; COUNSEL FEE AWARD**

In re Hearn, Department of Education, 417 N.J. Super. 289 (App. Div. 2010)

Plaintiff was accused of racial discrimination by a fellow employee and was demoted. He appealed to the Merit System Board. An Administrative Law Judge, after a hearing, recommended that he be restored to his position and that counsel fees be awarded. The Merit System Board restored him to his position but denied counsel fees because, it said, plaintiff had

not proven that the actions of the employer had been in bad faith or with invidious motivation. The Appellate Division held that the Board erred in limiting such an award to cases in which the employing authority had acted in bad faith or with invidious motivation. The court reversed and remanded the matter for a determination of the appropriate amount of fees. (1/2011)

ATTORNEYS FEES

- **EMPLOYMENT; DEFENSE OF PUBLIC RECORDS CUSTODIAN**

Shore v. Borough of Paramus (Unpub. App. Div., July 8, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a6246-09.opn.html
In 32 Municipal Law Review 57 (March 2009), we published the Law Division opinion in *Shore v. Borough of Paramus*, in which the court rejected a rule that required the borough clerk to submit all OPRA requests to the borough attorney before complying. The clerk had requested legal representation through governing body but had been rebuffed and, instead had hired his own counsel. The clerk brought the current application under *N.J.S.A.* 40A:9-134.1, which provides for municipal clerks to be given the necessary means for defense relating to clerk's official duties. The court found that the underlying OPRA lawsuit was properly related to the clerk's function. The payment of fees to an attorney retained by a clerk is limited only to reasonable costs and fees, but not precluded, because the attorney was not chosen by the municipality. The clerk was not barred by entire controversy doctrine and could bring this action separately because the cause of action for fees arose after the conclusion of the prior action. (10/2011)

ATTORNEYS FEES

- **PUBLIC RECORDS; FEE SHIFTING**

Spectraserv Inc. v. Middlesex County Utilities Authority, 416 N.J. Super. 565 (App. Div. 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a1080-09.opn.html
The Appellate Division upheld a Law Division ruling denying a request for attorney's fees by Spectraserv Inc., who asserted that it was the "prevailing party" under the Open Public Records Act (*N.J.S.A.* 47:1A-1 *et seq*.) The Court held that the request for documents was overly broad and generalized. Several requests sought "any and all" documents, failed to specify documents by date, title or author and sought records that "reflect", "explain" or "demonstrate" information of a technical and complex nature. The requests involved more than 150,000 documents and were so lacking in specificity that agency had to review vast files to analyze and to select potentially relevant public records. In addition to the holding that the document request exceeded the obligation imposed upon custodians by OPRA, the Court found that a compromise offered by the agency (to achieve the same result by simultaneous discovery in related construction litigation involving the same parties) was reasonable. (1/2011)

ATTORNEYS FEES

- **PUBLIC RECORDS; FEE SHIFTING**

Smith v. Hudson County Register (Unpub. App. Div., April 25, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a4113-09.opn.html
Under the Open Public Records Act (OPRA), *N.J.S.A.* 47:1A-1 *et seq*. Smith challenged the 25 cent per page fee charged by the Hudson County Register for copies of public documents made on self-service copiers. The court in *Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010),* held that the practice did not comply with OPRA but made its ruling prospective only. In this case for counsel fees under *N.J.S.A.* 47:1A-6, the county argued that the statute allowed counsel fees only to requestors who had been "denied access" not to those who had been granted access under improper conditions. The Appellate Division rejected this argument even though the trial court had agreed with it. The court found that Smith was a "prevailing party" because his action had resulted in rejection of the county's position that he had been a "volunteer" (because he had paid the fee rather than awaiting litigation). In addition his action had caused the court to construe OPRA in a way that –although not free from doubt—found the flat charge of $0.25, without regard to the cost of copying, to be invalid. The action by the denying authority does not need to be willful in order to trigger the obligation for counsel fees. (7/2011)

ATTORNEYS FEES

- **PUBLIC RECORDS; FEE SHIFTING**

Burke v. Margiotta (Unpub. App. Div., May 20, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a0731-10.opn.html
Plaintiff sought documents under the Open Public Records Act (OPRA), *N.J.S.A.* 47:1A-1 to -13. The documents requested related to the township's expert and counsel fees in a pending case in which the plaintiff was involved. After first being told that the documents were protected by the attorney-client privilege, the clerk, acting pursuant to the opinion of a new township attorney, subsequently supplied redacted documents. On an application by plaintiff for counsel fees in the OPRA action, the trial court found that the plaintiff was entitled to reasonable counsel fees as the catalyst for the production of the documents. As to the amount, the court ordered payment of $10,626, which was the amount suggested by the township, and denied the plaintiff's counsel's request for $29,009.55 plus a "lodestar enhancement" of 50%. On appeal, the Appellate Division upheld the denial of the lodestar enhancement noting that the unusual circumstances which should attach such an award -- such as public importance of the OPRA request, novelty of issues and risk of failure in securing the documents -- were not present. However, the Court reversed and remanded on the amount of counsel fees in light of the trial court's failure to make explicit findings of fact and conclusions of law. (7/2011)

ATTORNEYS FEES

- **PUBLIC RECORDS; FEE SHIFTING**

Newark Morning Ledger v. Sports & Exhibition Authority, Law Div., Essex County, Docket No. ESX-L-5408-09, January 11, 2011, Kennedy, J.S.C.

The Star Ledger, under the Open Public Records Act (OPRA), *N.J.S.A.* 47:1A-1 *et seq*., and the common law, sought unredacted contracts between the New Jersey Sports and Exposition Authority (NJSEA) and the concert and event promoters who provided entertainment at the various venues operated by the NJSEA. The NJSEA argued that it would be at a competitive disadvantage in dealing with promoters because other private venues had no obligation to make their contracts public. Judge Claude Coleman (now retired) held that this was a case of first impression on the issue of what constitutes "information which if disclosed would give an advantage to competitors or bidders" under *N.J.S.A.* 47:1A-1.1. Nevertheless Judge Coleman entered an order compelling the disclosure. The NJSEA took an appeal and sought a stay. In this case, Judge Kennedy ordered a stay because of potential irreparable harm from enforcement of the order while it was on appeal. The court ordered counsel fees and disbursements to the Star Ledger, as the prevailing party, in the amount of $126,135.95 for 351 hours of legal work. (4/2011)

CIVIL RIGHTS

CIVIL RIGHTS

- **SUMMARY JUDGMENT**

Campos v. Hackensack, 2011 U.S. Dist. LEXIS 33457 (D.N.J. 2011)

In an action against the Hackensack Police Department and its police chief there were factual disputes as to allegations involving a PBA election, elections to public office and alleged extortion in connection with those elections (7/2011)

CIVIL RIGHTS

- **SUMMARY JUDGMENT**

Ferraioli v. City of Hackensack, 2010 U.S. Dist. LEXIS 142069 (D.N.J. 2011)

A claim of a violation of the Fourth Amendment against a police captain for entering another officer's home to seize a home computer survived a motion for summary judgment (7/2011)

CIVIL RIGHTS

- **SAME ENTITY**

Medina v. Cumberland County, 2011 U.S. Dist. LEXIS 48070 (D.N.J. 2011)

A complaint alleging sexual harassment against the county sheriff's department and the department of corrections were dismissed because those defendants are not separate entities from the county. (7/2011)

CIVIL RIGHTS

- **RES JUDICATA**

Ezekwo v. City of Paterson Historic Preservation Commission, 2011 U.S. Dist. LEXIS 25839 (D.N.J. 2011)

A property owner's claims arising from a historic site designation were dismissed in the federal court as *res judicata* because they had already been decided in State court proceedings. New claims for violation of Fifth Amendment rights were dismissed under the New Jersey entire controversy doctrine (7/2011)

CIVIL RIGHTS

- **RELIGION**

Islam v. City of Bridgeton, 2011 U.S. Dist. LEXIS 32411, reconsideration denied 2011 U.S. Dist. LEXIS 49098 (D.N.J. 2011)

Federal civil rights and New Jersey Law Against Discrimination claims survived summary judgment in an incident in which a woman was instructed by employees of the New Jersey Motor Vehicle Commission to remove her head scarf for a photo resulting in a verbal melee. (7/2011)

CIVIL RIGHTS

- **PROSECUTOR NOT A PERSON**

Fletcher v. Camden County Prosecutor's Office (Unpub. App. Div., Oct. 28, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a0385-09.opn.html

Fletcher and Allah were innocent third parties who happened to be leaving a motel at the same time surveillance activity was taking place on a suspected drug dealer. Intelligence had revealed that a large shipment of marijuana was going to be delivered that day to the suspected dealer at the motel. According to Fletcher and Allah, as they were leaving, police officers blocked their car, pointed weapons at them, forcibly removed them from their car, handcuffed them and detained them for ninety minutes. Fletcher and Allah named the Camden County Prosecutor's Office, and three of its officers in a suit, claiming violations of 42 *U.S.C.* §1983 and state law. The trial court dismissed Fletcher and Allah's claims on summary judgment. On appeal, the court sustained the dismissal of the claims against the Prosecutor's Office because it is an agency of the State, and the State is not considered a "person" under §1983. The court also found that the initial stop of Fletcher and Allah was a valid "Terry stop" under *Terry v. Ohio, 392 U.S. 1 (1968)* and its progeny, which permits an officer to detain, temporarily, an individual for questioning when the officer observes unusual conduct which leads him to reasonably conclude, in light of his experience, that criminal activity may be afoot. The court remanded the case to the lower court, however, for a determination on whether two of the individual officers were protected by qualified immunity because the detention was too long and was not conducted in the least intrusive manner. Finally, the dismissal of the state law claims was sustained because the plaintiffs had not satisfied the Tort Claims Act injury threshold established by *N.J.S.A.* 59:9-2. (1/2011)

CIVIL RIGHTS

- **POLICY OR CUSTOM; DAMAGES**

Los Angeles Cty v. Humphries, ___ U.S. ___, 131 S.Ct. 447, 178 L.Ed.2d 460 (2010)

In order to prevail against a local government in an action under 42 *U.S.C.* §1983, a plaintiff must show that a "policy or custom" of the local entity caused the deprivation of plaintiff's

federal right. This Supreme Court decision holds that the rule applies not only when the plaintiff seeks declaratory relief (such as the injunction in *Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018; 56 L. Ed. 2d 611 (1978))* but also to the action for damages in this case. Plaintiffs had been exonerated on a child abuse claim. Under California Law their names were added to a Statewide central index. There were no statutory procedures for them to have a hearing to challenge this index. However, because it was a state statute not an enactment of the county that created the policy, Los Angeles County could not be said to have a "policy or custom" that would subject it to damage liability under 42 *U.S.C.*§1983. The opinion by Justice Breyer was joined by all except Justice Kagan, who recused herself. (1/2011)

CIVIL RIGHTS

- **OBJECTIVELY REASONABLE**

Pettit v. State of New Jersey, 2011 U.S. Dist. LEXIS 35452 (D.N.J. 2011)

Federal and State claims arising from an incident in which a State trooper, in connection with an investigation, shot plaintiff's dog, were dismissed on summary judgment because the trooper's actions were objectively reasonable. (7/2011)

CIVIL RIGHTS

- **MALICIOUS PROSECUTION**

Venezia v. Manasquan Police Department, 2011 U.S. Dist. LEXIS 58019(D.N.J. 2011)

A *pro se* complaint was dismissed without prejudice. The complaint alleged malicious prosecution after she had been acquitted of leaving the scene of an accident. (7/2011)

CIVIL RIGHTS

- **MALICIOUS PROSECUTION**

Robinson v. Jordan, 2011 U.S. Dist. LEXIS 34387 (D.N.J. 2011)

A civil rights case against police for arrest and malicious prosecution survived a motion for summary judgment. (7/2011)

CIVIL RIGHTS

- **IMMUNITY**

Badalamente v. Monmouth County Prosecutor's Office 2011 U.S. Dist. LEXIS 53457(D.N.J. 2011)

A *pro se* complaint arising out of an arrest and indictment for insurance fraud was dismissed on immunity and other grounds. (7/2011)

CIVIL RIGHTS

- **IMMUNITY**

Jefferson v. Medford, U.S.D.C. N.J. Docket No. 08-cv-6269 (NLH) (KMW), December, 16, 2010, Hillman, D.J.

In this case alleging police brutality as a predicate for a claim under 42 *U.S.C.* §1983, the District Judge granted summary judgment for the Medford Police Department because it is merely an administrative agency of the Township of Medford. It also granted summary judgment to the Township and the Police Chief on the count alleging a failure to supervise. That count rested only upon allegations that (a) two officers had fabricated the events surrounding the alleged unlawful arrest and the police chief had done nothing about it; and (b) in 26 years no police officer had been disciplined for use of excessive force. However, the complaint against one of the police officers survived the motion for summary judgment. Based upon the facts presented by the plaintiff, and putting them in the most favorable light, the court found that an excessive force claim in violation of the Fourth Amendment could be sustained against that officer and the court did not have enough facts to determine whether qualified immunity applied. As to the other officer involved, the court dismissed the complaint without prejudice to the filing of an amended complaint asserting more specific facts. Counts based on the Fifth, Eighth and Fourteenth Amendments were also summarily dismissed. The New Jersey Civil Rights Act claims against all but the one officer who remained subject to the excessive force claim were dismissed because the court found that the rules of law to be applied under the New Jersey Civil Rights Act were the same as those applied under Section 1983. There is no per quod claim allowed under either the Federal or the State acts. (4/2011)

CIVIL RIGHTS

- **IMMUNITY**

Kreimer v. City of Newark, 2011 U.S.Dist.LEXIS 35451 (D.N.J. 2011)

A homeless man was approached by a police officer in Penn Station, Newark and was told that he was violating a Newark ordinance and ordered to leave the station. He was not given a citation for violation. The Newark ordinance cited by the officer was unconstitutional under *State v. Crawley, 90 N.J. 241 (1982)* but it remained on the books. The officer was immune because he did not know of the unconstitutionality of the ordinance. (7/2011)

CIVIL RIGHTS

- **IMMUNITY**

Palmerini v. Burgos, 2011 U.S. Dist. LEXIS 90539 (D.N.J. 2011)

A civil rights complaint was dismissed on summary judgment in favor of the Middlesex County Prosecutor. Allegations were that the Prosecutor prosecuted the plaintiff but refused to prosecute her ex-fiancé for filing false police reports. (10/2011)

CIVIL RIGHTS

- **FIRST AMENDMENT**

Herrman v. City of Hackensack, 2011 U.S. Dist. LEXIS 27014 (D.N.J. 2011)

Most civil rights claims were dismissed as time barred or otherwise on summary judgment. The First Amendment claims involving extortion in connection with PBA elections and other elections survived. (7/2011)

CIVIL RIGHTS

- **FAIR HOUSING ACT**

Mount Holly Gardens Citizens in Action, Inc. v. Mount Holly, 658 F.3rd 375 (3rd Cir. 2011)

The evidence submitted by residents of Mount Holly was sufficient to establish a *prima facie* case of housing discrimination under 42 *U.S.C.* §3604 of the federal Fair Housing Act. Mount Holly had an area of the community in which a great proportion of its African American and Hispanic residents lived. Conditions of blight existed, the area was declared an "area in need of redevelopment" and a redevelopment plan was created. The designation and the plan were affirmed by the State courts. The redevelopment plan implementation was begun and residents were being moved out. The Third Circuit, in reversing a summary judgment, held that the district court, under the Fair Housing Act, should have looked to see whether the African American and Hispanic residents were being disproportionally affected by the redevelopment plan. A facially disparate treatment did not need to be shown. (10/2011)

CIVIL RIGHTS

- **EXCESSIVE FORCE**

Mota v. City of Bayonne (Unpub. App. Div., Nov. 16, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a5118-08.opn.html

This was an appeal of a summary dismissal of an excessive force claim under 42 *U.S.C.* §1983. The dismissal was upheld as to one of the plaintiffs, Eliezer Mota, Sr., but reversed as to his son, Eliezer Mota, Jr. Responding to a 911 "hang up" noise complaint call from a second floor residence in the City of Bayonne, police officers entered a first floor residence at the premises. Officer Lynch was alleged to have assaulted Mr. Mota, Jr., resulting in significant injury. The Motas were convicted in municipal court of a down-graded noise ordinance violation and stipulated that the officers had been legitimately on the premises and that the defendants' conduct had given rise to probable cause which resulted in their arrest. In the subsequent Section 1983 suit, the defendants moved for summary judgment on the basis of the municipal court stipulation. The Appellate Division affirmed the dismissal of Mr. Mota, Sr.'s claim because there was no evidence that he had been subjected to excessive force. As to Mr. Mota, Jr. however, his Section 1983 excessive force claim would be barred only if a verdict in the Section 1983 case

would imply the invalidity of his municipal court conviction. If his allegations of excessive force were proven, they would not expressly or impliedly invalidate his conviction of a noise ordinance violation. *Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed.2d 383 (1994)* was distinguished because, in that case, the municipal court conviction involved resisting arrest so the excessive force claim would have impliedly invalidated the conviction. (1/2011)

CIVIL RIGHTS

- **EXCESSIVE FORCE**

Malik v. Hannah, 2011 U.S. Dist. LEXIS 69564 (D.N.J. 2011)

In a civil rights case under 42 *U.S.C.* §1983, Camden failed to provide any responsive papers to a statement of undisputed facts. Therefore accepting as true all of the plaintiff's undisputed facts, the court found that his civil rights had been violated by an unwarranted search and that Camden itself was liable because it had a pattern of looking the other way on civil rights violations. (10/2011)

CIVIL RIGHTS

- **EXCESSIVE FORCE**

Bethune v. County of Cape May, 2011 U.S. Dist. LEXIS 55272 (D.N.J. 2011)

An excessive force claim survived a motion for summary judgment. (7/2011)

CIVIL RIGHTS

- **EXCESSIVE FORCE**

Brenner v. Township of Moorestown, 2011 U.S. Dist. LEXIS 52760 (D.N.J. 2011)

All claims except the one for excessive use of force were dismissed on summary judgment. A question of immunity remains to be decided. (7/2011)

CIVIL RIGHTS

- **EXCESSIVE FORCE**

Hare v. Woodhead, 2011 U.S. Dist. LEXIS 50224 (D.N.J. 2011)

All claims except the one for excessive force against two police officers were dismissed on summary judgment. (7/2011)

CIVIL RIGHTS

- **EXCESSIVE FORCE**

Graham v. Carini, 2011 U.S. Dist. LEXIS 46759 (D.N.J. 2011)

An excessive force claim survived a motion for summary judgment because there was evidence proffered that the police officers were, at a minimum, callously indifferent to the plaintiff's Fourth Amendment rights. (7/2011)

CIVIL RIGHTS

- **EXCESSIVE FORCE**

Johnson v. Manchester Township, 2011 U.S. Dist. LEXIS 99985 (D.N.J. 2011)

There was no Fourth Amendment "seizure" by the use of deadly force when an officer's weapon accidentally discharged in the presence of the plaintiff. Negligence does not "shock the conscience" which is the predicate for a due process claim. A failure to train claim against the municipality was dismissed because there was no constitutional violation. Under the circumstances the court refused to take jurisdiction over state claims. (10/2011)

CIVIL RIGHTS

- **EXCESSIVE FORCE**

DeMatos v. Township of Edison 2011 U.S. Dist. LEXIS 89993 (D.N.J. 2011)

A motion to dismiss for failure to state a claim against police officers was denied. The conviction of the plaintiff for either resisting arrest or for simple assault does not automatically preclude an excessive force claim under 42 *U.S.C.* §1983. (10/2011)

CIVIL RIGHTS

- **EXCESSIVE FORCE**

Doss v. Osty, 2011 U.S. Dist. LEXIS 68824 (D.N.J. 2011)

Excessive force claims against police officers arising out of the shooting of the plaintiff and handcuffing him survived a motion to dismiss. All other claims were dismissed. (10/2011)

CIVIL RIGHTS

- **EQUAL PROTECTION; DUE PROCESS**

D.O v. Borden, 2011 U.S. Dist. LEXIS 35443 (D.N.J. 2011)

Two Attorneys General of New Jersey (Peter Harvey and Anne Milgram) issued a directive advising local police to make "station house adjustments" for juveniles arrested for minor offences. The police chief of Haddonfield issued a directive to his department directing his officers not to make "station house adjustments" to minors charged with alcohol or drug offenses. The federal court found that the plaintiffs had asserted plausible claims of violation of

equal protection and due process with respect to the actions of the police chief, so the court denied summary judgment. The court granted summary judgment on plaintiffs' Fourth Amendment claims. (7/2011)

CIVIL RIGHTS

- **DUE PROCESS; NEW JERSEY CIVIL RIGHTS ACT**

Massey v. City of Atlantic City (Unpub. App. Div., March 31, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3818-09.opn.html
A candidate for City Council in Atlantic City alleged that city through municipal officials conspired to scuttle his campaign by causing sanitation workers to take down his campaign signs. There was no question that the city's Director of Public Works had directed the workers to take down plaintiff's signs on public property. The other defendants denied that they had done so and the city claimed that it was not vicariously liable for the misdeeds of its director. As the result of many procedural errors the matter got to a bench trial that was sharply delimited by interlocutory orders. The case was dismissed by the trial court. The Appellate Division reversed, finding that the trial court had not adequately addressed allegations as to violations of the New Jersey Civil Rights Act of 2004 (NJCRA), *N.J.S.A.* 10:6-1 to -2 and federal constitutional violations. The court specifically said that it was not addressing the issue of whether a city may be held derivatively liable under NJCRA for the misdeeds of one of its employees, noting that under *Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978)* there is no such federal liability under 42 *U.S.C.* §1983. (7/2011)

CIVIL RIGHTS

- **DISABILITY DISCRIMINATION**

Ashton v. Gloucester Twp (Unpub. App. Div., Jan 24, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1357-09.opn.html
The court upheld the determination of the Director of the New Jersey Division on Civil Rights, that Gloucester Township Police Department had not violated the New Jersey Law Against Discrimination (LAD) (*N.J.S.A.* 10:5-1 *et seq*.) when, in the course of an arrest in the middle of the night, it failed to provide a deaf plaintiff with an American Sign Language (ASL) interpreter and a teletypewriter (TTY) machine to place an outside call. As to the claim of denial of the TTY telephone the Director found no reasonable suspicion of discrimination because, whether or not plaintiff had a hearing impairment, he was so unruly that he could not be safely released from the restraints to use any phone device. Even a person without a hearing impairment would have been denied the use of a phone under those circumstances. The Director also found insufficient evidence to support the allegation that any member of respondent's staff had subjected plaintiff to bias-based comments or gestures or otherwise harassed or discriminated against him based on his disability. Lastly, as to the claim of being deprived of an ASL interpreter, the Director determined that under the circumstances, the use of sign language, lip reading, speech and

written notes were sufficient to ensure effective communication during the arrest and booking process, at which no interrogation occurred. (4/2011)

CIVIL RIGHTS

- **ATTORNEYS FEES**

Jones v. Hayman, 418 N.J. Super. 291 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3173-09.opn.html
Female prisoners were transferred from the all-female Edna Mahan Correctional Facility to the all-male State Prison because of limited capacity in the female prison. They claimed unconstitutional and discriminatory violations of law, and secured a preliminary injunction against the transfer of any more female prisoners to the State Prison. While the litigation was pending, the women were transferred back to Edna Mahan. The State and the Department of Corrections asserted that the transfer back to Edna Mahan had been unrelated to the litigation and had occurred only because capacity had become available. As a result, the court dismissed the complaint as moot. Plaintiffs then sought counsel fees claiming that, as the catalyst for change, they were the prevailing parties under the New Jersey Law Against Discrimination *N.J.S.A.* 10:5-1 (NJLAD) and the New Jersey Civil Rights Act, *N.J.S.A.* 10:6-1. The Appellate Division reviewed the "catalyst theory" adopted in *Mason v. City of Hoboken, 196 N.J. 51, 70-79 (2008)*, and more recently explained in *D. Russo, Inc. v. Township of Union, 417 N.J. Super. 384 (App. Div. 2010)*. Under the "catalyst theory" a party in an action brought under a fee-shifting statute, such as NJLAD or the Civil Rights Act, is entitled to recover such fees if the suit achieves the desired result by bringing about a voluntary change in the defendant's conduct. Under *Mason*, the applicant for counsel fees as a catalyst must show (1) that there was a factual causal nexus between the litigation and the relief ultimately achieved; and (2) that the relief ultimately secured by plaintiff had a basis in law. On the "factual causal nexus" prong, the court here went beyond *Mason* and held that the burden of proving no causal nexus became the defendants' once the plaintiff had shown that the extent and timing of the interim relief obtained by them strongly suggested a causal link between their suit and the State's actions in returning the women to Edna Mahan. Further, the second, "basis in law" prong is to be construed in a way that promotes the public policy underpinning fee-shifting statutes: to afford "access to the judicial process to persons who have little or no money with which to hire a lawyer by providing an incentive to lawyers to undertake litigation," [citing case] and to ensure that plaintiffs who have *bona fide* claims can attract competent counsel in cases involving statutory rights. (4/2011)

CIVIL RIGHTS

- **ATTORNEYS FEES**

D. Russo Inc. v. Township of Union, 417 N.J. Super. 384 (App. Div. 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a0763-09.opn.html
Plaintiff brought suit against Union Township challenging its ordinance regulating sexually oriented businesses. A preliminary injunction was issued against enforcement of the ordinance. The ordinance was amended twice to be less offensive and, ultimately, was repealed. The Appellate Division held that under the New Jersey Civil Rights Act, *N.J.S.A.* 10:6-2(f), plaintiff could be a prevailing party because it was a catalyst for change. While the catalyst theory was first applied by the Supreme Court in *Mason v. Hoboken, 196 N.J. 51 (2008)* to an action under the Open Public Records Act (OPRA) *N.J.S.A.* 47:1A-1 to 13, this court held that the same principles apply to an action brought under the New Jersey Civil Rights Act, *N.J.S.A.*10:6-1 *et seq*. In addition, the court found that there was no difference on the catalyst issue between cases brought under the Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq*.—as applied to a fee award in *Warrington v. Village Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000)*—and those brought under the New Jersey Civil Rights Act. The court also distinguished—as *Mason* and *Warrington* had—the decision of the United States Supreme Court in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)*, which had rejected the catalyst theory under sections of the Fair Housing Amendments Act of 1988, 42 *U.S.C.* §3613(c) (2) and the Americans with Disability Act, 42 *U.S.C.* §12205. *Buckhannon* had been relied upon here by the trial court. In addition, the court pointed out that *Buckhannon* had also been distinguished in the federal courts in cases, like this one, in which a preliminary injunction had been issued. In those cases, attorney's fees for services rendered up to the issuance of the injunction had been allowed. So, if the trial court on remand were to find that the plaintiff had not been a catalyst for the change by Union of its policies, the court was directed to consider counsel fees up to the date of the preliminary injunction. (4/2011)

CIVIL RIGHTS

- **ATTORNEYS FEES**

Dinizo v. Scotch Plains, 2011 U.S. App. LEXIS 6684 (3rd Cir. 2011)
Plaintiff got a $1,500 award in a federal employment discrimination case. The trial court subsequently awarded his counsel $141,900 in counsel fees based upon a lodestar amount reduced by 55% to account for the limited success. The Third Circuit Court of Appeals said that the award was at the high end of what is permissible, but could not say that the court abused its discretion. Accordingly it affirmed the award. (7/2011)

CONSTITUTIONAL LAW

CONSTITUTIONAL LAW

- **RECALL**

The Committee to Recall Robert Menendez v. Wells, 204 N.J. 79 (2010)

http://lawlibrary.rutgers.edu/courts/supreme/a-86-09.opn.html

The New Jersey Supreme Court analyzed the United States Constitution and ruled, in a 4-2 decision, that a United States Senator cannot be recalled under state law. The court determined unconstitutional those portions of Article I, Paragraph 2 of the New Jersey Constitution (which was added in 1993 after a referendum) and implementing legislation, the Uniform Recall Election Law (*N.J.S.A.* 19:27A-1 *et seq*.), which authorize recall of a United States Senator. Pursuant to the Uniform Recall Election Law, a notice of intention was filed with the New Jersey Secretary of State, by a committee seeking to recall United State Senator Robert Menendez. The Secretary of State rejected the notice. The Appellate Division, however, ordered the Secretary of State to accept the notice for filing in deference to the New Jersey Constitution and because the federal constitutional issues were not ripe. [The Appellate Division case in this matter was previously abstracted in at 33 Local Government Law Review 76 (April, 2010)]. A petition for certification by Senator Menendez was granted by the Supreme Court.

On the issue of ripeness the Supreme Court concluded that, without a determination on the federal constitutional issues, the recall process could not proceed and therefore the issue was ripe for determination. It acknowledged that courts are to avoid constitutional issues when possible, but determined there was no other appropriate way to resolve the matter.

Thereafter, following the framework for addressing such constitutional questions established by the United States Supreme Court, the court examined the text of the Federal Constitution, relevant historical materials, and the principles of our nation's democratic system. Article I, Section 3, clause 1 of the United States Constitution provides that the term of a United States Senator is 6 years. That clause is subject only to the provisions of Article 1, Section 5 clause 2 which empowers Congress to expel a member by 2/3 vote. The Supremacy Clause [Article IV, clause 2] makes the Constitution supreme, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." In a detailed review of the history of the drafting and ratification of the United States Constitution the court determined that the historical record led to but one conclusion: a recall provision for Senators had been proposed and rejected in 1787-1789.

The Seventeenth Amendment did not change the result. The original Article I, Section 3, clause 1 provided for election of Senators from each state by the "legislature thereof." The Seventeenth Amendment substituted the "people thereof" for the "legislature thereof." The court examined

the history of that provision and found that it was not intended to allow a state recall. Further, the court found that, were each state to determine recall of federal elected officials there could be a patchwork of inconsistent rules. The court noted that this finding was consistent with the views of nine United States Supreme Court justices who made those same observations, in *dicta*, in *U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)*, even as they divided 5-4 over the primary issue in that case.

The court further rejected the reliance of the recall proponents on the Tenth Amendment. (1/2011)

CONSTITUTIONAL LAW

- **FREE SPEECH; CONFLICT OF INTEREST**

Nevada Commission on Ethics v. Carrigan, ___U.S.___, 131 S.Ct. 2343, 180 L.Ed.2d 150 (2011)

http://laws.findlaw.com/us/000/10-568.html

The Nevada Commission on Ethics censured a city council member for violating Nevada's Ethics in Government Law, *Nev. Rev.Stat §281A.420(2) (2007)*. As an elected official he had voted to approve a hotel/casino project proposed by a company that used the council member's long-time friend and campaign manager as a paid consultant. The law required recusal of the elected official on "a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by," *inter alia*, "[h]is commitment in a private capacity to the interest of others." The Supreme Court of the United States held that this statute was not unconstitutionally broad and did not violate the council member's First Amendment rights to freedom of speech. Restrictions on legislators' voting are not restrictions on their protected speech.

Justice Alito, concurring, would have found that the votes of legislators are speech but that recusal restrictions are not impermissible restrictions because they were common at the time of the founders. (7/2011)

CONSTITUTIONAL LAW

- **EDUCATION AID**

Village of Loch Arbour v. Township of Ocean (Unpub. App. Div., July 13, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3136-09.opn.html

The Village of Loch Arbour was incorporated in 1958. Rather than being identified as a separate school district (as other municipalities are), *N.J.S.A.* 18:5-1.1 provides that an incorporated village remains part of the district in which it was situated at the time of incorporation – in this case Ocean Township School District (OTSD). In 1999, in the Kiely Bill (*N.J.S.A.* 18A:8-1.1), the legislature carved out an exception from the school funding formula for all incorporated

villages that remained part of another school district. Loch Arbour was the only one in the State, so its school contribution to OTSD was capped at $300,000. As a result, the village's school tax rate was well below the state average and disproportionately low compared to the rest of the township.

In January 2008, the Legislature enacted the School Funding Reform Act of 2008 (SFRA), *N.J.S.A.* 18A:7F-43 to -63, a comprehensive revision of the state's school funding formula. In so doing, the SFRA repealed certain legislative enactments related to the prior funding formula, including the Kiely Bill. The court rejected all challenges by Loch Arbour to the SFRA repeal legislation. It found that the SFRA was clearly not special legislation, because it established an equitable statewide funding formula and mandated that all municipalities — including the one incorporated village — contribute to the tax levy in an equitable and predictable way. Loch Arbour also claimed that the Kiely Bill had formalized an agreement between the township and the village and that therefore the SFRA impaired that contract. The court could find no contract and said that, in any event, the Legislature had full power to repeal the Kiely bill. Finally, because the SFRA would result in a 447 percent increase in Loch Arbour, the village asserted an unconstitutional taking. The court rejected that with limited discussion.

The court refused to decide whether the OTSD was a consolidated district – as OTSD said- or a regional district-as the village argued—because that was a matter for the Commissioner of Education. (10/2011)

CONSTITUTIONALITY

- **SEXUALLY ORIENTED BUSINESSES**

Sayreville v. 35 Club, L.L.C., 416 N.J. Super. 315 (App. Div. 2010)

Sayreville is attempting to shut down and prohibit Club 35, a sexually oriented business featuring live nude erotic dancing, under *N.J.S.A.* 2C:34-7 and its own licensing ordinance. The trial court, after a six day trial permanently enjoined the operation of the business at that location and ordered that a perpetual deed restriction be recorded in the County Clerk's Office. Club 35 asserted an as-applied challenge to the constitutionality of *N.J.S.A.* 2C:34-7. In such an as-applied challenge the court needs to consider and apply the factors enumerated in the Supreme Court's decision in *Township of Saddle Brook v. A.B. Family Center, Inc., 156 N.J. 587 (1999).* Under that case one of the issues is whether the statute "allows adequate alternative channels of communication within the relevant market area." The trial court accepted the testimony of the borough's expert that a portion of Staten Island in New York was a part of the relevant market area for determining compliance with the Saddle Brook factors. The Appellate Division held, as a matter of law, that out of state areas could not be considered in this determination. The conclusion was based upon language of Justice Blackmun in a concurring opinion in *Schad v. Mount Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed. 2d 671 (1981),* one of the seminal Supreme Court decisions on this issue. The deed restriction imposed the trial court decision was

struck down by the Appellate Division. The court also refused to find any error in the trial court's refusal to consider the internet as an alternative channel of communication for the live nude dancing. Judge Skillman concurred, in part and dissented, in part, reading Justice Blackmun's opinion differently from the majority. Because of the dissent, the case is now in the Supreme Court on an appeal-as-of right. (4/2011). **[*Editor's update: as of November 11, 2011, the appeal was still pending.*]**

CONTRACTS

CONTRACTS

- **PROCEDURAL DUE PROCESS**

Fariello Bus Service, LLC v. Old Bridge Bd. of Ed., 2011 U.S. Dist. LEXIS 65498 (D.N.J. 2011)

A federal case arising out of the rejection of a contractor's bid for school bus services was dismissed. The New Jersey Public School Contracts Law does not create a bidder's "property interest," existing before the acceptance of the bid that would trigger protection of the Due Process Clause of the 14th Amendment to the United States Constitution. (10/2011)

DEANNEXATION

DEANNEXATION

Citizens for Strathmere & Whale Beach v. Township of Upper, Law Div., Atlantic, CPM-L-432-09, October 25, 2010, Armstrong, A.J.S.C.

Strathmere and Whale Beach (collectively "Strathmere") is a 407.5 acre residential community on a portion of Ludlam Island, a Cape May County coastal barrier island. It is part of Upper Township, but to get to Strathmere from the rest of Upper Township, one must travel through at least one other municipality. It contains only 2.42% of the total area of Upper Township, but it has 17.5% of the total tax ratable base. A non-profit community organization, comprised of resident and property owners of Strathmere, sought to deannex Strathmere and Whale Beach from Upper Township in order to annex it to Sea Isle City. They gathered the requisite number of signatures and filed a petition to that end pursuant to *N.J.S.A.* 40A:7-12. The township committee referred the petition to the planning board for the purpose of providing an advisory report as to the impact of the proposed deannexation on the township. The board held a total of 17 hearings, at the conclusion of which it adopted an 80-page report recommending that the township committee deny the petition. The board found that Strathmere's residents would get a 40-50% decrease in their property taxes but would receive twice-weekly instead of once-weekly garbage pick-up, and would be serviced by a local police force instead of the State police. The board also found that although the deannexation would save the township approximately $400,000 annually in beach protection and other services currently being provided to Strathmere, property taxes in Upper Township would likely increase by approximately 19.7 cents per $100 of assessed value, the township's bonding capacity would be reduced from $71 million to $58.7 million, Upper Township would cease to have a beachfront community, and the township's residents would lose access to Strathmere's free beaches, free parking adjacent to the beach, free boat ramp, and the ability for their children to participate in Strathmere's Junior Lifeguard Program. The board concluded that the plaintiff had failed to satisfy its burden of proof under the statute and recommended that the petition be denied. The township committee agreed and denied the petition. Under the annexation statute, the burden is on the petitioner to prove that the refusal to consent to annexation will be detrimental to the economic and social well-being of a majority of the residents of the affected land and that the annexation will not cause a significant injury to the well-being of the municipality in which the land is located. The trial court found that both the board's findings and recommendations and the township committee's ultimate decision were amply supported by the evidence in the record and could not be considered arbitrary, capricious or unreasonable. The opinion contains a thorough discussion of the underlying policies of the annexation statute, the procedures to be followed by a board and/or governing body in evaluating a petition for deannexation or annexation, the standard of review, and the applicable case law. (1/2011)

EDUCATION

EDUCATION

- **STANDING OF MAYOR**

Borough of Victory Gardens v. State of New Jersey (Unpub. App. Div., Jan 28, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a6255-08.opn.html
Both the municipality and its mayor lacked standing to challenge the formula utilized by the Commissioner of Education to apportion the tax levy between two boards of education which had just merged. The mayor did, however, have standing in her individual capacity but the court rejected her claims because she had failed to exhaust administrative remedies. (4/2011)

EDUCATION

- **FISCAL MONITOR**

Pleasantville Board of Education v. N.J. Department of Education (Unpub. App. Div., Jan 13, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1011-09.opn.html
In what the Appellate Division succinctly described as a case of "too little too late", it denied an eleventh hour petition by the Pleasantville Board of Education challenging the decision of Commissioner of Education Davy to appoint a fiscal monitor to the Board under the School District Fiscal Accountability Act. Since March 26, 2007 the Commissioner had appointed fiscal monitors to the Pleasantville Board and advised the Board that a new fiscal monitor would begin on October 1, 2009. On September 30, 2009, the day before the effective date of the appointment, Pleasantville filed a petition for a stay, but with no accompanying brief in support of emergent relief. In dismissing the petition, the Commissioner relied upon the criteria in *Crowe v. DeGioia, 90 N.J. 126 (1982)* that the district would suffer no irreparable harm and that there had been no demonstration of likelihood of success on the merits. On appeal by the board, the Appellate Division affirmed the denial of the stay and the appointment of the fiscal monitor. It found that the statutory criteria justifying a monitor continued to be present. Contrary to the Board's contention that no plan had been prepared by the monitor, the court found that the Commissioner had satisfactorily required the monitor to develop and implement a plan within forty-five days, if not already developed. Finally, it held that the $600.00 per day compensation for a fiscal monitor did not constitute irreparable harm because it involved only the payment of monies. (4/2011)

ELECTION

ELECTION

- **PLACEMENT ON BALLOT**

Del Vecchio v. Randall, Bergen County Clerk, Law Div, Bergen, BER-L-3691-11, April 29, 2011, De La Cruz, J.S.C.

The County Clerk was justified in placing the candidates who filed a joint petition for County freeholder seats in the first column on the ballot for a primary election. There was no need for a drawing for that position. Thereafter, the clerk did not act unreasonably in placing the Senate candidate who was running with the same slogan as the freeholders in the first column, even though the name of another candidate had been the first one drawn in the required drawing for the Senate position. (7/2011)

ELECTIONS

- **TIME BAR**

King v. Lopez (Unpub. App. Div., Dec.8, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a2514-09.opn.html

James King, who placed second, challenged the election of Nidia Lopez as a Ward C councilperson in Jersey on the grounds that Lopez was not registered to vote in New Jersey and had not been a resident of Ward C in Jersey City at the time of the election. The challenge was not filed within 30 days of the disputed election. King sought an extension of time under *N.J.S.A.* 19:29-3 because, he claimed, he discovered the information needed to file the complaint only when the final campaign finance report had been filed by Lopez. However, the Appellate Division found that the information contained in the campaign finance report did not prove that Lopez was not a resident of Ward C, as he claimed, and that, therefore, the extension of time was not warranted. (1/2011)

EMINENT DOMAIN

EMINENT DOMAIN

- **VALUATION; TRIAL OBJECTIONS**

City of Asbury Park v. Jersey Urban Renewal, LLC (Unpub. App. Div., Oct. 1, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a0677-09.opn.html
The court rejected three challenges by the Asbury Park, the condemning authority, to a jury award in this eminent domain, valuation only case. First, the court found that it was not an abuse of the trial court's discretion to bar Asbury Park's expert from giving testimony about data never supplied in the subject case, even if it had been supplied in a previous matter between the same attorneys. It was also not error to bar testimony by the expert at the commissioner's hearing, because the Eminent Domain Law (*N.J.S.A.* 20:3-1 *et seq*.), provides for a *de novo* jury trial, as if no administrative action had taken place. Further, the trial court did not abuse its broad discretion in determining the allowable testimony of property owner's expert. Finally, the jury award as to value was upheld because there was ample evidence to support the verdict and the value was neither wide of the mark nor pervaded by a sense of wrongness. (1/2011)

EMINENT DOMAIN

- **VALUATION**

City of Long Branch v. Angelides (Unpub. App. Div., Nov. 18, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a6088-08.opn.html
The Appellate Division affirmed a jury award in a condemnation of property in a Long Branch redevelopment area. The property owners did not contest the right of municipality to condemn, so the condemnation commissioner's hearing and a subsequent jury trial proceeded on the issue of valuation only. At the trial level, both the municipality and the property owner provided testimony from expert appraisers. There were disagreements as to the quality of the surrounding neighborhood and its effect on value. Long Branch objected to several methods of computation used by the property owner's expert. Contracts of sale at the time of valuation, comparable sales after the time of valuation, information about other types of residences, and non-arms length transactions, were all admitted into evidence because there was ample opportunity for cross-examination, the parties cross-examined extensively and the jury was free to reject the testimony of experts. The Appellate Division found that none of this was reversible error.

Additionally, Long Branch complained that comments by property owner's counsel were made to the jury about ongoing litigation involving the redevelopment zone. In addition the property owner's counsel called the surrounding area "blighted". The court concluded that those comments were not outrageous or prejudicial enough to qualify for a new trial. (1/2011)

EMINENT DOMAIN

- **VALUATION**

State by the Commissioner of Transportation v. 200 Route 17, L.L.C., 421 N.J. Super. 168 (App. Div. 2011)

In a condemnation matter, the property owner is entitled to compensation for land and improvements in their present condition. The property owner was also entitled to seek compensation for potential future renovations to improve the property for its highest and best use, discounted by the value of the risks and cost of making such improvements. The reasonable probability of such future renovations is to be determined by the trier of fact. (10/2011)

EMINENT DOMAIN

- **SETTLEMENT**

City of Asbury Park v. Estate of Pasquale N. Vaccaro (Unpub. App. Div., May 6, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a6233-09.opn.html

An attorney for the City of Asbury Park made an offer to a property owner's attorney in a condemnation case that would have settled the case. The terms included the payment of $650,000. The funds were to be provided by the designated redeveloper. The city attorney later stated the offer was a mistake explaining that the decision-making structure of the redeveloper had changed and that only $25,000 was being offered. The deal also included other provisions. The Appellate Division applied *Conduit & Foundation Corp. v. City of Atlantic City, 2 N.J. Super. 433 (Ch. Div. 1949)* to deny a motion to enforce the settlement summarily when material facts about the settlement remained in dispute. (10/2011)

EMINENT DOMAIN

- **LEASEHOLD**

Town of Kearny v. Discount City of Old Bridge, 205 N.J. 386 (2011)

http://lawlibrary.rutgers.edu/courts/supreme/a-76-09.opn.html

Discount City of Old Bridge (Discount) was a tenant of property in the Town of Kearny (Kearny). Kearny designated the property as an "area in need of redevelopment" and named the fee owner of the property as the designated redeveloper, all pursuant to the Local Redevelopment and Housing Law (LRHL), *N.J.S.A.* 40A:12A-1 *et seq*. The fee owner, as the designated redeveloper, offered $250,000 for relocation, but there were no "*bona fide* negotiations" about the value of the leasehold because the fee owner/redeveloper relied on a provision in the lease which caused the lease to terminate in the event the fee owner's interest in the land was being condemned. Kearney then sought to take the leasehold interest only, not the fee, in a condemnation proceeding. The Supreme Court, following its recent case of *Iron Mountain Information Management, Inc. v. City of Newark, 202 N.J. 74 (2010)*, held that the lessee (as one who was not the record owner) was not entitled to individualized notice of the "blight"

proceedings under *N.J.S.A.* 40A:12A-6(b) (3) and therefore could not wait until the condemnation proceeding in order to challenge the blight declaration. However, because in this case, the leasehold was a separately condemnable interest and the fee was not being taken, Kearny was obligated to engage in *bona fide* negotiations with the tenant Discount. It did not do so and, therefore, the Supreme Court ordered dismissal of the condemnation complaint. The court refused to construe the "termination on condemnation" clause of the lease to be applicable in this case, in which the fee was not being condemned. (7/2011)

EMINENT DOMAIN

- **INVERSE CONDEMNATION**

Penn Auto Sales of Route 21, Inc. v. State of New Jersey, Dept. of Transportation (Unpub. App. Div., Mar. 1, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a2860-09.opn.html

A car dealer claimed losses against NJDOT arising out of prolonged construction work on Route 21. The complaint alleged negligence, tortious interference with contractual rights and due process violations. It did not allege inverse condemnation. NJDOT failed to respond to discovery requests and its answer was stricken. The trial court awarded damages to the dealer on a limited proof hearing as if the complaint were one for inverse condemnation. The Appellate Division reversed. The trial court erred, it said, because no findings as to liability were made. Rather, the trial court proceeded immediately to a summary damage hearing. Even though the State could not present affirmative proofs in its defense, it retained the right to cross-examination of the dealer's witnesses and to argue that the dealer had not proven liability or damages. (4/2011)

EMINENT DOMAIN

- **INVERSE CONDEMNATION**

Smith v. Jersey Central Power & Light Company, 421 N.J. Super. 374 (App. Div. 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a2801-08.opn.html

Homeowners filed suit against their power company seeking monetary and other damages and a finding of inverse condemnation. Their problems were caused by "stray voltage" on the property as a result of the nearby electrical substation. This stray voltage interfered with their use of their backyard, swings and swimming pool. The homeowners prevailed before a jury on a nuisance claim but their inverse condemnation claim was dismissed. The Supreme Court upheld lower court determinations that the verdict on the nuisance claim did not provide a sufficient factual predicate for the inverse condemnation claim. In particular, permanent interference with use of the property is not needed to support a nuisance claim, but such a finding is required in inverse condemnation. (10/2011)

EMINENT DOMAIN

- **INTEREST**

Piscataway Township v. South Washington Ave, LLC (Unpub. App. Div., August 23, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a0356-10.opn.html

In the long-running attempt by Piscataway to acquire the Halper Farm, the issue is now the amount of interest payable. The condemnation complaint was filed on December 10, 1999. The declaration of taking was filed on September 3, 2004, along with a deposit of $4,326,000, the Township's appraisal value of the farm. The defendants remained in possession of the property until June 2006. During the proceedings the court agreed with defendants that the date of taking should be fixed at September 2004 rather than in December 1999. A jury – so charged -- determined that the farm was worth $17,955,000 as of September 4, 2004. The trial court awarded compound interest at the prime rate from September 4, 2004. This ruling was made in spite of the language of *N.J.S.A.* 20:3-31 which, as a general rule, requires interest from the "commencement of the action" with credits taken for the value of use and occupancy until possession is actually taken. Defendants argued that interest should be calculated from December, 1999 – the date of commencement of the action -- a position rejected by the trial court. Under settled law, the amount of interest awarded is to be sufficient to ensure that the condemnee is placed in as good a position pecuniarily as he would have been in had payment not been delayed. A flexible approach is required in making this judgment. Here the success of defendants in getting a later valuation date meant that they did not need to be indemnified for Piscataway's delayed payment between 1999 and 2004. During that period defendants had continued to occupy the property and to realize profits from its use. The Appellate Division affirmed the trial court conclusion that interest would start to run from September 2004. However, the Court remanded the matter to the trial court because there had been no reasons given for using the prime rate or for compounding interest. In addition, the trial court judgment was technically not final because issues remained as to the amount of the environmental escrow needed under *Housing Authority of the City of New Brunswick v. Suydam Investors, L.L.C., 177 N.J. 2 (2003)*. The interest could not be reduced to a fixed amount until those issues had been resolved. (10/2011)

EMINENT DOMAIN

- **BROKER COMMISSION; INTERVENTION**

City of Jersey City v. Liberty Storage, LLC (Unpub. App. Div., Jan 20,2011)
http://lawlibrary.rutgers.edu/courts/appellate/a4111-09.opn.html

Impact Realty appealed from the denial of its motion to intervene in a condemnation action brought by the City of Jersey City against the numerous defendants. Impact is a real estate broker who claimed that it had worked diligently to secure a purchase of some of the properties being condemned. The court determined that the pending eminent domain action concerned only one issue -- a just compensation for the property. Impact's intervention would delay the proceeding

because it would require litigation of unrelated matters. Therefore, the Appellate Division affirmed the trial court's denial of Impact's motion to intervene. (4/2011)

EMINENT DOMAIN

- ***BONA FIDE* NEGOTIATIONS**

New Jersey Transit Corporation v. Hartz Mountain Development Corporation (Unpub. App. Div., Dec. 7, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a3086-09.opn.html

New Jersey Transit (NJT) was granted the authority to condemn three permanent and two temporary construction easements on a portion of property owned by Hartz Mountain. Hartz challenged the taking of one of the temporary construction easements asserting that NJT had not engaged in *bona fide* negotiations because it failed to disclose that it planned to place contaminated fill on the Hartz property. NJT had sent Hartz an offer letter to purchase the property at the appraised value of $68,150.00, which it said did not include an additional $17,000 that NJT estimated it would incur in the remediation of soil contamination located within the subject easements. NJT also sent Hartz an environmental report that indicated that soils regulated by the New Jersey Department of Environmental Protection would be used as fill and that those 'excess soils' that could not be reused on site would be disposed of or recycled elsewhere. The Appellate Division found that a sophisticated and experienced entity such as Hartz had sufficient notice of NJT's plans for the project because the environmental report expressly referred to 'regulated' soils and a soil reuse plan. (1/2011)

EMINENT DOMAIN

- ***BONA FIDE* NEGOTIATIONS**

State of New Jersey v. The General's Group, LLC, Law Div., Bergen, Docket Nos. BER-L-4853-10 and 4854-10, July 21,2010, Doyne, A.J.S.C.

The State Department of Transportation (State) began two actions to condemn land owned by General's Group, L.L.C. (General's Group) and a related company for a realignment of the "Little Ferry Circle" on Route 46 in Little Ferry. The Law Division in this opinion dismissed the complaints because the State had failed to engage in *bona fide* negotiations required by the Eminent Domain Act, *N.J.S.A.* 20: 3-6. There were extensive discussions, exchange of letters, appraisals, reappraisals and change of plans over an extensive period of time. However, the appraisals did not take into account the loss of business to be suffered during a temporary taking during construction; the elimination of highway access that would be the result of the condemnation; and the plan of the State to discharge water onto the property of General's Group, which could result in a total taking. Under all of the circumstances, including the State's constantly shifting position in the condemnation proceeding, the court found that the negotiations had not been *bona fide*. On the issue of the right to compensation for loss of business in a temporary taking, the court recognized the unpublished opinion in *State v. Arifee,*

http://lawlibrary.rutgers.edu/courts/appellate/a5633-07.opn.html, which was abstracted in 32 Municipal Law Review 141 (October 2009). However, because that opinion was unpublished, the court did not use the case as a precedent. It instead used the published authority underlying *Arifee* to reach the same result. (1/2011)

EMPLOYMENT

EMPLOYMENT

- **UNFAIR LABOR PRACTICE**

Morris County Sheriff's Office v. Morris County Policemen's Benevolent Association, Local 298, 418 N.J. Super. 64 (App. Div. 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3174-09.opn.html

Morris County sought to end a longstanding practice—called "featherbedding" by the Appellate Division—of assigning holiday hours at the County Correctional Facility to Sheriff's Officers in nonoperating positions – such as those who transported prisoners to court, provided court liaison, mailroom, library and records services -- all of which were closed on holidays. This allowed those officers to earn double time pay even though they were assigned to make-work positions when they showed up on holidays. The county's decision to end this practice was taken at a time that the county and the sheriff's officers' collective bargaining unit were in the midst of an interest arbitration. Upon review, the Public Employees Relation Commission (PERC) determined that the county had committed an unfair labor practice under the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, by unilaterally changing the employees' ability to earn wages and by also violating a requirement that no changes are to take place while interest arbitration is pending.

The Appellate Division reversed, even after granting deference to PERC on agency decisions. The court found that the practice was simply designed to make work for employees and thus allow them to earn significant salary benefits. There was no operational need for the employees to work at facilities that were closed on holidays. The court, therefore, viewed this as a staffing decision and not a decision based solely on compensation. Indeed, those employees whose jobs required them to work holidays would still receive holiday pay if they worked. The court found that staffing level determinations have always been a managerial prerogative, not requiring negotiations. The court noted that the county had a responsibility to expend public funds wisely. The County was doing so in this case on sound public policy grounds. Moreover, the implementation of this change during interest arbitration proceedings was permitted. (4/2011)

EMPLOYMENT

- **TERMINATION; TIMELINESS**

In re Wilson (East Orange Police Department) (Unpub. App. Div., August 26, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3184-09.opn.html

An appeal to Department of Personnel Merit System Board was filed nine days beyond the twenty day appeal period of *N.J.S.A.* 11A:2-15. The Appellate Division upheld the dismissal of

the petition as untimely. The defense that the notice of termination was illegible was rejected by the court. The notice had been served upon the appellant by personal service and facsimile and on his counsel by facsimile. (10/2011)

EMPLOYMENT

- **TERMINATION; RESIGNATION**

In re Hector Martinez, Trenton (Unpub. App. Div., May 24, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a4961-09.opn.html
Martinez sought reinstatement by the Civil Service Commission pursuant to a settlement agreement which required him to produce medical proofs that he was free of the sleep apnea that had caused his prior termination for excessive absenteeism. He failed to provide the proofs. The Appellate Division gave due deference to the Commission's determination not to reinstate him and affirmed. (7/2011)

EMPLOYMENT

- **TERMINATION; DISABILITY**

Servideo v. Board of Trustees, Police and Firemen's Retirement System (Unpub. App. Div., Nov. 30, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a5257-08.opn.html
In this disability claim by a Bergen County Sheriff's Officer, the Appellate Division restated the proper standard of review of an administrative agency's determinations. The Board of Trustees of the Police and Firemen's Retirement System adopted the finding of an administrative law judge that the employee was not permanently disabled, notwithstanding conflicting medical evidence. The administrative law judge had found that the testimony of the doctor retained by the agency was more persuasive and credible. The Court affirmed and noted that, while not a simple *pro forma* exercise, its review is generally limited to a determination that the findings are supported by sufficient credible evidence in the record. (1/2011)

EMPLOYMENT

- **TERMINATION**

In re Stephen Cesare (Unpub. App. Div., Dec.3, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a3276-07.opn.html
Cesare was properly removed from his position as a senior investigator at the Bayside State Prison pursuant to *N.J.A.C* 4A:2-2.3(a)(2) (insubordination); *N.J.A.C.* 4A:2-2.3(a)(6) (conduct unbecoming a public employee); *N.J.S.A.* 4A:2-2.3(a)(7) (neglect of duty); and *N.J.A.C* 4A:2-2.3(a)(11) (other sufficient cause) because he had disobeyed direct orders and falsified reports. (1/2011)

EMPLOYMENT

- **TERMINATION**

In re Patel (Unpub. App. Div., Nov. 22, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a6216-08.opn.html

Patel was employed as a security guard with the Bergen County Sheriff's Office, where his duties included operating metal detectors and x-ray screening machines in the county court buildings. He began to complain to his colleagues about being watched by satellites run by the government or an insurance company. His behavior also became increasingly combative and erratic. His supervisors arranged for a psychological evaluation to determine his fitness for duty, but Patel refused to submit. The sheriff's office subsequently suspended him because the partial evaluation, together with his past work performance, indicated that he was unable to adequately fulfill his duties as a security officer. Patel submitted to a second evaluation and was found by the doctor to be unfit for duty. A formal hearing was held, following which the Sheriff removed Patel from his position. After a hearing by an Administrative Law Judge that was adopted by the Civil Service Commission, the Appellate Division affirmed the dismissal because there was ample support in the record for the commission's final determination. (1/2011)

EMPLOYMENT

- **TERMINATION**

In re Glosson (Unpub. App. Div., Nov. 18, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a6109-08.opn.html

Two former human services assistants, a father and son, appealed their dismissal from employment with a state psychiatric hospital. Both asserted that the administrative law judge (ALJ) assigned to hear the matter disregarded their testimony. The Appellate Division on appeal from the final decision of the Civil Service Commission affirmed both terminations. In a dispute with a patient, the father and son both ended up punching and kicking the patient, according to the testimony of at least two other human service assistants. Afterward, during an investigation conducted by the hospital, the father, who was also a union official, instructed witnesses to change their testimony and, at one point, grabbed written statements out of a supervisor's hands. There was also a videotape of part of the incident that supported the charges. Both father and son gave a benign version of the incident and stated at trial that the patient was agitated and they needed to take action. Under all of the circumstances, the Administrative Law Judge (ALJ) disbelieved the employees. After acknowledging that administrative actions receive deference and that the credibility of witnesses is properly determined by the ALJ, the Appellate Division found no arbitrary, capricious or unreasonable action by the ALJ or the Civil Service Commission in terminating both father and son. (1/2011)

EMPLOYMENT

- **TERMINATION**

In re Steven J. Winters, North Hudson Regional Fire and Rescue (Unpub. App. Div., Sep.28, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a1518-08.opn.html

Steven Winters, an employee of the North Hudson Regional Fire and Rescue (NHRFR) took a sick leave from NHRFR but then, during the leave, went to work for two other public employers. He was terminated from his job with NHRFR and, on appeal, the Merit System Board, after a hearing by an Administrative Law Judge, upheld the termination. The Appellate Division affirmed because this was egregious misconduct by a public employee and there was no reason to interfere with the agency's decision. Certification has been granted. (1/2011)

EMPLOYMENT

- **TERMINATION**

Ryan v. Township of Mount Olive (Unpub. App. Div., Sep.24, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a5768-08.opn.html

Ryan was the assistant to the mayor of Mount Olive, on medical leave when the mayor was recalled and a new mayor elected. While she was still on medical leave the council approved a budget that eliminated her position. She sued, alleging that she had been discharged because of her age, gender, and political affiliation and in retaliation for taking medical leave under the federal Family and Medical Leave Act (29 *U.S.C.* §2612(a)). The Appellate Division affirmed a trial court summary judgment that Ryan had failed to establish a *prima facie* case on any of her claims, and therefore dismissed her complaint on summary judgment. The opinion does not break any new legal ground but it does contain a helpful synopsis of the elements that must be proved in order to sustain a claim of sexual harassment, gender discrimination, age discrimination, political affiliation discrimination, and retaliation. (1/2011)

EMPLOYMENT

- **TERMINATION**

Ebert v. The Judiciary of the State of New Jersey (Unpub. App. Div., Mar. 11, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a0571-09.opn.html

Plaintiff was a military veteran appointed to a JC-2 position in the New Jersey Judiciary's Probation Division. Pursuant to *N.J.S.A.* 11A:4-13 and -15, his appointment was subject to a four-month test period. If he performed satisfactorily during the working test period, his appointment would become permanent and he would be tenured. If his performance was not satisfactory, however, he could then be terminated at the end of the test period or, if he had previously worked in a lower title, he would be returned to that title. Just prior to the expiration of his four-month test period in the JC-2 position, plaintiff applied for a JC-3 position in a

different division, to which he was appointed, again subject to a four-month test period. At the conclusion of the test period for the JC-3 position, his performance was deemed unsatisfactory and he was terminated. He sued the Judiciary, claiming that he had attained tenure as a JC-2. The Appellate Division rejected plaintiff's contentions and affirmed the lower court's dismissal of his complaint. The court held that veterans appointed subject to a probationary working test period are not entitled to tenure under the statute until their positions are made permanent by satisfactory completion of the test period. Because plaintiff never had a permanent position as a JC-2 (having resigned prior to the completion of his test period) or as a JC-3 (having failed to satisfactorily complete his test period), he was not entitled to tenure in either position. (4/2011)

EMPLOYMENT

- **TERMINATION**

In re Kevin George (Unpub. App. Div., Feb. 3, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3538-08.opn.html

The Appellate Division acknowledged that a reviewing court should not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence. Nevertheless, the court in this matter remanded for a second time the termination of a police officer based upon a random drug test. The court found numerous issues to be determined on remand, including the threshold to be applied in the drug testing, the reliability of the testing, the credibility findings of the agency, and the employer's burden of proof. (4/2011)

EMPLOYMENT

- **TERMINATION**

In re F.B.F., Department of Corrections (Unpub. App. Div., April 20, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a0956-08.opn.html

F.B.F. was arrested and pled guilty to a disorderly persons' offense resulting from an incident with his girlfriend. In a disciplinary proceeding he was discharged because the Merit System Board (now known as the Civil Service Commission) found that he was no longer able to carry a firearm under the federal Lautenberg Amendment 18 *U.S.C.* §922(g)(9). The first time this case came to the Appellate Division the court found that the Lautenberg Amendment charge could not be sustained. On remand the Administrative Law Judge found F.B.F guilty of official misconduct and recommended a 6-month suspension. The Merit System Board nevertheless discharged him again for the official misconduct and this time asserted his inability to carry a firearm under the state law related to domestic violence. *N.J.S.A.* 2C:12-1a(3). However, F.B.F. had not been charged until the day of trial with the state law firearms' disability and there had been no proof that his plea had resulted from domestic violence. The discharge was reversed and the 6-month suspension for unbecoming conduct was reinstated. (7/2011)

EMPLOYMENT

- **TERMINATION**

In re R.J., Department of Corrections (Unpub. App. Div., April 13, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1334-08.opn.html
A corrections officer was terminated after a positive result for cocaine in a random drug screen. The Administrative Law Judge and the Civil Service Commission both reversed the termination. The Appellate Division, however, found that there had been insufficient admissible evidence to support the officer's position that the positive test for cocaine was caused by other medication he had been taking. The termination was therefore reinstated based upon the view of the Appellate Division that the administrative agency had acted arbitrarily and capriciously. (7/2011)

EMPLOYMENT

- **TERMINATION**

In re Borrero (Newark) (Unpub. App. Div., June 8, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a6291-08.opn.html
The Civil Service Commission properly upheld the removal of a police officer based upon his conviction for simple assault pursuant to *N.J.S.A.* 2C:12-1(a). (10/2011)

EMPLOYMENT

- **TERMINATION**

Busa v. Gloucester Twp., 2011 U.S.Dist.LEXIS 41284 (D.N.J. 2011)
The Director of Public Works in Gloucester Township brought this complaint in the Federal District Court claiming that he had been wrongfully terminated for political reasons. Although plaintiff claimed a property right in his job based upon an ordinance that provided that a certain class of employees be terminated only for cause, the court found that a Faulkner Act section, *N.J.S.A.* 40:69A-4(b) controls. That section provides that department heads are appointed by the mayor with the advice and consent of the council and serve during the term of the mayor who appointed them. A director of public works can get tenure but only if an ordinance is passed authorizing that, Gloucester Township had never passed such an ordinance. In the absence of a property interest in the job, no due process claim could be sustained and therefore summary judgment was granted. The court also found that the plaintiff was not entitled to accrued sick pay on his termination. As for his firing on the grounds of political affiliation, which was alleged to infringe plaintiff's freedom of speech, the court found that in order to sustain such a claim, he would have to show (1) he was employed at a public agency in a position that does not require political affiliation; (2) he was engaged in constitutionally protected conduct and (3) this conduct was a substantial or motivating factor in the government's employment decision. *Galli v. New Jersey Meadowlands Comm'n, 490 F.3d 265 (3rd Cir. 2007).* Because the office of director of

public works was a policy making position, and had not been declared a tenured position, it was deemed to be a political position from which he could be dismissed. *McKeever v. Township of Washington, 236 F.Supp. 400 (D.N.J. 2002)* was distinguished because in that case a tenure ordinance had been adopted. (7/2011)

EMPLOYMENT

- **TERMINATION**

Laval v. Jersey City Housing Authority, 2011 U.S. Dist. LEXIS 50438 (D.N.J. 2011)
Various federal and state claims of discrimination and retaliation, violation of freedom of speech, and right to privacy were dismissed. The only claim surviving is a Fourth Amendment claim based upon a search of plaintiff's apartment because no work-related reason was articulated for that search. (7/2011)

EMPLOYMENT

- **TAX COLLECTOR; REDUCTION IN SALARY**

Hyland v. Township of Lebanon, 419 N.J. Super. 375 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a4139-09.opn.html
The part time, tenured tax collector of Lebanon Township sued the township for failing to provide her with the same paid leave days she had received in the past. *N.J.S.A.* 40A:9-165 prohibits the reduction of "salary" of a tax collector during her term of employment. The paid leave days were "akin" to salary and could not be reduced. This result followed even though the collector's original agreement entitled her to 40% of the paid leave days allowed to other municipal employees and, at some point, other similarly situated part time municipal employees were, by collective bargaining agreement, deprived of sick leave benefits. She was not a member of the union and the terms and conditions of her employment were not governed by the collective bargaining agreement. (7/2011)

EMPLOYMENT

- **SUSPENSION**

In re Gerard Slack, Voorhees Township (Unpub. App. Div., Dec. 17, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a6167-08.opn.html
The Voorhees Police Department filed disciplinary charges against a police sergeant for insubordination, conduct unbecoming a public employee, and neglect of duty. The Administrative Law Judge (ALJ) sustained the charges and imposed a thirty-day suspension. The Civil Service Commission adopted the ALJ's findings and sustained the thirty-day suspension. The Appellate Division affirmed, holding without discussion that the Commission's decision was supported by sufficient credible evidence in the record and was not arbitrary, capricious or unreasonable. (4/2011)

EMPLOYMENT

- **SETTLEMENT**

Pollack v. South Orange-Maplewood Bd. of Education (Unpub. App. Div., March 23, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3386-09.opn.html
Pollack, an embattled school principal, was terminated by the Maplewood Board of Education following efforts by Pollack and the board to attain a settlement of the matter. The board claimed that it had accepted Pollack's terms, and, therefore, was within its rights to terminate her in accordance with the settlement terms. The court, however, concluded that there had been no meeting of the minds between Pollack and the board, and that the board's termination violated her contract and tenure rights. (7/2011)

EMPLOYMENT

- **SCOPE OF NEGOTIATIONS**

In re Flemington-Raritan Regional Board of Education (Unpub. App. Div., June 27, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1167-10.opn.html
The Flemington-Raritan Regional Board of Education (Board), facing significant financial constraints, decided to eliminate summer work hours for four categories of workers and to assign some of the duties formerly performed by them to administrative and other personnel. The Teachers Association filed a grievance alleging contract violations and failure to negotiate terms and conditions of employment. PERC held that the board was entitled to eliminate the summer work and not obligated to arbitrate the association's claim that existing employees were contractually entitled to the summer work. However, the board's decision to move work performed by unit workers to non-unit employees was mandatorily arbitrable. Giving due deference to PERC, the Appellate Division affirmed. The Court further noted that there are three exemptions to the mandatory negotiability of the "unit work" rule. While the board, on appeal, criticized PERC for not considering them, the board never argued the applicability of the exemptions before PERC. Accordingly, the Court concluded that there was no meritorious basis upon which to disturb PERC's decision. (10/2011)

EMPLOYMENT

- **REVOCATION OF TEACHING CERTIFICATE**

In re the Suspension of the Teaching Certificate of Danielle Ponti (Unpub. App. Div., May 3, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a4951-09.opn.html
Ponti quit her teaching job at a charter school without providing notice and without securing the consent of the school. Even though this was a charter school teacher, her teaching certificate was suspended for one year under *N.J.S.A.* 18A:26-10 on account of unprofessional conduct. Ponti's

appeal of that decision was denied. (7/2011)

EMPLOYMENT

- **REVERSE DISCRIMINATION; RULE OF 3**

Finley v. Camden County Board of Chosen Freeholders 2011 U.S. Dist. LEXIS 67452 (D.N.J. 2011)

Summary judgment was granted to all defendants in what was styled as a "reverse discrimination" claim. Plaintiff alleged that the defendants discriminated against him on the basis of race by repeatedly failing to promote him to the rank of sergeant in the police department. The court examined the procedures used when the "rule of three" had been successively applied to the promotion process and found that the city had been justified in passing plaintiff over because of the number of his sick days and late arrivals as compared to the other candidates. (10/2011)

EMPLOYMENT

- **RESIDENCY REQUIREMENT**

In re Deloria Martin, Burlington County Jail (Unpub. App. Div., May 23, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a4381-09.opn.html

Martin was specifically told that she had to maintain residence in Burlington County to keep her county job under a long-standing Board of Freeholders' resolution. Nevertheless she failed to do so for ten months. Her termination was upheld by both the Civil Service Commission and the Appellate Division. (10/2011)

EMPLOYMENT

- **PROGRESSIVE DISCIPLINE**

In re Collins (Unpub. App. Div., July 8, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a0130-09.opn.html

A Newark police officer failed to submit a written report of a serious threat against a fellow officer and was disciplined. The Administrative Law Judge (ALJ) recommended a 6- month suspension because there had been no prior disciplinary actions in the officer's record. The Civil Service Commission nevertheless ordered termination. The Appellate Division, deferring to the agency's expertise, affirmed the decision of the commission, citing *In re Carter, 191 N.J. 474,484 (2007)* to the effect that "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." (10/2011)

EMPLOYMENT

- **PENSION; POST RETIREMENT EMPLOYMENT**

In re Anthony Ambrose (Unpub. App. Div., Jan 20,2010)
http://lawlibrary.rutgers.edu/courts/appellate/a2650-09.opn.html
Ambrose retired from law enforcement at age 47 and began collecting his Police and Firemen's Retirement System (PFRS) pension. Within 1½ years of retirement he was appointed Chief of Investigators for the Essex County Prosecutor's Office. PFRS refused to waive Ambrose's reenrollment in PFRS and suspended his monthly pension payments. The court sustained the PFRS decision. It found that Ambrose's new position met the statutory definition of "policeman" under *N.J.S.A.* 43:16A-1. (4/2011)

EMPLOYMENT

- **PENSION; FORFEITURE**

In re Hess, 422 N.J. Super. 27 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a2408-09.opn.html
Hess was involuntarily terminated from her public employment at the State Office of Information Technology following a negotiated guilty plea to assault by auto. She had caused injuries to the occupants of another motor vehicle by driving her personal vehicle while intoxicated. The Trustees of the Public Employees Retirement System denied her application for deferred retirement benefits, from which she appealed. Noting that pension statutes are to be liberally construed in favor of public employees, the Court found that the Trustees had wrongly interpreted *N.J.S.A.* 43:15A-38. A denial under that statute required that the misconduct be related to her employment. The court here found that the conduct was unrelated to her employment and therefore remanded the matter to the Trustees for a determination of her eligibility for the deferred retirement benefit. (10/2011)

EMPLOYMENT

- **PENSION; ELIGIBLE COMPENSATION**

East Windsor Regional School District, Active Members v. Board of Trustees, Teachers' Pension and Annuity Fund (Unpub. App. Div., August 8, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3655-09.opn.html
Employees working for a school district were entitled to pension credits under *N.J.S.A* 18A:66-(2)(d), for compensation they earned for serving as content specialists and program coordinators. They were not being remunerated for performing temporary or extracurricular duties beyond the regular school day or the regular school year – which, under the statute—are not pensionable. Instead their increased pay was the result of work performed during the regular school day. While giving deference to the Board of Trustees of the Retirement System, the court construed the statute as a matter of law, to require the pension credits. *N.J.A.C.* 17:3-4.1(a)(1)(ii), which

was relied on the board to deny the credits, is invalid because it impermissibly narrows the statutory definition of "compensation." (10/2011)

EMPLOYMENT

- **PENSION; BREAK IN SERVICE REQUIREMENT**

Chiappini v. Board of Trustees, Public Employees' Retirement System (Unpub. App. Div., July 29, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3983-09.opn.html

Marc Chiappini filed for retirement from the Public Employee's Retirement System (PERS) on July 20, 2006. His pension was effective February 1, 2007 and he began to receive pension payments. In November of 2006, Chiappini signed a contract with the Cumberland County College (CCC). He was advised by an official at CCC that the job would not interfere with his pension. In fact however, Chiappini had failed to observe the thirty day break in service between public positions required by the PERS regulations. The PERS Board informed him that his retirement was not considered "*bona fide*" and he was directed to return pension payments of $32,479.25 which had by then been paid to him. Chiappini had earned only $8,775 for the three semesters of part time teaching at CCC and had ceased employment upon the return of a formerly ill professor. The board, noting that Chiappini, although not acting with malice, had nevertheless failed to observe the regulations, did not act with the standard of conduct of a reasonable person in applying for retirement and should have contacted the Division of Pension and Benefits regarding his employment at CCC. The Appellate Division, while noting deference to an agency's administrative expertise, stated that interpretation of statutes is a judicial function. After upholding the PERC Board's interpretation of the 30 day break in service requirement to be correct, as well as Chiappini's failure to follow proper procedures, the Court found the remedy imposed to be excessive and, under the circumstances of the case, required a reduced refund. Citing the general rule that the pension statutes are to be liberally construed in favor of the beneficiaries, and that Chiappini had not manipulated the system, but misunderstood the applicable regulations. He was accordingly, directed to return his CCC salary to PERS and was restored to full pension service during 2007 and 2008. (10/2011)

EMPLOYMENT

- **JURISDICTION OF COMMISSIONER OF EDUCATION**

Jackus v. Elizabeth Board of Education (Unpub. App. Div., March 9, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a0993-10.opn.html

Plaintiff was terminated from his position as a supervisor following a reduction in force. He challenged the termination alleging that it violated the terms of a settlement agreement he had previously entered into with the Elizabeth Board of Education (Board). The trial court entered a preliminary injunction requiring the Board to reinstate plaintiff to his former position under the terms of the settlement agreement. The board challenged the court's subject matter jurisdiction,

arguing that the dispute involved the non-renewal of an employment contract due to a reduction in force and the implementation of seniority rights, over which the Commissioner of Education had primary jurisdiction. The Appellate Division agreed. It held that even though plaintiff's complaint sought to enforce contract claims and constitutional rights, which are legal issues squarely within the purview of the courts, the underpinning of the legal issues was an examination of the board's conduct in approving the reduction in force. The court concluded that the Commissioner's prior review was essential to creating a factual record as to whether the board could demonstrate a 'sound educationally based reason' for its decision to implement the reduction in force, how the affected positions were chosen, and whether the Board's action complied with the authorizing statute. (7/2011)

EMPLOYMENT

- **HEALTH OFFICERS; EXHAUSTION; COLLECTIVE BARGAINING AGREMENT**

Vogt v. City of Jersey City (Unpub. App. Div., April 4, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1186-09.opn.html
An action was filed by several public health officers employed by Jersey City challenging the re-classification of their positions. The case was properly dismissed because the plaintiffs had failed to complete the grievance procedure required by the collective bargaining agreement and the grievance procedure required by *N.J.S.A.* 34:13A-5.3 of the New Jersey Employer-Employee Relations Act. (7/2011)

EMPLOYMENT

- **GENDER DISCRIMINATION; RETALIATION;**

Davis v. City of Newark, 2011 U.S. App. LEXIS 13236 (3rd Cir. 2011)
The Third Circuit Court of Appeals upheld the dismissal of federal claims made by a police officer claiming First Amendment violations by Newark. It modified the district court order by providing that state claims were dismissed without prejudice rather than with prejudice. (10/2011)

EMPLOYMENT

- **GENDER DISCRIMINATION**

Puchakjian v. Township of Winslow, 2011 U.S. Dist. LEXIS 70672 (D.N.J. 2011)
A female municipal clerk claimed that the Township of Winslow had discriminated against her on the basis of gender because it compensated her significantly less than it had compensated her male predecessor and male counterparts who performed substantially equal or similar work. The court found that the male predecessor's raises were not the result of gender discrimination in violation of the Equal Pay Act, 29 *U.S.C.* §206 *et seq*., but rather were reflective of his 30-year

tenure as municipal clerk. In addition the court found that the raises mandated by *N.J.S.A.* 40A:9-165 during his tenure explained any compensation disparity between the male predecessor and plaintiff, his female successor. (10/2011)

EMPLOYMENT

- **FURLOUGH; UNEMPLOYMENT**

Futterman v. Board of Review, 421 N.J. Super. 281 (App. Div. 2011)

Futterman, a State employee, filed for unemployment benefits for the period of her self-directed furlough. The Board of Review determined that an employee who is obligated to take several self-directed furlough days does not qualify for unemployment compensation by scheduling those days consecutively. The court sustained the board, observing "It is clear to us that any individual who intentionally schedules five consecutive furlough days in order to advance a claim for unemployment benefits has not done everything necessary and reasonable to remain employed." (10/2011)

EMPLOYMENT

- **FORFEITURE; EXPUNGEMENT**

In re the Expungement Petition of D.H., 204 N.J. 7 (2010)

http://lawlibrary.rutgers.edu/courts/supreme/a-82-09.opn.html

D.H. was convicted of a disorderly persons offense nine years before she sought expungement. As part of her conviction she had been ordered to forfeit her public office. Her offense was the purposeful and unauthorized use of a computer while employed in the office of the Monmouth County Prosecutor. The Supreme Court affirmed a judgment expunging her conviction in an action brought under *N.J.S.A.* 2C:52-32, but held that that expungement did not modify the forfeiture of her office pursuant to *N.J.S.A.* 2C:52-14(b). (1/2011)

EMPLOYMENT

- **FAMILY AND MEDICAL LEAVE ACT; LIMITATIONS**

Simisak v. County of Mercer (Unpub. App. Div., September 1, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3184-09.opn.html

Simisak claimed violations of the federal Family and Medical Leave Act (FMLA), 29 *U.S.C.* §§2601 to 2119, the New Jersey Family Leave Act (FLA), *N.J.S.A.* 34:11B–1 to –16 and the Law Against Discrimination (LAD), *N.J.S.A* 10:5–1 to –42. He also claimed intentional infliction of emotional distress. Summary judgment was affirmed on the FLMA and FLA counts for the first leave he had taken because they were barred by the 2-year limitations periods in both acts. The court could find no basis for applying the discovery rule to extend this period. In addition, as to a second leave, the court could find no retaliation. Because Simisak was not able to return to work after his FMLA leave expired, his FMLA claim based on that leave failed. On

the LAD claims, the court held that defendants were entitled to summary judgment on Simisak's claims of discrimination based on political affiliation, gender and disability. Defendants were also entitled to judgment on Simisak's claim of intentional infliction of emotional distress. (10/2011)

EMPLOYMENT

- **FAMILY AND MEDICAL LEAVE ACT**

Matejik v. State of New Jersey (Unpub. App. Div., August 17, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3682-09.opn.html
The State was not entitled to summary judgment because there were questions of fact as to whether the State had unreasonably delayed the reinstatement of an employee who had taken leave under the Family and Medical Leave Act (FMLA), 29 *U.S.C.* §§2601 to 2119. It was also entitled to summary judgment on her claim that the delay in reinstatement was retaliation for her use of the leave to which she was entitled under FMLA. On this record, a jury would be permitted to find that her employer had perceived her as disabled and took adverse action to exclude her from the workplace because of that perception. Therefore, her Law Against Discrimination (LAD) *N.J.S.A.* 10:5-1 to -42, claim also survived the State's motion for summary judgment. (10/2011)

EMPLOYMENT

- **FAMILY AND MEDICAL LEAVE**

In re Township of Parsippany-Troy Hills and Parsippany Public Employees Local 1, 419 N.J. Super. 512 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a0471-10.opn.html
A municipal employee and member of a union opted to use paid sick leave under a collective bargaining agreement in order to take time off to care for a sick relative—a right confirmed at oral argument to be allowed under the agreement. The employee opted not to take unpaid leave under the Family Medical Leave Act (FMLA), 29 *U.S.C.* §2612. The municipality required the employee to submit a FMLA certification form completed by a health care provider and threatened suspension when the employee initially refused to do so. The employee did eventually complete the FMLA form but the union opted to file an unfair practice charge with the Public Employment Relations Commission (PERC). PERC found in favor of the union. The Appellate Division affirmed PERC's ruling. The court held that although the FMLA implementing regulations (29 C.F.R. §825) allow an employer to require an FMLA medical certification before granting FMLA leave, the regulations do not apply if the employee specifically states that such leave is not requested. In that case the employer may not require the certification. There is no inherent managerial right to require an FMLA certification to verify the right to sick leave even when the FMLA was not invoked. An employer does not need the details of the illness of the relative to verify sick leave, and the employee's privacy interests outweigh the employer's

interest in obtaining the details of an employee's illness or injury. The municipality retains the managerial prerogative to require sick leave verification pursuant to any established sick leave policy and can require an FMLA certification when an employee eligible for FMLA leave has not expressly declined that leave. (7/2011)

EMPLOYMENT

- **FALSE ARREST**

Trafton v. Woodbury, 2011 U.S. Dist. LEXIS 70682 (D.N.J. 2011)

The City of Woodbury, its police department and a police officer for false arrest and injuries were sued in a civil rights case. Plaintiff asserted claims under 42 *U.S.C.* §1983, the New Jersey Constitution and common law. Summary judgment was granted in favor of the police department because, for purposes of Section 1983 liability, the police department and the city are treated as a single entity. The complaint against the city was dismissed because the plaintiff did not allege any facts showing a policy of indifference to constitutional rights which is one of the predicates to a case for failure to properly train police officers on the use of handcuffs. Summary judgment was also granted to the officer on claims of unreasonable seizure and abuse of process. However, the federal claims for false arrest and excessive force were permitted to proceed. The same results followed on the state law claims. (10/2011)

EMPLOYMENT

- **FAILURE TO PROMOTE; CIVIL RIGHTS**

Razzano v. Twp. of North Brunswick (Unpub. App. Div., June 13, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a0534-10.opn.html

The court upheld the summary dismissal of Razzano's claims of disability discrimination in a "failure to promote" case. Even though Razzano was able to present a *prima facie* case under the relatively low threshold of the Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 to -49, the Township presented a legitimate, non-discriminatory reason for the decision to promote another employee rather than Razzano. That employee had supervisory experience in the public sector when Razzano did not. When the burden shifted back to him, Razzano failed to produce evidence showing that the Township's explanation for promoting the other person was a pretext for discrimination based on handicap or political affiliation. There was no factual issue; summary judgment was proper. (7/2011)

EMPLOYMENT

- **FAILURE TO PROMOTE**

Duncan v. Mayor and Committee of Hazlet (Unpub. App. Div., July 19, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a6165-08.opn.html
Plaintiff is a police officer in the Township of Hazlet and was a reservist in the United States Air Force between 1992 and 2004. In a prerogative writ claim he asserted that the chief of police was biased against him and intentionally thwarted his efforts to be promoted to sergeant. Among his claims was the invalidity of the Hazlet ordinance organizing the police department. The Appellate Division held the ordinance to be valid, citing its prior decision in *Loigman v. Twp. Comm. of Middletown, 409 N.J. Super. 13 (App. Div.), certif. denied, 200 N.J. 503 (2009),* that the applicable statute does not require that police ordinances include detailed provisions regarding internal department structure, explaining that "[a]n ordinance is valid if it 'create[s] positions within the police department....and specif[ies] the maximum number of positions within each rank.'"

Plaintiff also argued that the defendants had violated the ordinance because they had not filled every vacancy within the police department as it arose. The Court found that such a requirement would be "inconsistent with the general intent of the statute, *i.e.*, that 'the department's day-to-day operations [are left] in the hands of the police chief, who would be accountable to the appropriate authority.'"

Plaintiff's also asserted a claim under the Law Against Discrimination (LAD) *N.J.S.A* 10:5-12(a) stating that failure to promote him to the position of sergeant amounted to discrimination on the basis of his military status. The Appellate Division pointed out, however, that plaintiff had been discharged from the service at least one year prior to any of the actions about which he complained. This was a fatal flaw in his *prima facie* LAD claim for discrimination.

With respect to the plaintiff's claim of unconstitutional retaliation, the Appellate Division applied the test established by the Third Circuit in *Baldassare v. New Jersey, 250 F. 3d 188, 194-95 (3d Cir. 2001)*: plaintiff must establish (1) that the activity in question was protected; (2) that his interest in the activity outweighed the State's countervailing interest as an employer; and (3) that the protected activity was "a substantial or motivating factor in the alleged retaliatory action." The court could find no "protected activity" here because there were no matters of public concern. (10/2011)

EMPLOYMENT

- **DISCRIMINATION; TIMELINESS**

Alexander v. Seton Hall University, 204 N.J. 219 (2010)

http://lawlibrary.rutgers.edu/courts/supreme/a-87-09.opn.html

Several female Seton Hall University professors brought an action for wage discrimination pursuant to the Law against Discrimination, *N.J.S.A.* 10:5-1 to -49 (LAD). The Appellate Division applied *Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)* (establishing a framework for analyzing accrual and timeliness in Title VII wage discrimination claims) and held that dismissal of the action was proper when the actual decision setting wages was beyond the two-year statute of limitations. The New Jersey Supreme Court reversed, holding that, under LAD, each payment of a discriminatory wage is an actionable wrong that is remediable. (1/2011)

EMPLOYMENT

- **DISCRIMINATION; RETALIATION**

Connolly v. County of Hudson, 2011 U.S. Dist. LEXIS 66654 (D.N.J. 2011)

Federal claims under the Family and Medical Leave Act, the Rehabilitation Act and the Hatch Act were dismissed on summary judgment. The remaining claims arose under New Jersey law and were dismissed without prejudice. (10/2011)

EMPLOYMENT

- **DISCRIMINATION; RETALIATION**

Astriab v. City of Jersey City, 2011 U.S. Dist. LEXIS 91101 (D.N.J. 2011)

In the same set of facts involved in *Montone v. City of Jersey City, 2011 U.S. Dist. LEXIS 68998 (D.N.J. 2011), infra*, the court summarily dismissed the claim of another police officer in Jersey City who alleged that he had not been promoted to lieutenant for retaliatory reasons. (10/2011)

EMPLOYMENT

- **DISCRIMINATION; POLITICAL RETALIATION**

Montone v. City of Jersey City, 2011 U.S. Dist. LEXIS 68998 (D.N.J. 2011)

All federal claims were dismissed on summary judgment in this case in which the plaintiff alleged political retaliation and gender discrimination in the failure of Jersey City to promote her to police lieutenant. State claims were remanded to the State courts. (10/2011)

EMPLOYMENT

- **DISCRIMINATION; JURISDICTION; PORT AUTHORITY**

McClement v. Port Authority Trans-Hudson Corporation, 2011 U.S. Dist. LEXIS 70047 (D.N.J. 2011)

An age discrimination and retaliation claim against Port Authority Trans-Hudson (PATH) was dismissed on summary judgment. The New Jersey Law Against Discrimination (LAD) and the Conscientious Employee Protection Act (CEPA) cannot be applied against PATH unless both New York and New Jersey have adopted the same legislation or if the states have similar legislation which purports to apply to the Port Authority. That has not occurred. The policy of screening out from promotional consideration those that had been subject to a discipline in the year before the promotion application is not discriminatory or retaliatory in the context of the Age Discrimination in Employment Act (ADEA). (10/2011)

EMPLOYMENT

- **DISCRIMINATION; FAMILY LEAVE; RETALIATION**

Brooks v. State of New Jersey (Unpub. App. Div., September 8, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3834-09.opn.html

Brooks sued the Motor Vehicle Commission and various others on grounds of employment discrimination under the New Jersey Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 *et seq*., and federal Family and Medical Leave Act (FMLA), 29 *U.S.C.* §2601. Her complaint was dismissed on the State's summary judgment motion. The Appellate Division found the matter to be quite complicated factually, and highly fact-sensitive. It concluded that there were genuine issues of material fact with respect to her performance and whether her termination was retaliatory, and, in large part reversed the trial court's dismissal. (10/2011)

EMPLOYMENT

- **DISCRIMINATION; CONSTITUTIONAL LAW**

Maslow v. Atlantic City, 2011 U.S. Dist. LEXIS 70666 (D.N.J. 2011)

Atlantic City's motion for judgment as a matter of law in a civil rights case was granted, in part, and denied in part. A police officer, who had been declared by his own doctor to be unfit to work as a police officer because of stress, was ordered to turn in both his service weapon and a personal weapon. He claimed violation of his Second Amendment and "due process" rights against the city and its chief of police. The court held that the officer had not shown that Atlantic City had issued a proclamation, policy or edict with respect to confiscation of weapons or that there was a well settled custom to that effect. Therefore under *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 695, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)* as applied in the Third Circuit by *Andrews v. Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990)*, the case against the city was

dismissed. However, because a case against the chief of police remained pending after the dismissal of the city, the state law claims against Atlantic City were left standing. (10/2011)

EMPLOYMENT

- **DISCRIMINATION**

Munoz. v. Perth Amboy Police Dept. (Unpub. App. Div., Nov. 22, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a3415-09.opn.html
Plaintiff appealed an order denying his motion for leave to file a third amended complaint and from a final order granting summary judgment in favor of defendants in an alleged retaliation case under the Law Against Discrimination, *N.J.S.A.* 10:5-1 to -49 (LAD). The Appellate Division found that the record did not support a claim of reprisal under the LAD. The court also found no abuse of discretion in the order denying plaintiff's motion to amend his complaint to add a new claim and a new defendant on the eve of trial. This would have required re-opening of discovery and unreasonable delay. (1/2011)

EMPLOYMENT

- **DISCRIMINATION**

In re J.M. and Department of Transportation (Unpub. App. Div., Oct. 19, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a4098-08.opn.html
The Department of Transportation, Division of Civil Rights and Affirmative Action denied complainant's claims of hostile work environment, gender discrimination and sexual harassment. The Civil Service Commission upheld the Division's decision based upon a written record and without a trial type hearing. Citing the preference of the Legislature for expedited consideration of employee claims, the Appellate Division upheld the Commission's decision, particularly because the complainant's factual assertions were unsubstantiated and complainant's claims for compensatory and punitive damages were not recoverable under the agency's regulations. (1/2011)

EMPLOYMENT

- **DISCRIMINATION**

Paula Middleman v. New Jersey Transit (Unpub. App. Div., Sep. 28, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a4203-08.opn.html
Middleman brought an action under the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq*. (LAD), claiming that New Jersey Transit had, over the years, failed to promote her and, thereby, had discriminated against her for prohibited reasons. The Appellate Division affirmed a summary judgment against her because only one of the claims of failure to promote had occurred within the two-year statute of limitations for LAD claims. As to that claim New Jersey Transit proved reasons for the non-promotion that were not discriminatory and, after the burden had

shifted to her, Middleman did not prove that the reasons were pretextual. During the course of discovery, the trial court -- after Middleman's counsel had advised the court that proof of damages would be limited to the differential in pay resulting from the failure to promote—dismissed all of her other claims, including those of a hostile work environment. She did not appeal this decision so the Appellate Division did not address any claims of hostile work environment which, as a continuing violation, might have survived the statute of limitations issue. (1/2011)

EMPLOYMENT

- **DISCRIMINATION**

Cruz v. Bergen County, 2011 U.S. Dist. LEXIS 32927 (D.N.J. 2011)

The only claim that survived summary judgment was a §1983 claim against the police chief for ordering an officer to report to headquarters in full uniform but without his gun belt. (7/2011)

EMPLOYMENT

- **DISCOVERY; TIMELINESS**

Faunce v. City of Atlantic City (Unpub. App. Div., June 23, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a2587-09.opn.html

The court properly dismissed a disciplinary charge against three firefighters, because the city failed to provide discovery mandated by court order within the extended time allowed by the court. Further, under Civil Service rules the city cannot force the employees to participate in an investigatory interview while the charges are pending. Such an interview would defeat the protection afforded to all civil service employees by *N.J.A.C.* 4A:2-2.6(c), against being forced to testify at their own disciplinary hearing. (10/2011)

EMPLOYMENT

- **DISCIPLINE**

In re Stallworth, Camden County Municipal Utilities Authority, 208 N.J. 182 (2011)

http://lawlibrary.rutgers.edu/courts/supreme/a-6-10.opn.html

Is abuse of a morning coffee break a terminable offence for a civil service employee? Maybe. In this decision, the Supreme Court, after six years of litigation, remanded a disciplinary action to the Civil Service Commission for a further explanation of why it had imposed a four month suspension instead of the termination recommended by an Administrative Law Judge. The case implicates the concepts of "progressive discipline" --first enunciated in *West New York v. Bock, 38 N.J. 500 (1962)*--and the proper standard of judicial review.

Stallworth, an employee of the Camden County Municipal Utilities Authority, was entitled to a 15 minute morning break under a collective bargaining agreement. He took an hour and 15

minutes instead, during which time he admittedly ate breakfast, played the lottery and socialized with others at a convenience store. He did this frequently, leaving the Authority's truck in front of the store, unlocked, for all the world to see (and to criticize the Authority's inefficiency). He was fired. The Administrative Law Judge upheld the firing, finding that the conduct had been so egregious as to warrant removal even without consideration of Stallworth's prior employment history. The Civil Service Commission rejected the recommendation and – under a concept of progressive discipline which it did not thoroughly explain-- ordered a four month suspension. The Appellate Division reversed the Commission and ordered the termination reinstated. Although finding that this decision of the Appellate Division was based on "common sense" the Supreme Court nevertheless reversed and remanded the matter to the Civil Service Commission. The Court found that the Appellate Division had exceeded its scope of judicial review but the Civil Service Commission had not adequately explained its application of the doctrine of progressive discipline. (7/2011)

EMPLOYMENT

- **DISABILITY PENSION; TRAUMATIC EVENT**

Russo v. Board of Trustees, Police and Firemen's Retirement System, 206 N.J. 14 (2011)
http://lawlibrary.rutgers.edu/courts/supreme/a-20-10.opn.html
A police officer, who was untrained in firefighting and who also had no previous psychiatric history, was ordered into a burning building and suffered injuries. A resident of the building who could not be reached died in the fire. The victim's family subsequently blamed the officer for the death. The officer claimed he suffered from post-traumatic stress disorder and sought accidental disability pursuant to *N.J.S.A.* 43:16A-7. Applying *Patterson v. Bd. of Trustees, State Police Retirement System, 194 N.J. 29 (2008)* and *Richardson v. Bd. of Trustees, Police and Fireman's Retirement System, 192 N.J. 189 (2007)*, the Supreme Court held that the officer had sufficiently demonstrated a permanent and total disability which was the direct result of a traumatic event identifiable as to time and place; that the event was not designed and was unexpected and was caused by an external circumstance; that the event occurred as part of the officer's regularly assigned duties; and that his condition was not the result of any willful negligence. The Supreme Court further found the event was objectively capable of causing a reasonable person in similar circumstances to suffer a disabling mental injury. An accidental disability pension was therefore required. (7/2011)

EMPLOYMENT

- **DISABILITY PENSION; TRAUMATIC EVENT**

Russo v. Board of Trustees, Police and Firemen's Retirement System (Unpub. App. Div., Jan. 27, 2010), rev'd, 206 N.J. 14 (2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3706-08.opn.html
During his first year as a police officer, Gregory Russo went into a burning building with his

fellow officers to escort three occupants to safety. He could hear a fourth person crying for help, but the fire department arrived and ordered the police out. The man who had been crying for help died. From outside the building, Russo saw the body being removed from the building and the victim's family berated Russo for not doing enough to save the victim. Russo sought accidental disability for his post traumatic stress syndrome. Under *Patterson v. Trustees, State Police Retirement System, 194 N.J. 29 (2008),* individuals with "disabling mental injuries" are entitled to accidental disability benefits even if the injuries are solely caused by psychological trauma. This is referred to as the "mental-mental category." The Board of the Police Pension System found, contrary to an ALJ recommendation, that the trauma caused in this situation did not rise to the level of an accidental disability under the *Patterson* test. The Appellate Division, granting deference to the administrative agency, affirmed, saying: "None of the four officers who responded to the fire suffered any injuries beyond the smoke inhalation for which Russo was treated. Although the sight of the lifeless body of the fourth occupant of the burning building being removed was no doubt traumatic for Russo and entitles him to receive ordinary disability, police officers are trained to deal with injured dead citizens under a multitude of horrific circumstances, including homicides, automobile accidents and natural disasters. It no doubt compounded Russo's trauma to be verbally berated by the surviving family members of the deceased occupant. That circumstance in and of itself, however, does not constitute a traumatic event…" ***[Editor's note: the Supreme Court has since reversed this decision.]***

EMPLOYMENT

- **DISABILITY PENSION; TRAUMATIC EVENT**

Gleisberg v. Board of Trustees (Unpub. App. Div., Mar.10, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a2873-09.opn.html
The Appellate Division upheld a decision of the Board of Trustees, Police and Firemen's Retirement System (Board) that denied a police officer a disability pension for post-traumatic stress disorder. The Board had held that there had been no "traumatic event."

The officer was originally called to the scene of a domestic violence action. He met with the alleged victims and instructed them on how to return home safely. Disregarding the officer's suggestion, the victims returned to their homes where they were brutally slain by an attacker. Police from another jurisdiction found the attacker who was killed by one of the officers in self-defense. Appellant came to the scene after the investigation into the deaths and the police shooting had been concluded. He viewed the bloodied bodies of the victims. He was severely emotionally and psychologically affected. As the result of his post-traumatic stress syndrome he was no longer able to work.

The Appellate Division found that the board's decision was not arbitrary and capricious. In order for there to be a traumatic event under *N.J.S.A.* 43:16A-7(1) the event would have to have been direct personal experience that involved actual or threatened death or serious injury. Because the

officer had come to scene only after the occurrences and did not witness any of them first hand, there had been no threat of death or injury. Police officers are specially trained to deal with the events of this case. Therefore, there was no "traumatic event" and the decision of the board was upheld. (4/2011)

EMPLOYMENT

- **DISABILITY PENSION; TIME BAR; DELAYED MANIFESTATION EXCEPTION**

Hayes v. Board of Trustees of the Police and Firemen's Retirement System, 421 N.J. Super. 43 (App. Div. 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a2967-09.opn.html

N.J.S.A. 43:16A-7 requires that a petition for accidental disability retirement benefits under the Police and Firemen's Retirement System (PFRS) be filed within five (5) years of the original traumatic event, but expressly permits late filing where the "manifestation" of the disability is delayed. Petitioner's disability was post-traumatic stress disorder (PTSD). The traumatic event which triggered petitioner's PTSD occurred on December 20, 2001 but her application was not filed until July 20, 2007, outside the five-year period. The Appellate Division determined that petitioner's PTSD was "manifested" only when she learned, in May, 2007, that her doctor had found that she was "incapable of performing police duties" and had to be terminated from that employment. The court noted that disabilities from PTSD, in the "mental-mental" category of injuries, are not always obvious to the person suffering from them. Denial by the Board of Trustees was reversed and remanded back to the Board for a more fact-sensitive analysis as to whether the petitioner's application was filed within a reasonable time after the delayed manifestation of her symptoms. (10/2011)

EMPLOYMENT

- **DISABILITY PENSION; PREEXISTING CONDITION**

Menna v. Board of Trustees, Public Employees' Retirement System (Unpub. App. Div., Oct. 18, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a4210-08.opn.html

Following a work-related accident, Diane Menna, a former DYFS worker, sought accidental disability retirement benefits from the State under *N.J.S.A.* 43:15A-43. The court sustained the denial of benefits by the Board of the Public Employees' Retirement System. Menna had a pre-existing condition that had already left her with a 65% disability in her shoulder. The trauma she sustained in the work-related accident was not the "direct" cause of the claimed disability, nor was it the essential, significant or substantial contributing cause; therefore, she was not entitled to benefits under the statute. (1/2011)

EMPLOYMENT

- **DISABILITY PENSION**

Ciallella v. Board of Trustees, Public Employees' Retirement System (Unpub. App. Div., July 26, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a0344-10.opn.html

Ciallella, a municipal sanitation worker, was injured on the job and, as a result of the injury was not able to lift anything heavier than fifteen pounds. He retired and sought accidental disability benefits, which are more generous than ordinary disability retirement benefits. The court upheld the denial of accidental disability benefits by the board of the Public Employee's Retirement System (PERS). The board determined that Ciallella's injuries were caused by strenuous work effort, rather than a traumatic event. In order for there to be accidental disability benefits there must be a traumatic event that directly causes permanent and total disability. (10/2011)

EMPLOYMENT

- **COMPENSATORY TIME; FAIR LABOR STANDARDS ACT**

Nutley Policemen's Benevolent Association Local # 33 v. Township of Nutley, 419 N.J. Super. 160 (App. Div. 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3730-09.opn.html

Under the Fair Labor Standards Act (FLSA), 29 *U.S.C.*S. §§201-219, an employee is entitled to "compensatory time" off equal to 1½ times the extra hours worked. But, the FLSA does not give employees the right to take this compensatory time off work whenever they choose. In this case the court concluded that an employer who denies permission to use compensatory time on the exact date requested but permits use within the reasonable time period defined in a collective bargaining agreement does not need to show also that the use of compensatory time on the requested day would unduly disrupt the operation of the employer. (7/2011)

EMPLOYMENT

- **COLLECTIVE BARGAINING; RETIREE BENEFITS**

Petersen v. Township of Raritan, 418 N.J. Super. 125 (App. Div. 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3290-09.opn.html

Plaintiff is a retired police officer. Section 1 of the collective bargaining agreement (CBA) in effect when he retired provided that the municipality would "continue all insurance[]s . . . in effect upon the signing of [the CBA], for employees and their dependents, at the same levels of coverage enjoyed under the custom U.S. Healthcare Patriot V and X Plan . . . ." Another section of the CBA, section 5, provided that "[a]ny employee who retires after twenty-five (25) or more years of service, . . . shall continue to receive all health and medical benefits provided by the employer for the remainder of his life. Such coverage shall be provided at the expense of the employer."

At the time of his retirement, the municipality offered its employees both a traditional plan, in which plaintiff was enrolled, and a point-of-service (POS) plan. Later, however, the municipality eliminated the traditional plan and began offering only the POS plan to its eligible employees. Plaintiff, as a retiree, was given the option of enrolling in the POS, for which the municipality would bear the full cost, or continuing with the traditional plan, for which plaintiff would be required to pay the difference between the cost of the POS and the cost of the traditional plan. Plaintiff claimed that under section 1 of the CBA, the municipality was required to continue providing him the benefits of the traditional plan at its sole cost and expense. The Appellate Division disagreed. It ruled that the section 1 of the CBA applied only to current employees and their dependents, and that the applicable section, Section 5, obligated the municipality only to provide plaintiff with the same benefits as it was offering to its current employees, not to provide a specific plan or level of coverage. The court therefore concluded that the municipality's decision to stop participating in the traditional plan and cover only the costs of the POS plan did not curtail or breach the contractual benefits due to plaintiff. Plaintiff was not entitled to reimbursement for additional costs resulting from his choice to continue coverage in the traditional plan. (4/2011)

EMPLOYMENT

- **COLLECTIVE BARGAINING; CHANGE OF HEALTH BENEFITS**

Communications Workers of America, AFL-CIO v. State of New Jersey, Law. Div., Mercer, Docket No. MER-C-72-10, January 19, 2011, Feinberg, A.J.S.C.

In this extensive opinion, Judge Feinberg upheld *P.L.* 2010, *c.* 2, section 8, which imposed on all State and local employees the changes to the State Health Benefit Plan (SHBP) that were collectively negotiated by a majority representatives for State employees only. The unions challenged the law as a violation of Article I, Paragraph 19 of the New Jersey Constitution which grants public employees the right to organize and present grievances and proposals through the representatives of their own choosing. It also asserted violations of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The court held that the law did not violate the New Jersey Constitution because (a) the constitutional provision does not create a right for employees to negotiate, only the right to present grievances and proposals; (b) the statute on its face imposed on all public employees the changes to the SHBP negotiated by any State employees union; and (c) Section 8 did not impose any new responsibilities on the State or local employees or their majority representatives. The court also rejected the union contention that this was "parity clause" which PERC has ruled unconstitutional. Finally, the court rejected the "void for vagueness" arguments of the unions. (4/2011)

EMPLOYMENT

- **CIVIL SERVICE; RULE OF 3**

In re Foglio, 207 N.J. 38 (2011)

http://lawlibrary.rutgers.edu/courts/supreme/a-16-10.opn.html

Reversing the Appellate Division's June 24, 2010 decision in *In re Nicholas R. Foglio, Fire Figher, Ocean City (infra)*, the Supreme Court clarified the application of the "Rule of Three" in civil service municipalities. It is insufficient for the municipality to by-pass the top ranked applicant in a hiring exam with only a boiler plate explanation that doing so was "in the best interest of the municipality." The municipality has the burden of presenting a legitimate reason under *N.J.A.C.* 4A:4-4.8(b)(4). The reason need not be lengthy or multifaceted, but must set forth the reasons why a higher ranking candidate was bypassed. To the extent that non-civil service municipalities rely upon the "Rule of Three," this case should be heeded as well. Includes a dissent by Justices LaVecchia and Hoens. (10/2011)

EMPLOYMENT

- **CIVIL SERVICE; RULE OF 3**

In re Nicholas R. Foglio, Fire Fighter, Ocean City (Unpub. App. Div., June 24, 2010), rev'd and remanded, 207 N.J. 38 (2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3609-08.opn.html

Nicholas Foglio placed third on the eligibility list for fire fighter in Ocean City. Ocean City, the appointing authority, bypassed Foglio and appointed the second, eighth and tenth ranked eligibles. The State Division of Local Human Resource Management found that the appointing authority had properly disposed of the certification pursuant to the "rule of three" in *N.J.A.C.* 4A:4-4.8(a)(3). The Civil Service Commission upheld the other appointments and the Appellate Division affirmed. According to the Commission and the Appellate Division, Foglio had the burden of proof by a preponderance of the evidence that the decision to bypass him was the result of discrimination or improper conduct, such as political influence. (1/2011)

EMPLOYMENT

- **CIVIL SERVICE; REVERSE DISCRIMINATION**

Flamma v. City of Atlantic City (Unpub. App. Div., Jan.25, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a1907-08.opn.html

Flamma brought suit against the City of Atlantic City and other parties, when he was not appointed to the position of captain in the city's fire department. He claimed that he had not been appointed because of reverse discrimination against him during the effective term of a civil service promotion list on which he had been highly ranked. A jury awarded damages in his favor. The trial court also granted Flamma's equitable relief for seniority and adjustment of his pension commensurate with the rank of captain retroactive to the date when he should have been made a

captain. The Appellate Division reversed and held that the trial judge should have granted the city's motion for a directed verdict as a matter of law. The durational limits of the civil service list had expired at the time the vacancy occurred and, therefore, there was no question of fact as to any discrimination. Although not necessary to the outcome, the court also found that the trial judge erred in permitting the jury to consider the financial condition of the city in connection with its deliberations on punitive damages. (4/2011)

EMPLOYMENT

- **CIVIL SERVICE; PROMOTION; RULE OF THREE**

In re Charles Gallo, Linden (Unpub. App. Div., May 31, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a2525-09.opn.html
A police officer who was ranked first on a civil service promotional list but was passed over four (4) times for promotion filed a challenge with the Civil Service Commission. The officer alleged that the actions of the Linden Police Department were retaliatory and discriminatory because of his support for a former mayor. The department, however, properly invoked the "rule of three" pursuant to *N.J.A.C.* 4A:4-4.8(a)(3)ii in selecting lesser ranked candidates. The selections were further supported by written statements from the police chief pursuant to *N.J.A.C.* 4A:4-48(b)(4). Finally, the officer failed to provide any evidence of discrimination or retaliation. His complaint was properly dismissed. (7/2011)

EMPLOYMENT

- **CIVIL SERVICE; EXCLUSION FROM ELIGIBILITY**

In re Seay Fletcunerher (Unpub. App. Div., June 1, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a2154-09.opn.html
The Civil Service Commission was entitled to consider conduct of an individual leading to his or her entrance into a pretrial intervention program and use same as a valid rationale to exclude that individual from the list of eligible fire fighter candidates. (10/2011)

EMPLOYMENT

- **CIVIL SERVICE; EDUCATION**

Headen v. Jersey City Board of Education, 420 N.J. Super. 105 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a5947-09.opn.html
A ten month food service employee of a school district is not entitled to the vacation leave benefits of the New Jersey Civil Service Act, *N.J.S.A.* 11A:1-1 to :12-6, even though the school district has adopted the Act and is operated by the State. At least for the purpose of this civil service statute, a school district is not a "political subdivision" whose full time employees are entitled to the benefits of the Act. *N.J.S.A.* 11A:6-3. The Appellate Division found that there had been no legislative intent to include ten month school district employees within the coverage of

N.J.S.A. 11A:6-3 but instead left those employees to the provisions of Title 18A, governing education, and collectively negotiated agreements. (7/2011)

EMPLOYMENT

- **CEPA; ISSUE PRECLUSION**

Need v. Union County Educational Services Commission (Unpub. App. Div., Jan 20, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3149-09.opn.html
In the federal court, plaintiff alleged violations of the Federal Civil Rights Act 42 *U.S.C.* §1983 arising from incidents at the Union County Educational Services Commission. The federal court found that the allegedly retaliatory acts were not significant enough to constitute actionable "adverse employment consequences" under that act and dismissed the case. Plaintiff then filed an action in the Law Division asserting violations of the New Jersey Law Against Discrimination (LAD) and Conscientious Employee Protection Act (CEPA) as well as common law. The Appellate Division determined that collateral estoppel did not apply because the "adverse employment consequences" under the Federal Act were different from the predicates required under LAD and CEPA. (4/2011)

EMPLOYMENT

- **CEPA; DAMAGES**

Messina v. Fair Lawn (Unpub. App. Div., July 11, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a4214-09.opn.html
A jury awarded $419,000 for compensatory damages under the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1 to -8. $126,548 was added for punitive damages and the balance, bringing the total award to $815,324.67, included counsel fees, prejudgment interest and a sum to cover the negative tax consequence to plaintiff of receiving a lump sum award. The Appellate Division set the judgment aside. At trial, Plaintiff put forth several different actions that he maintained were retaliatory but the jury had not been asked to identify the specific action upon which it was basing its verdict. The Appellate Division concluded that this flaw affected the calculation of damages. Compensation could be different depending on which actions were deemed to be retaliatory. A new trial was ordered. Because the compensatory damages were questioned, the punitive damages needed to be retried as well. (10/2011)

EMPLOYMENT

- **CEPA; ADVERSE EMPLOYMENT ACTION**

Buccilli v. State of New Jersey (Unpub. App. Div., April 6, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a4223-08.opn.html
Buccilli, a terminated employee, claimed that his firing was an adverse employment action which he attributed to a complaint made to his supervisor a year earlier after an incident in which

an unknown fellow employee damaged one of his uniforms. Under the Conscientious Employer Protection Act (CEPA), *N.J.S.A.* 34:19-1 *et seq.*, an employee who claims retaliation must demonstrate a causal connection between the protected activity and the adverse employment action. These proofs may be based on reasonable inferences from the circumstances surrounding the employment action. In this case, however, the Appellate Division found that the facts permitted no such reasonable inference of a causal connection because Buccilli's termination was too far removed in time from his protected acts. (7/2011)

EMPLOYMENT

- **CEPA**

Racanelli v. County of Passaic, 417 N.J. Super. 52 (App. Div. 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a5350-08.opn.html
Racanelli sued the Passaic County Sheriff's Dept. and various officers in the department following his layoff. He asserted violations of the Conscientious Employer Protection Act, *N.J.S.A.* 34:19-1 to -8 (CEPA). The trial court dismissed the claims, concluding they were barred by his failure to appeal the Civil Service Commission's decision sustaining his layoff. The Appellate Division reversed. It likened a CEPA claim to claim under the Law Against Discrimination, *N.J.S.A.* 10:5-1 to -49 (LAD). Under *Hennessey v. Winslow Twp., 183 N.J. 593 (2005)*, an LAD claim is not precluded by a plaintiff's failure to pursue an administrative remedy. The Appellate Division also held that CEPA claims are not barred when the plaintiff has failed to comply with the notice requirements of the Tort Claims Act, *N.J.S.A.* 59:1-1 *et seq*. (1/2011)

EMPLOYMENT

- **CEPA**

Gacina v. State of New Jersey (Unpub. App. Div., Nov. 17, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a6233-07.opn.html
After a lengthy review of this state police officer's factual assertions, the court upheld summary dismissal of complaint in a case brought under the Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 *et seq*. (CEPA). While two charges against the officer had been ultimately dismissed, in all other instances, he had been properly disciplined for acts of misconduct that were either admitted or deemed substantiated. Further, the officer had not been subjected to a pattern of wrongful retaliatory conduct, and he had suffered no loss of pay, benefits or rank. Therefore, the record did not support a claim that the officer had been subjected to any adverse employment action in violation of CEPA. (1/2011)

EMPLOYMENT

- **CEPA**

Hester v. Parker (Unpub. App. Div., April 14, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1681-09.opn.html
A school teacher was terminated after one bad performance evaluation (after getting good performance evaluations and suffering no discipline during his employment). During his employment he had filed a complaint with the school district's department of human resources complaining that some members of the board were attempting to get him fired in a discriminatory way. Just prior to the action terminating him for his bad performance evaluation he filed a civil complaint alleging the same discrimination. The Appellate Division held that he was entitled to protection under the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1 *et seq*., and therefore remanded the civil action to the trial court for further proceedings. (7/2011)

EMPLOYMENT

- **CEPA**

Valentino v. The Borough of Woodcliff Lake (Unpub. App. Div., June 30, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a5570-09.opn.html
The court determined that the plaintiff had a reasonable belief that some Borough employees had violated the law by submitting time cards with inaccurate information. By telling the business administrator and the mayor of her concerns, plaintiff performed a "whistle-blowing" activity under the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1 to -8. Nonetheless, the court also concluded that, even viewing the facts and all legitimate inferences in the light most favorable to plaintiff, a rational fact finder could not find that the restructuring of her duties of which she complained could be considered retaliatory, adverse employment actions occasioned by her whistle-blowing activity. (10/2011)

EMPLOYMENT

- **BENEFITS; CHANGES TO PLAN**

N.J. State Firefighters' Mutual Benevolent Ass'n v. State of New Jersey, Law. Div. Mercer, Docket No. MER-L-1004-10, January 19, 2011, Feinberg, A.J.S.C.
In this extensive opinion, Judge Feinberg upheld *P.L.* 2010, *c.* 1, 2 and 3, which made changes to public employee benefits to take effect upon the expiration of existing collective bargaining agreements and to pension calculations for new employees. The court upheld the laws against many and varied challenges by each of the unions who had filed complaints in the consolidated action. The laws do not violate Article I, Paragraph 19 of the New Jersey Constitution, the Public Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq*.or the Reform Act, *N.J.S.A.* 34:13A-14 *et seq*. The laws do not violate the Contract Clause of the New Jersey Constitution Article IV, §7 ¶ 3 or

the United States Constitution, Article I §10. Article IV, §7 ¶ 9 of the New Jersey Constitution, prohibiting special legislation, has not been violated by the Laws. The laws are not void for vagueness and there has been no violation of the Equal Protection Clause of the New Jersey Constitution, Article I, ¶ 1 and the Fourteenth Amendment to the United States Constitution. The challenged legislation did not impose a tax so there is no violation of Article VIII, §1, ¶ 7 of the New Jersey Constitution. This was not a bill to raise revenue so the fact that it did not originate in the General Assembly did not violate Article IV §6 ¶ 1 which requires revenue bills to originate there. There was not "taking" in violation of the Fifth Amendment to the United States Constitution. Finally, there were no violations of the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. (4/2011)

EMPLOYMENT

- **BACK PAY; MITIGATION**

In re Oliveira (Unpub. App. Div., Sep. 28, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a3325-08.opn.html
Manuel Oliveira was removed from his public position. The Civil Service Commission found, four-and-a-half years after the removal, that mitigating circumstances warranted a six-month suspension rather than removal. Oliveira returned to duty and pay status but a dispute remained as to his entitlement to back pay. The Civil Service Commission denied his claim for back pay because of a failure to mitigate his damages. It also denied counsel fees. The Appellate Division affirmed the ruling as being supported by sufficient credible evidence. (1/2011)

EMPLOYMENT

- **BACK PAY; MITIGATION**

In re Holland (Rowan University) (Unpub. App. Div., Nov. 30, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a0338-05.opn.html
Holland, a groundskeeper for Rowan University, was dismissed for "conduct unbecoming a public officer" when the University learned he was subject to criminal proceedings for possession and distribution of marijuana. The arrest occurred prior to his employment by Rowan, but the employment application did not seek information on pending criminal charges. The criminal proceedings were ultimately dismissed because the evidence came from an impermissible search. Holland acknowledged that marijuana, drug paraphernalia and marijuana seeds were, in fact, in his apartment. Nonetheless, the court held that a public employee cannot be subject to dismissal for "conduct unbecoming a public officer" when the "unbecoming conduct" occurred prior to his date of hire. (1/2011)

EMPLOYMENT

- **BACK PAY; MITIGATION**

In re Golden (Unpub. App. Div., Nov. 8, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a4421-08.opn.html
The Civil Service Commission's reduction in a back pay award was proper in a case in which there was no evidence the employee made reasonable efforts to find suitable employment during the time he had been wrongfully removed. (1/2011)

EMPLOYMENT

- **ATTORNEYS FEES**

Green v. Township of Deptford (Unpub. App. Div., July 21, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1672-09.opn..html
The Township declined to pay legal fees of more than $50,000 to Officer Green's attorney for services rendered in the defense of a criminal complaint for false swearing and a subsequent police department disciplinary matter against Green. The court agreed with the Township. It held that a municipality's obligation to reimburse a police officer for legal fees incurred in a criminal matter is triggered only when the charges arise out of the officer's lawful exercise of police powers in furtherance of the officer's duties. The officer's false statement in an investigation against a fellow officer was not made in furtherance of his duties but, instead, was a perversion of those duties. In addition, the Township had not consented to the officer's retention of counsel. Such consent is required under *Twp. of Edison v. Mezzacca, 147 N.J. Super. 9, 14 (App. Div. 1977)*. (10/2011)

EMPLOYMENT

- **ATTORNEYS FEES**

In re Hearn, Department of Education, 417 N.J. Super. 289 (App. Div. 2010)
Plaintiff was accused of racial discrimination by a fellow employee and was demoted. He appealed to the Merit System Board. An Administrative Law Judge, after a hearing, recommended that he be restored to his position and that counsel fees be awarded. The Merit System Board restored him to his position but denied counsel fees because, it said, plaintiff had not proven that the actions of the employer had been in bad faith or with invidious motivation. The Appellate Division held that the Board erred in limiting such an award to cases in which the employing authority had acted in bad faith or with invidious motivation. The court reversed and remanded the matter for a determination of the appropriate amount of fees. (1/2011)

EMPLOYMENT

- **ATTORNEYS FEES**

Shore v. Borough of Paramus (Unpub. App. Div., July 8, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a6246-09.opn.html
In 32 Municipal Law Review 57 (March 2009), we published the Law Division opinion in *Shore v. Borough of Paramus*, in which the court rejected a rule that required the borough clerk to submit all OPRA requests to the borough attorney before complying. The clerk had requested legal representation through governing body but had been rebuffed and, instead had hired his own counsel. The clerk brought the current application under *N.J.S.A.* 40A:9-134.1 which provides for municipal clerks to be given the necessary means for defense relating to clerk's official duties. The court found that the underlying OPRA lawsuit was properly related to the clerk's function. The payment of fees to an attorney retained by a clerk is limited only to reasonable costs and fees, but not precluded, because the attorney was not chosen by the municipality. The clerk was not barred by entire controversy doctrine and could bring this action separately because the cause of action for fees arose after the conclusion of the prior action (10/2011)

EMPLOYMENT

- **ARBITRATION; REASONABLY DEBATABLE**

Borough of East Rutherford v. East Rutherford PBA Local 275 (Unpub. App. Div., July 18, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a5310-09.opn.html
The Borough of East Rutherford was enrolled in State Health Benefits Plan (SHBP). All employees including police officers were subjected to a $5 co-pay. The co-pay amount was statutorily increased to $10. The collective bargaining agreement in effect at the time of the adoption of the statute put a limit of $5 on the co-pay amount. The Public Employment Relations Commission (PERC) decided that even though the SHBP benefit levels (including co-pays) could be changed by the Legislature, local governments and unions could contract for a certain level of health benefits such as the $5 limit on co-pays. (10/2011)

EMPLOYMENT

- **ARBITRATION; APPOINTING AUTHORITY**

Fleming v. State of New Jersey, College of New Jersey (Unpub. App. Div., March 24, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1943-09.opn.html
Under a collective bargaining agreement all charges against employees were required to be made within 45 days of the date when the appointing authority reasonably became aware of the offending conduct. Plaintiff, a campus police officer at The College of New Jersey (TCNJ) was charged with injecting steroids on two occasions and refusing to identify the person who had

sold him the drugs. A departmental hearing resulted in a recommendation that plaintiff be removed from his employment; this determination was communicated to Associate Vice President of Human Resources of TCNJ, who concurred with the recommendation. In the subsequent grievance proceeding, the plaintiff argued that the chief of the campus police force was the "appointing authority" and knew about the facts much earlier, so the charges were filed too late. The arbitrator held that the Vice President was the "appointing authority" and that the charges were timely. The Appellate Division upheld the award, noting the strong deference given to arbitration under a standard which requires confirmation "so long as the award is reasonably debatable." The award was not contrary to existing law or public policy. (7/2011)

EMPLOYMENT

- **ARBITRATION**

Policemen's Benevolent Association, Local No. 11 v. City of Trenton, 205 N.J. 422 (2011)
http://lawlibrary.rutgers.edu/courts/supreme/a-116-09.opn.html
The City of Trenton ordered police officers to report for "muster" ten minutes prior to the start time of their scheduled shifts. In requiring the uncompensated ten-minute muster, the City relied on language in its collective bargaining agreement with the PBA that stated, "no overtime shall be paid for a ten minute period prior to the commencement of a tour . . ." The PBA grieved the city's right to demand an additional ten-minute period of work without pay. The arbitrator sustained the grievance and determined that officers who report early were entitled to straight-time compensation – but not overtime--for ten minutes. Trenton challenged the award, arguing that no pay—straight time or overtime—was due. The Supreme Court upheld the award applying the standard set forth in *Middletown Twp. PBA Local 124 v. Twp. of Middletown, 193 N.J. 1, 11 (2007)* that an arbitrator's award will be confirmed "so long as the award is reasonably debatable." The majority found that the arbitrator had considered the contract as a whole and that, while other interpretations were plausible, the arbitrator's interpretation met the "reasonably debatable" standard. Three justices dissented and would have upheld Trenton's interpretation. (7/2011)

EMPLOYMENT

- **AGE DISCRIMINATION; MANDATORY RETIREMENT**

Babecki v. State of New Jersey (Unpub. App. Div., Jan. 28,2011)
http://lawlibrary.rutgers.edu/courts/appellate/a5783-09.opn.html
Plaintiffs brought an action under the Law Against Discrimination, *N.J.S.A.* 10:5-1 to-49, as well as the New Jersey Civil Rights Act, *N.J.S.A.* 10:6-1 to -2, challenging the section of the State Police Retirement System Act, *N.J.S.A.* 53:5A-1 to -47, mandating retirement at age 55. The Court rejected all discrimination claims and held it did not sit as a "superlegislature" to deal with occupational qualifications for law enforcement officers. (4/2011)

EMPLOYMNENT

- **COLLECTIVE BARGAINING**

Fort Lee Policemen's Benevolent Association, Local 245, v. Borough of Fort Lee, Ch.Div. Bergen, Docket Nos. BER-C-330-09, BER-C-155-10, Oct. 12, 2010, Contillo, P.J.Ch.

An interest arbitration award, entered in 2008, but still on appeal to the Appellate Division, is not a collective bargaining agreement. Therefore, Fort Lee is required to deduct 1.5% of employees' compensation to pay for health benefits beginning with May 10, 2010, the effective date of *P.L.* 2010, *c.* 2. The opinion was published in the January 2011 issue of the Local Government Law Review. (1/2011)

ENVIRONMENT

ENVIRONMENT

- **WATER QUALITY**

In re the Adoption of N.J.A.C. 7:15-5.24(b) and N.J.A.C. 7:15-5.25(e), 420 N.J. Super. 522 (App. Div. 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3262-08.opn.html

The court upheld proposed rule changes by the Department of Environmental Protection (DEP) affecting area water quality management planning under the Water Quality Planning Act. *N.J.S.A.* 58:11A-1 *et seq*. (WQPA). The regulations concerned limits on extension of sewerage lines and changes to allowable nitrate levels for septic discharge. Objectors to the rule amendments asserted that the DEP did not have the authority to issue these regulations because they were actually land use directives which can be regulated only by municipalities under the Municipal Land Use Law (MLUL), *N.J.S.A.* 40:55D–1. The court said that, even though there was some collateral effect of the regulations that limited land use that was not their main objective. Even though the WQPA and the MLUL overlapped with each other, this was acceptable regulation, because all served the common purpose of protecting the environment. Environmental and land use issues are inextricably linked and the mission of the DEP is not as narrow as the objectors proposed. (10/2011)

ENVIRONMENT

- **SOIL EROSION; WATER POLLUTION CONTROL ACT**

N.J. Department of Environmental Protection v. Kings Lake, LLC (Unpub. App. Div., June 17, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a4120-09.opn.html

Because of a large storm, a runoff spill occurred at Appellant's construction site. The local conservation district, which had approved a soil erosion and sediment control plan, found that an improperly installed silt fence had failed and issued a notice of violation requiring remedial measures. NJDEP which had issued an NJPDES general construction permit governing storm water discharge also levied fines for violation of the permit and for an oil spill caused by the flooding. On appeal, appellant argued that only the local soil conservation district or the municipality can compel compliance, citing *New Jersey Department of Environmental Protection and Energy v. T. E. Warren, Inc., 270 N.J. Super. 546 (App. Div. 1994)*. The Court in strong terms distinguished the *T.E. Warren* case because, in this case, there had been a violation of the NJPDES Permit and there had been no attempt by DEP to intrude upon the local enforcement authority granted under the Soil Erosion and Sediment Control Act. As support for its conclusion the court noted that appellant had been notified by the soil conservation district

that penalties from the DEP could follow. As to the amount of the fines, the court found that the fines and penalties and the matrix used by the DEP were within its statutorily delegated authority. (10/2011)

FIREARMS

FIREARMS

- **LAW ENFORCEMENT AGENT**

In re the Denial of the Application of Casaleggio for a Retired Law Enforcement Officer Permit to Carry a Handgun, 420 N.J. Super. 121 (App. Div. 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a4924-09.opn.html

The Superintendent of the State Police denied an application for a hand gun carry permit to a person claiming the right to do so as a retired law enforcement officer under *N.J.S.A.* 2C:39-6(l). Casaleggio had been employed as an Assistant Prosecutor in the Union, Passaic and Morris County Prosecutors' offices and as a Deputy Attorney General in the Division of Criminal Justice. In those positions he was issued a firearm and trained in the use of firearms. On his retirement in good standing in 1988 he became a professor at Saint John's University. A permit to carry a gun is a closely regulated aspect of the State's gun control laws so the Appellate Division considered the legislative intent and plain meaning of the statutory language. The court concluded that, under the New Jersey act, Mr. Casaleggio had not been a law enforcement officer, but rather a lawyer providing legal services in connection with law enforcement. The court also found that no right existed under a federal statute, the "Law Enforcement Officer's Safety Act of 2004" (LEOSA), 18 *U.S.C.* §§926B & 926C as it had been incorporated into *N.J.S.A.* 2C:39-6(l). The federal act created a right on the part of retired law enforcement officers to carry concealed firearms, "shipped or transported in interstate or foreign commerce" and by amendments to the New Jersey act in 2008, those persons were included as possible permittees. The Appellate Division analyzed the Legislature's treatment of LEOSA in the 2008 amendment of the gun permit statute and concluded, again based upon a narrow interpretation of a strictly regulated subject, that Casaleggio's claim failed because the Legislature intended by this amendment only to accommodate retired law enforcement officers from out of state who had relocated to New Jersey. (7/2011)

FIREARMS

- **FALSE STATEMENTS**

In Re Application of Roy Vonder Heyden for a Firearm Purchaser's Identification Card and a Permit to Purchase a Handgun (Unpub. App. Div., July 19, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a0979-10.opn.html

Vonder Heyden's application for a gun permit was denied because the Paterson Police Chief concluded that he had falsified his address on the application. The court reversed the denial and found that the error was not a deliberate falsification. (10/2011)

FIREARMS

- **DUE PROCESS**

In re Lupinski (Unpub. App. Div., Oct. 26, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a1625-09.opn.html
The Appellate Division followed *Weston v. State, 60 N.J. 36 (1972),* which held that an application for a Firearms Purchaser Identification Card is governed by constitutional procedural due process requirements. In this case the requirements had not been met when the trial court reached its decision without formally identifying or admitting the evidence it relied on in support of its findings and conclusion of law. The Appellate Division reversed and remanded for a plenary hearing in which the applicant would be afforded the opportunity to present evidence in support of his application and to contest the evidence presented by the State in opposition. (1/2011)

FIREARMS

- **BOUNTY HUNTER**

In re Application of Atkins for Permit to Carry a Firearm (Unpub. App. Div., Jan 10, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3502-09.opn.html
Appellant sought to overturn lower court's denial of his request for a gun permit. He alleged that he needed a weapon because he was employed as a bounty hunter and that he would be likely to encounter persons who might seek to harm him. Under *N.J.S.A.* 2C:58-4d the applicant for a gun permit is required to show a "justifiable need." Justifiable need is described in the statute as urgent need for protection by evidence of specific threats or previous attacks. Just because appellant was a bounty hunter, this was not sufficient to prove a justifiable need. A particularized harm is required. Indeed, the Appellate court recognized the countervailing potential for a public risk by allowing the possibility of open and free exchange of gunfire with fugitives. (4/2011)

HEALTH

HEALTH

- **COUNTY FUNDING; QUANTUM MERUIT**

Cumberland County Board of Health v. Mayor and Council of Vineland (Unpub. App. Div., July 12, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a1544-09.opn.html

The City of Vineland is the only municipality in Cumberland County that does not participate in the Cumberland County Board of Health. As a result Vineland residents do not pay the county "health tax", paid by all other county residents. Among the functions of the county board of health is the provision of Early Intervention Services (EIS) for children with disabilities residing in the county, including Vineland. These services are funded under the federal Individuals with Disabilities Education Act, 20 *U.S.C.* §§1400-1482 and the New Jersey implementing law. *N.J.S.A.* 26:1A-36.7; *N.J.A.C.* 8:17-1.1 to 8:17-18.2. The county health department determined that residents of Vineland were not paying their proportionate share for EIS and attempted to correct this by collecting from the city. The court found that the county board of health did not have statutory authority, itself, to tax county residents and it was dependent upon the county board of chosen freeholders to raise the monies by taxation. Further, although declining to rule on the issue of standing, the court pointed out that the board of health had suffered no loss because all of its expenses for the provision of EIS throughout the entire county, including Vineland, had been paid with monies provided by the grant and by the county through its general operating revenues. In addressing the board of health's unjust enrichment argument, the court determined that the intervention services had not been provided by the health department to the city but rather to its residents and that all residents of the State of New Jersey are entitled to receive such services under both federal and state law. (10/2011)

HIGHLANDS ACT

HIGHLANDS ACT

- **AFFORDABLE HOUSING**

In re Highlands Master Plan, Executive Order 114, 421 N.J. Super. 614 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1026-08.opn.html
A public interest group advocating for affordable housing challenged Executive Order 114 of the Highlands Water Protection and Planning Council (Council) and a Memorandum of Understanding between the Council and the Council on Affordable Housing (COAH) about affordable housing within the highlands region. For the most part, the challenge was rejected. The Regional Master Plan (RMP), adopted by the Council in strict conformity with the Highlands Water Protection and Planning Act (the Highlands Act), *N.J.S.A.* 13:20-1 to -35, is not required to have been adopted in conformity with the Administrative Procedures Act (APA), *N.J.S.A.* 52:14B-1 to -15. Executive Order 114, which requires the Council and COAH to work jointly to implement affordable housing regulations within the Highlands Region, does not direct either body to take action that is inconsistent with its enabling legislation or its own rules and regulations. Likewise, the Memorandum of Understanding entered into by the two agencies is valid. However, the August 12, 2009 COAH resolution that "waived" parts of the COAH revised third round regulations as applied to municipalities in the highlands region and directed those municipalities to follow the procedures and standards promulgated by the resolution, are invalid because they are rules that must be properly adopted under the APA. (10/2011)

HIGHLANDS ACT

- **TRANSFER OF DEVELOPMENT RIGHTS**

In re Adoption of Highlands Regional Master Plan, 421 N.J. Super. 396 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1054-08.opn.html
The Regional Master Plan (RMP) adopted by the Highlands Water Protection and Planning Council (Council) adopted standards for the transfer of development rights (TDR) that were different than those contained in the State Transfer of Development Rights Act, *N.J.S.A.* 40:55D-137 to 40:55D-163. The court upheld the RMP because its standards for TDR were authorized by the Highlands Act itself. *N.J.S.A.* 13:20-13. (10/2011)

HIGHLANDS ACT

- **EXEMPTION**

Lakeside Manor and Mountain Lakes Estates v. Department of Environmental Protection, 421 N.J. Super. 362 (App. Div. 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a0843-09.opn.html

A developer controlled two properties located within the preservation area of the Highlands Water Protection and Planning Act (Highlands Act), *N.J.S.A.* 13:20-7(b) and (c) and *N.J.S.A.* 13:20-10(b) and (c). Development of land within the preservation area is discouraged. The Highlands Act, however, contains several exemptions, including one for developments which, prior to March 29, 2004, had received both municipal approvals pursuant to the Municipal Land Use Law and at least one NJDEP permit. *N.J.S.A.* 13:20-28(a)(3). As of that date, the developer had obtained all municipal land use approvals for two projects as well as DEP permits for sewer and water and had also begun infrastructure improvements. The developer was therefore entitled to exemptions. (10/2011)

INSURANCE

INSURANCE

- **WORKERS COMPENSATION; SUBROGATION**

Thomas v. City of East Orange (Unpub. App. Div., July 1, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1468-10.opn.html
Plaintiff, a police officer, was injured in line of duty. He obtained worker's compensation benefits from City of East Orange, which is self-insured for that purpose. He also sued the City of Newark and Essex County for negligence and got a settlement. The complaint in the negligence suit did not seek recovery for medical bills or lost wages which would not have been recoverable in any event because such damages are barred by the Workers Compensation Act. *N.J.S.A.* 59:9-2(e). Under these circumstances, East Orange, as workers compensation self-insurer, was not entitled to recover in subrogation from the officer's other settlements. The claims for subrogation against other governmental entities were barred by the Tort Claims Act. *N.J.S.A.* 59:9-2(e). (10/2011)

LAND USE

LAND USE

- **COURTESY REVIEW; RIPENESS**

Carter Road Homeowner's Association, Inc. v. Lawrence Township Planning Board (Unpub. App. Div., March 2, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a4156-09.opn.html

Objectors challenged a "courtesy review" by the planning board for a cell tower located on municipal land but leased to a tower operator. The land had been dedicated to the township for an emergency services substation pursuant to the condition of a subdivision resolution at the time it was acquired. The deed creating the public lot stated that the purpose of the conveyance was for emergency purpose. While municipalities are bound by deed restrictions just as private landowners are, the deed here did not restrict the land solely to emergency purposes and a cell tower therefore was not contrary to the terms of the deed.

As to the "courtesy review" the trial court and the appellate division found no authority of the planning board to issue an advisory opinion about the compliance of a proposed use or site plan with applicable laws and regulations. The trial court held that the matter was not ripe for determination until the project was "shovel ready." The municipality argued that it did not have to obtain variances and site plan approvals to construct the tower. For specific support of this proposition in cell tower cases it cited the Law Division case of *Hills of Troy Neighborhood Association v. Township of Parsippany, 392 N.J. Super. 593 (Law Div. 2005)*. That case held that the municipality had authority to construct a communications tower at its police headquarters without zoning approvals but its construction plans were subject to review to ensure they were reasonable and the public had a right to notice and public comment on the plans. That court also held that private entities who were co-locators on the tower were also exempt from zoning regulations so long as the public interest outweighed the private benefit. The Appellate Division here did not decide the correctness of the statements in *Hills of Troy*. It agreed with the lower court that plaintiffs may again challenge, when ripe for adjudication, the procedures the township has followed in authorizing use of the site for a communications tower. (10/2011)

LAND USE

- **VIOLATION OF ORDINANCE; JURISDICTION**

State v. McGlone (Unpub. App. Div., Sep.30, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a3776-08.opn.html

The Winslow Township zoning officer cited McGlone for placing an accessory shed on his property in violation of the Township's five-foot setback. The municipal court judge found him

guilty. On a *de novo* appeal, the trial court also found him guilty. Sometime thereafter, however, the trial judge *sua sponte* issued an opinion in which he found that the Winslow Township municipal court never had jurisdiction over the matter, because the complaint as well as a letter from the Winslow Township construction official listed McGlone's address as Egg Harbor Road in Hammonton rather than Winslow. The Appellate Division reversed. It faulted the trial judge for ignoring the actual location of McGlone's property in Winslow as shown on his survey and as described in the complaint, and for relying instead on McGlone's mailing address. The court held that a mailing address is not dispositive of a property's location. It also held that a court's jurisdiction over subject matter would not be defeated by a technical insufficiency of a complaint in pleading the facts that substantively operate to invoke that jurisdiction, when the facts themselves clearly show that jurisdiction exists. As set forth in the fifty year old case of *State v. Vreeland, 53 N.J. Super. 169 (App. Div. 1958),* "the enlightened concepts which are entertained today in respect to the subordination of form to substance, the fact of jurisdiction should be controlling." (1/2011)

LAND USE

- **VIOLATION OF CONDITIONS**

Washington Commons, LLC v. City of Jersey City, 416 N.J. Super. 555 (App. Div. 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a0779-09.opn.html
Washington Commons and the City of Jersey City have been litigating for years over an obligation, included in a land use approval, that Washington Commons convey seven affordable housing units to the City. The price is the primary issue. In a procedural ruling the Appellate Division held that the City could not proceed by motion but needed to file a new complaint in order to seek enforcement of the condition. The court opined, however, that, because of doctrines of *res judicata* and the law of the case, the matter should be summarily decided rather than involving more discovery and a full trial. (1/2011)

LAND USE

- **USE VARIANCE; INHERENTLY BENEFICIAL**

Market Street Mission d/b/a Jersey Shore Rescue Mission v. Zoning Bd. of Adj. of the City of Asbury Park (Unpub. App. Div., Oct. 1, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a0685-08.opn.html
The Market Street Mission applied to the zoning board of Asbury Park seeking four (4) use variances to operate a soup kitchen, a 40 person residence, a house of worship, and the continuance of the existing used automobile sales operation on the property. The board denied the Mission's application and the law division affirmed the denial. The Appellate Division reversed. The court held that the Mission's proposed uses are inherently beneficial under the analysis required by *Sica v. Board of Adjustment of the Township. of Wall, 127 N.J. 152 (1992).* Therefore, it had satisfied the positive criteria of *N.J.S.A.* 40:55D-70d. The court further held that

the Mission, through its testimony, had also satisfied the negative criteria and showed that the use would not substantially impair the intent and purpose of zone plan and zoning ordinance. (1/2011)

LAND USE

- **USE VARIANCE**

Price v. Hudson Heights Development (Unpub. App. Div., Jan.13, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a4766-06.opn.html
A proposed 4 story residential building was not a "limited multi-family development" allowed as a conditional use but rather was a "high-rise apartment" as those terms are defined in the Union City ordinance. The use variance standards of *Medici v. BPR Co., 107 N.J. 1 (1987)* had to be fulfilled rather than the more relaxed standard of *Coventry Square, Inc. v. Westwood Zoning Bd. of Adj., 138 N.J. 285 (1994),* which applies only to conditional uses. Because it was reversing on these grounds, the court did not consider plaintiff's contention that the Board's action was void because the applicant had not filed the stockholder disclosure statement required by *N.J.S.A.* 40:55D-48.1 before the Board acted. The court did note that the disclosure statement had subsequently been filed and accepted by the Board. (4/2011)

LAND USE

- **USE VARIANCE**

Kinderkamack Road Associates, L.L.C. v. Mayor and Council of the Borough of Oradell, 421 N.J. Super. 8 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a4453-09.opn.html
Kinderkamack Road Associates, LLC (Kinderkamack) owned an assemblage of lots on which it sought to build a drugstore. One lot (Lot 9) was located in a residential district and the other lots were zoned commercially. Kinderkamack sought variances to use the residential Lot 9 as a landscaped buffer to the commercial use. The board of adjustment approved the variances; but, on appeal, the governing body denied them. The governing body found that the proposed buffer use of Lot 9 would result in the drugstore's parking area being brought closer to the adjacent residential Lot 8, and that the use of Lot 9 as a buffer would allow for a more intense commercial use that was inconsistent with both Oradell's zoning ordinance and its master plan. The court upheld the governing body's determination that Kinderkamack failed to satisfy either the positive or negative criteria necessary to sustain the variances. (10/2011)

LAND USE

- **USE VARIANCE**

Signature Communities LLC v. Borough of Red Bank Zoning Bd. of Adj. (Unpub. App. Div., Oct.10, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a0942-09.opn.html

The owner of a mid-rise apartment complex sought use and bulk variances, and site plan approval to expand a pre-existing, nonconforming building and to change the parking configuration. The board of adjustment denied the application, and the trial and appellate courts affirmed its decision. The board's findings, including that the parking was substantially deficient, were reasonable. The court deferred to the board's local knowledge. (4/2011)

LAND USE

- **USE VARIANCE**

Price v. Himeji, LLC (Unpub. App. Div., August 2, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a4974-09.opn.html

The grant of use variance relief pursuant to *N.J.S.A* 40:55D-70d(1) (5) and (6) for an apartment building was upheld. Giving deference to the board, the Appellate Division held that the location of other suitable properties was not a bar to finding satisfaction of the positive criteria (10/2011)

LAND USE

- **USE VARIANCE; INTERESTED PARTY**

TSI Marlboro, Inc. v. Township of Marlboro Zoning Bd. of Adjust. (Unpub. App. Div., August 17, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a5382-08.opn.html

A zoning board granted approval of a use variance application for recreational facility and health club. The trial court overturned the approval by noting that no proof had been presented that this facility could not be built elsewhere in the municipality and that, therefore, there was no uniqueness to this particular location. Moreover, the property encompassed such a large portion of the zone that the variance would be tantamount to a rezoning. The Appellate Division adopted these positions and upheld the denial of the variance. The plaintiff, a competitor, was an interested party under *N.J.S.A.* 40:55D-4 and entitled to file an action to overturn a variance approval. Court concluded that competitors do have a right to contest land use board actions and are probably best situated to initiate a challenge due to knowledge of the use and its effects. Further, this plaintiff was a taxpayer in the municipality and could seek relief under that status as well. (10/2011)

LAND USE

- **TIMELINESS**

Greenberg v. 236 E. Absecon Boulevard Mobile Home Park, L.L.C. (Unpub. App. Div., August 23, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a4254-09.opn.html

Owners of 65 residential properties near the property of the applicant appealed from land use approvals granted by the Absecon Board of Adjustment. The applicant was owner of a dilapidated mobile home park which had been in existence for many years. Applicant applied first, in 2007, for certification of the non-conforming use, which was granted; and then, in 2008, for preliminary and final site plan approval with (c) variances which was also granted. Plaintiffs located within 200 feet had been properly noticed prior to both proceedings and none had appeared at either hearing in opposition. Notice of the second approval was published in September, 2008. Plaintiffs did not file suit until February, 2010. The trial court dismissed the case as time-barred. On appeal, plaintiffs argued that the challenge was a collateral attack on an "utterly void" municipal action, making it timely and meritorious. Their principal contention was that the board lacked jurisdiction to grant site plan and variance relief. The court rejected this because the board had properly exercised its ancillary jurisdiction under *N.J.S.A.* 40:55D-76b.

The Court distinguished *Najduch v. Township of Independence Planning Board, 411 N.J. Super 268 (App. Div. 2009),* in which, almost 20 years prior to the action, a planning board had improperly granted site plan approval for a use prohibited in the zone district. In that case, the collateral attack on the original action, which could be raised at any time, was nevertheless timely when brought forth as a challenge to planning board decision permitting an amendment to the improperly granted site plan. Here, there had been no timely complaint that implicated any prior actions of the board of adjustment. Further, the Court found that none of the factors which must underlie an expansion of the 45 day rule were present. (10/2011)

LAND USE

- **TELECOMMUNICATIONS**

T-Mobile Northeast, L.L.C. v. Zoning Board of Adjustment of the New Milford (Unpub. App. Div., Feb 22, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3068-09.opn.html

The zoning board's denial of use variance relief for a cell tower pursuant to *N.J.S.A.* 40:55D-70d(1) was reversed when it was based solely on failure by the applicant to use the most effective means of camouflage. In addition, the board did not balance the positive and negative criteria. (4/2011)

LAND USE

- **TELECOMMUNICATIONS**

Mesquite Tower Consulting, LLC v. Zoning Board of Adjustment of the Township of Dover (Unpub. App. Div., September 7, 2011)

The Dover Township Board of Adjustment, after remand of an initial denial of a use variance for a cell tower in a marina, voted to grant the variance, but failed the super majority requirements of *N.J.S.A.* 40:55D-70(d). The court reviewed the denial under familiar principles applicable to cell towers and found that the board had acted arbitrarily, capriciously and unreasonably because the denial lacked any rational basis and was unsupported by competent evidence in the record. The applicant established an undisputed need for a cell tower to fill a gap in coverage between existing cell towers and to provide sufficient capacity to handle the needs of wireless customers. There were seven possible alternate sites, however, they were either unavailable or less suitable because they were located in residential zones, were smaller properties, or had more adjacent residential properties. The marina was particularly suited to cell tower use because it was in the GB Zone and it had sufficient space, with the fewest residential neighbors. Moreover, the tower and equipment compound would occupy only a small portion of an existing parking lot, without interfering with the marina's operations. The applicant met the positive criteria because it held FCC licenses. On the issue of the negative criteria, the judge found that the opposing members of the board erred in relying upon the net opinion of the objector's real estate expert and in rejecting plaintiffs' real estate expert's opinion without explanation. (10/2011)

LAND USE

- **TELECOMMUNICATIONS**

Omnipoint Communications, Inc. v. Zoning Bd. of Adj. of Rutherford (Unpub. App. Div., Dec. 10, 2010

http://lawlibrary.rutgers.edu/courts/appellate/a0202-09.opn.html

The Rutherford Borough Board of Adjustment denied use variance and site plan relief sought by Omnipoint for the erection of eight rooftop wireless antennas on an apartment building in a residential zone. The antennas were to be located within eight faux chimneys resembling the brick façade of the building. The Appellate Division upheld the reversal by the trial court of the denial substantially for the reasons given in the trial court opinion. Noting that no expert testimony had been presented in opposition to Omnipoint's experts, the Court held that the positive criteria for a use variance had been satisfied because applicant, as an FCC licensee, proposed a use serving the general public and that it had demonstrated a coverage gap. As to the negative criteria, the faux chimneys would have only minimal visual impact and otherwise, no adequate proof had been offered to demonstrate substantial detriment to adjoining properties or the public good. (1/2011)

LAND USE

- **TELECOMMUNICATIONS; COURTESY REVIEW; RIPENESS**

Carter Road Homeowner's Association, Inc. v. Lawrence Township Planning Board (Unpub. App. Div., March 2, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a4156-09.opn.html

Objectors challenged a "courtesy review" by the planning board for a cell tower located on municipal land but leased to a tower operator. The land had been dedicated to the township for an emergency services substation pursuant to the condition of a subdivision resolution at the time it was acquired. The deed creating the public lot stated that the purpose of the conveyance was for emergency purpose. While municipalities are bound by deed restrictions just as private landowners are, the deed here did not restrict the land solely to emergency purposes and a cell tower therefore was not contrary to the terms of the deed.

As to the "courtesy review" the trial court and the appellate division found no authority of the planning board to issue an advisory opinion about the compliance of a proposed use or site plan with applicable laws and regulations. The trial court held that the matter was not ripe for determination until the project was "shovel ready." The municipality argued that it did not have to obtain variances and site plan approvals to construct the tower. For specific support of this proposition in cell tower cases it cited the Law Division case of *Hills of Troy Neighborhood Association v. Township of Parsippany, 392 N.J. Super. 593 (Law Div. 2005).* That case held that the municipality had authority to construct a communications tower at its police headquarters without zoning approvals but its construction plans were subject to review to ensure they were reasonable and the public had a right to notice and public comment on the plans. That court also held that private entities who were co-locators on the tower were also exempt from zoning regulations so long as the public interest outweighed the private benefit. The Appellate Division here did not decide the correctness of the statements in *Hills of Troy*. It agreed with the lower court that plaintiffs may again challenge, when ripe for adjudication, the procedures the township has followed in authorizing use of the site for a communications tower. (10/2011)

LAND USE

- **SUBSTANTIVE DUE PROCESS; EXHAUSTION**

Rezem Family Associates v. Borough of Millstone (Unpub. App. Div., 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a2290-09.opn.html

Rezem sued the Borough of Millstone after its multiple efforts over many years to develop its property were allegedly thwarted by the borough. Rezem's claims included violations of substantive due process. The complaint was dismissed because a substantive due process claim in a land use dispute requires both governmental misconduct that "shocks the conscience" and exhaustion of remedies available under land use law. Though the trial court found that a rational jury could conclude that, if proven, Rezem's allegations about the borough's actions would

shock the conscience, it was undisputed that Rezem had not pursued development applications or zoning changes to a final decision. (7/2011)

LAND USE

- **SUBSTANTIVE DUE PROCESS; EQUAL PROTECTION**

Toll Bros., Inc. v. The Township of Moorestown, 2011 U.S. Dist. LEXIS 68788 (D.N.J. 2011)
Various claims for substantive due process, duty to serve and inverse condemnation were dismissed on summary judgment. Claims for equal protection, fraud and breach of contract survived the motion. The dispute involved a condition imposed by the planning board on a subdivision proposed by Toll Brothers. The condition required Toll Brothers to make modifications to an off-tract water system and there were various settlement agreements to be interpreted. (10/2011)

LAND USE

- **SUBDIVISION; VARIANCES**

Cappelluti v. City of Union City Planning Bd. (Unpub. App. Div., July 19, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3075-09.opn.html
The Cappellutis continued to challenge the planning board's approval of Mautone's minor subdivision with variances allowing him to build two three-story, three-family homes on neighboring property. If these homes are built, the Cappellutis will lose their view of the Manhattan skyline. The initial challenges to the board's actions were successful because the court found the board's resolutions to have been deficient. The resolution after the remand, however, contained explicit findings of fact supported by evidence, all of which supported the board's conclusions of law. Accordingly, the resolution passed the court's muster. (10/2011)

LAND USE

- **SUBDIVISION; VARIANCES**

Hooper v. Gloucester County Planning Board (Unpub. App. Div., July 11, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a6224-08.opn.html
A contract purchaser sought preliminary subdivision approval to subdivide one lot into 18 fully conforming residential lots. In the same application, the applicant sought lot frontage and lot area bulk variances on two other, existing, lots to permit the development of single family homes on them. The board, although finding that proper conditions could be imposed on the 18 lot subdivision, nevertheless denied both the subdivision and the variances. Its reason for denying the subdivision was very conclusory – the subdivision did not meet the requirements of public safety – and unsupported by the record. The Appellate Division reversed the denial of the preliminary subdivision approval and ordered it issued with the conditions approved by the board's consultants. The variance denial was not arbitrary, capricious or unreasonable. (10/2011)

LAND USE

- **SUBDIVISION; STANDING; ILLEGAL CONVEYANCE**

Newmark v. Board of Adjustment of the Township of Mendham (Unpub. App. Div., August 25, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a1617-09.opn.html

A property owner was denied a subdivision for undersized lots and this denial was upheld by the Appellate Division. Within weeks of that appellate division decision the owner nevertheless conveyed one of the lots to a third party. Neither the neighboring objector in the initial case nor the municipality sought any action to force injunctive relief against the illegal subdivision within the two year period prescribed by *N.J.S.A.* 40:55D-55. The neighboring property owner brought an action in aid of litigant's rights, but that relief was denied. The court said that the subdivision existed, but that the owner of the subdivided lot could not do anything with it and that any variance application for use of that lot would be self-created. (10/2011)

LAND USE

- **SUBDIVISION; STANDING**

Figa v. Raritan Twp. Planning Bd. (Unpub. App. Div., May 3, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a5007-09.opn.html

Property owners in Raritan Township entered into a contract with a developer, an adjoining property owner, under the terms of which the developer would make an application to the planning board for a subdivision to include both parcels. The developer's obligation to purchase the property was contingent upon obtaining subdivision approval and the developer agreed to pay all expenses required to gain approval. In addition, the developer agreed that it would "Hold [Plaintiffs] Harmless" in the event that the subdivision was rejected. The planning board denied the application. The property owner sued the planning board and the developer, challenging the decision of the board and seeking counsel fees, indemnification and damages from the developer. Counsel fees, indemnification and contractual damages were denied based upon the court's interpretation of the contract. As for the challenge to the planning board, the Appellate Division, while recognizing a low barrier for standing, denied the property owner standing to sue. The court said the case was controlled by *Spinnaker Condo Corp., v. the Zoning Board of City of Sea Isle City, 357 N.J. Super., 105 (App. Div. 2003)* (a telecommunications case in which the owner was denied standing to challenge a denial of a variance). The court distinguished *Campus Assocs. L.L.C. v. Zoning Bd. of Adjustment of the Twp. of Hillsborough, 413 N.J. Super. 527 (App. Div. 2010)*(in which the owner was granted standing to challenge the denial of the subdivision of a single parcel wholly owned and controlled by the plaintiff-owner). Here, the property owner owned only part of the subdivision and could not effect any relief without the participation of the developer, so lacked standing. (7/2011)

LAND USE

- **SUBDIVISION; RES JUDICATA**

Gage v. Sleepy Hollow of Warren, LLC (Unpub. App. Div., Oct. 18, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a5679-08.opn.html
Gage objected to the approval by the Warren Township Planning Board of a subdivision on neighboring property owned by Sleepy Hollow. The approval, which was challenged unsuccessfully by Gage, required, as a condition, that Sleepy Hollow provide a secondary access road through Somerset County park property. Ultimately, the County did not permit the access. Sleepy Hollow amended its plans and obtained amended approvals, which Gage also challenged. In his second complaint, Gage asserted many issues addressed in his first suit. The court held that Gage's second suit was either barred by the principles of *res judicata* and the entire controversy doctrine, or otherwise lacked merit. (1/2011)

LAND USE

- **SUBDIVISION; "C" VARIANCES**

Bush v. Planning Bd. of Middletown Twp. (Unpub. App. Div., March 29, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a2185-09.opn.html
Plaintiff applied for variance relief under *N.J.S.A* 40:55D-70(c)(2) to subdivide a conforming lot improved with a single-family dwelling into two undersized lots with deficient front yards so that they could build a second single-family home. The board denied the application. The trial court reversed holding that the applicant had made a case for a "hardship" variance under *N.J.S.A* 40:55D-70(c)(1) even though the case had not been tried before the board on that basis. The Appellate Division held that the trial court had impermissibly substituted its judgment for that of the board and had not accorded proper deference to the board's decision. The court also held that plaintiff's desire to maximize the economic potential of the property by squeezing in a second house did not constitute a hardship under *N.J.S.A.* 40:55D-70 (c)(1). (7/2011)

LAND USE

- **SUBDIVISION; FLAG LOT; DEED RESTRICTION**

American Dream at Marlboro, LLC v. Planning Bd. of Marlboro Twp. (Unpub. App. Div., Jan 20, 2011), certif. granted, 206 N.J. 329 (2011)
http://lawlibrary.rutgers.edu/courts/appellate/a0738-09.opn.html
This is an interesting (unfortunately unreported) decision involving the refusal by a court to enforce a deed restriction against further subdivision of land. Plaintiff's predecessor-in-title received subdivision approval to develop land in a residential zone in which the minimum lot size was 80,000 square feet and the minimum street frontage was 250 feet. Six residential lots were created fronting on a cul de sac. The seventh lot was a 5 acre flag lot with only fifty feet of frontage, requiring a variance from the 250 foot requirement. Because the flag lot was

substantially oversized for the zone, the Planning Board was concerned about its potential further subdivision and the creation of additional flag lots. So the board required, as a condition of the variance approval, that a deed restriction be recorded preventing any further subdivision of the flag lot. Although the predecessor agreed to the restriction, the deed was not recorded. Plaintiff subsequently purchased the property with actual knowledge of the (unrecorded) restriction and entered into a developer's agreement agreeing to the restriction. Thereafter, plaintiff subsequently acquired an adjacent 10-acre parcel and applied to the Board for approval to merge that parcel with the flag lot, divide the merged parcels into six new building lots, and provide access to those lots by building a new road off of the end of the previously-approved cul-de-sac. Under the applicant's proposal, all of the lots would have the requisite 250 feet of frontage on a public road, no flag lots would be created, and no variances would be needed.

The Board approved the application. The owner of one of the lots in the original subdivision sought to overturn the approval on the basis that the former flag lot had been restricted against any further division. The Appellate Division held that the deed restriction would be terminated and not enforced. A restrictive covenant will be enforced in equity only as long as it remains reasonable in light of its purpose. Under the doctrine of changed conditions, a court can terminate a restrictive covenant if changes occur that would make it impossible as a practical matter to accomplish the purpose for which the covenant was created. Here, there was no longer any need to use or further subdivide the approved flag lot. The purpose of the restriction against further division of the flag lot was to prevent future flag lots, not to allow a single owner to benefit from having a large single lot behind her property. (4/2011) ***[Editor's note: Certification has been granted, see 206 N.J. 329]***

LAND USE

- **SUBDIVISION; EXTENSION**

Rogers v. Township of Holland Planning Board, Law Div. Hunterdon, HNT-L-540-09, November 12, 2010, Buchsbaum, J.S.C.

N.J.S.A. 40:55D-54 requires that a subdivision plat be filed with the County Clerk within 95 days of its signing. In this case the plaintiffs argued that a subdivision approved in 2004 could not be filed in 2010 because it had "expired" under *N.J.S.A.* 40:55D-54. The court found that argument to be unpersuasive because the plat could not realistically have been signed earlier as the result of other litigation challenging the approval. The objectors also claimed that an extension of the approval by the planning board was ultra vires because it extended the life of the approval beyond the two years permitted by *N.J.S.A.* 40:55D-52 and was not tolled by *N.J.S.A.* 40:55D-21. Because of the litigation history in this case the court found that the board had not acted arbitrarily, capriciously and unreasonably when, after several false starts, it held that time for perfecting the subdivision had been tolled and extended. (1/2011)

LAND USE

- **SUBDIVISION**

O'Brien v. Woodland Township Joint Land Use Board (Unpub. App. Div., Dec.14, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a3577-09.opn.html
Plaintiff challenged the denial of a variance to subdivide 39 acres into 4 building lots all located in the Preservation Area of the Pinelands National Reserve (Pinelands). The Appellate Division recognized that the Pinelands Protection Act, *N.J.S.A.* 13:18A-27, overrides regulations in the Municipal Land Use Law *N.J.S.A.* 40:55D-1 *et seq*. Strict regulations severely prohibiting subdivisions are permitted by the Pinelands Protection Act and the denial was therefore lawful. (1/2011)

LAND USE

- **SUBDIVISION**

NAR Farms, LLC v. Borough of Glassboro Planning Board (Unpub. App. Div., June 27, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a2012-10.opn.html
The land use ordinance of Glassboro specifically prohibits the planning board from approving a subdivision if the property contains "other features which can reasonably be expected to be harmful to the health, safety and general welfare of the present or future inhabitants..." unless the applicant has formulated "adequate and acceptable methods...to solve the problems...." In this instance, the applicant did not know the full extent of a contamination problem and provided no specific plan to resolve the contamination concerns. The planning board denied the subdivision and the court affirmed the denial. Relying on its decision in *Field v. Mayor & Council of Franklin Township, 190 N.J. Super. 327 (App. Div.), certif. denied, 95 N.J. 183 (1983)*, the Appellate Division affirmed the lower Court, finding that "fundamental elements of [Plaintiff's] development plan [were] left unresolved..." to be addressed at "an unspecified later day....". The court rejected plaintiff's argument that the Department of Environmental Protection (DEP) had primary jurisdiction over that issue and that, therefore, the planning board was required to approve the subdivision subject to DEP approval. (10/2011)

LAND USE

- **STATUTORY APPROVAL**

Johnson v. Ocean City Planning Board (Unpub. App. Div., Nov. 4, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a5505-06.opn.html
A land owner filed a planning board application seeking preliminary and final site plan approval. The board tabled and rescheduled the application in order to wait for the adoption of a new ordinance. The applicant then sought an automatic approval pursuant to *N.J.S.A.* 40:55D-10.4. The Appellate Division applied *Amerada Hess Corp. v. Burlington Cty. Planning Bd., 195 N.J.*

616 (2008) and found the board to have engaged in a purposeful delay requiring an automatic approval. (1/2011)

LAND USE

- **SEXUALLY ORIENTED BUSINESS; CONSENT JUDGMENT**

DEG, LLC v. Township of Fairfield (Unpub. App. Div., April 7, 2011)

Plaintiff leased a building on highway for the purpose of a sexually-oriented business. The Plaintiff's business was in the back of the building situated between a state highway and a local road. Plaintiff had an entrance and windows facing the local road. Sexually-oriented businesses were absolutely prohibited by local ordinance and also by state statute, *N.J.S.A.* 2C:34-7, which prohibits the location of a sexually-oriented business within 1000 feet of various public uses such as schools and churches. Plaintiff challenged the unconstitutionality of the local ordinance and state statute and a consent order was entered under which plaintiff could operate the business in the back of the building but could not display any adult or sexually oriented products in the window displays facing the local road. Moreover, certain measures had to be taken to avoid observation by passers-by of any sexually oriented operations or advertising. The municipality later enacted an ordinance which allowed for sexually-oriented businesses as conditional uses in certain districts, but plaintiff's establishment was outside this zone. Plaintiff applied to expand its business within the building for the sale of non-sexually oriented clothing, which was denied by the zoning officer. Plaintiff then reapplied to move its business from the back of the building to the front. The zoning officer denied this application as inconsistent with consent order. The Appellate Division enforced the consent order. (7/2011)

LAND USE

- **SETTLEMENT ENFORCEABILITY**

Borough of Bloomingdale v. Flarlas, LLC (Unpub. App. Div., Jan 6, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a1418-09.opn.html

A summary judgment was entered awarding the Borough of Bloomingdale a judgment of $40,000 based upon a previous settlement of a case in which penalties had been levied for unlawfully expanding a non-conforming use, performing construction without approvals, and maintaining an unsafe structure on the property. The Appellate Division reversed the judgment finding that there was a potential question of the good faith and fair dealing of the borough who, allegedly, was expressing an interest in acquiring the property at the same time it was considering land use applications presented by the applicant and pursuing this case for the agreed upon penalty. (4/2011)

LAND USE

- **NON-RESIDENTIAL DEVELOPMENT FEE; REFUND; ECONOMIC STIMULUS ACT**

Beta Realty Unit 6 LLC v. Township of Randolph (Unpub. App. Div., March 16, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3910-09.opn.html
A commercial recreational tennis center which is open to the public but charges a substantial fee is not "available" to the public pursuant to the New Jersey Economic Stimulus Act, *N.J.S.A.* 40:55D-8.8 as amended, and is not an exempt use. Further, a developer receiving a final approval prior to July 17, 2008, is not entitled to a full refund of fees paid under the Non-Residential Development Fee Act, *N.J.S.A.* 40:55D-8.1 to -8.7, where a requirement to pay fees existed at the time of the approval. Neither a separate developer's agreement nor a specific reference in a resolution is necessary to have created the commitment to pay. (7/2011)

LAND USE

- **PRINCIPAL USE**

Nuckel v. Borough of Little Ferry Planning Bd., 208 N.J. 95 (2011)
A use variance pursuant to *N.J.S.A.* 40:55D-70d (1) was required for a driveway across an undersized lot containing a nonconforming use. The driveway was proposed to service a hotel on an adjacent lot. Driveways were not identified as accessory uses in the land use ordinance and this proposed driveway, therefore, was a second principal use on the undersized lot. The reduction in the buffer between the two lots was also held to create the potential need for variance relief pursuant to *N.J.S.A.* 40:55D-70d(2) for intensification of a non-conforming use. The Appellate Division's concept of a *de minimis* expansion of a nonconforming use was rejected. (10/2011)

LAND USE

- **PERFORMANCE BOND; CONSTRUCTION OF IMPROVEMENTS**

Jack Trocki Development Co., LLC v. City of Northfield (Unpub. App. Div., May 24, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a0230-10.opn.html

LAND USE

- **ORDINANCE; TIME OF DECISION**

Miller v. City of Margate (Unpub. App. Div., Feb.28, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a4858-09.opn.html
The court refused to invalidate a zoning ordinance, finding the changes enacted were relatively modest and limited and therefore were not a change of classification that would require personal notice under *N.J.S.A.* 40:55D-62.1. The court further determined that the ordinance amendments were rationally based, served a public purpose and applied to the entire district, and were

therefore not special legislation intended to assist one property. Finally, the court ruled that the new ordinance applied to the individual defendant's property under the "time of the decision" rule. (4/2011)

LAND USE

- **ORDINANCE; PROTEST PETITION; REFERRAL TO BOARD**

Jennings v. Borough of Highlands, 418 N.J. Super. 405 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a0941-09.opn.html
The court decided a previously unanswered question as to when owners of condominium units may oppose zoning amendments through a protest petition authorized by *N.J.S.A.* 40:55D-63, of the Municipal Land Use Law (MLUL) (*N.J.S.A.* 40:55D-1 *et seq*.). In this case, the only portions of the condominium within the designated 200-foot area were common areas, with no individually owned units within the 200-foot circle. Even though the individual unit owners had an undivided percentage interest in the common elements under the Condominium Act (*N.J.S.A.* 46:8B-1 *et seq.),* the court determined that this undivided interest did not rise to the level of allowing them to be counted in a protest petition. Therefore the supermajority required by *N.J.S.A.* 40:55D-63 was not needed for adoption of the zoning ordinance. On other grounds, however, -- though the issue had not been raised on appeal -- the court determined that the record did not reflect any review by the governing body of the planning board's report on the ordinance. This material violation of *N.J.S.A.* 40:55D-26(a) rendered the ordinance invalid. Finally, the court noted that the dismissal of plaintiff's claim of spot zoning was improper without allowing for discovery and, potentially, a plenary hearing on the issue. (4/2011)

LAND USE

- **ORDINANCE; MASTER PLAN**

Mahwah Realty Associates Inc. v. Township of Mahwah, 420 N.J. Super. 341 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1726-10.opn.html
A Municipal Land Use Law (MLUL) provision, *N.J.S.A.* 40:55D-62(a), requires that when a governing body adopts an ordinance that is inconsistent with the Master Plan, the governing body's reasons must be "set forth in a Resolution and recorded in its minutes." Here the reasons were set forth in a detailed resolution of the council but there was no discussion or statement of reasons in the minutes. The Appellate Division held that the council's detailed resolution -- to which reference was made in the minutes of the meeting-- was all that was needed to satisfy the statutory intent of *N.J.S.A.* 40:55D-62 (a). The Court noted "Minutes...need only contain a recitation of the matters discussed, the identities of the speakers, a summary of the discussion, and a statement of the decisions made." The governing body was not required to repeat in the minutes what was stated clearly in the adopted resolution. (10/2011)

LAND USE

- **ORDINANCE; DEDICATION REQUIREMENT; PAYMENT IN LIEU**

Robert J. Pacilli Homes, LLC v. Township of Harrison (Unpub. App. Div., July 22, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a2975-09.opn.html
On June 23, 2008, the Appellate Division issued its opinion in *Shore Builders Association v. Jackson Township, 401 N.J. Super. 152 (App. Div. 2008),* holding that the Municipal Land Use Law, *N.J.S.A.* 40:55D-1 *et seq.,* does not permit a municipal ordinance to require a residential builder to make a payment towards recreational facilities or set aside land for that purpose. On August 1, 2008, the plaintiffs filed this case to invalidate an ordinance of Harrison Township imposing such a requirement and to recover fees paid by them pursuant to the ordinance well before *Shore Builders* had been announced. The Appellate Division held that *Shore Builders* was retroactive rather than prospective in operation. Rather than being a "sudden and unanticipated repudiation of long standing practice," *State v. Cupe, 289 N.J. Super. 1, 12 (App. Div. 1996),* the rule in *Shore Builders* was not new but instead an application of existing precedents to a specific fee. Although finding the *Shore Builders* ruling to be retroactive, the court found that the developer was not entitled to a refund of the fees because it had been required to timely protest the fee at the time it was imposed. *See Woodside Homes, Inc. v. Town of Morristown, 26 N.J. 529, 534, 545 (1958); Yardville Estates, Inc. v. City of Trenton, 66 N.J. Super. 51, 62-63 (App. Div. 1961).* By the time this developer filed this suit the municipality had used the funds to build recreation facilities in reliance on the contributions of the plaintiffs and others. If timely protest requirements were not enforced, the municipality would also be liable for substantial refunds to other developers. Therefore, the case by the plaintiff was properly dismissed. (10/2011)

LAND USE

- **NOTICE; WAIVER**

Northgate Condominium Association, Inc v. Borough of Hillsdale Planning Board (Unpub. App. Div., Jan.24, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a1042-09.opn.html
A notice for a public meeting for an application for age restricted senior housing mistakenly identified one lot and neglected to include one lot that was part of the proposed construction. The notice, however, identified the property by its former place name and by its immediate location south of a main road. A neighboring residential community objected to the application. At the hearing, that community's condominium association did not object to the description of the properties in the notice. The board approved the application. The association appealed, but the Appellate Division affirmed, concluding that notice of the public meeting was sufficient, and that the association had waived its right to appeal the notice requirement when it appeared before the board and participated in the hearing without raising any objection to the content of the notice. (4/2011)

LAND USE

- **NOTICE**

Shakoor Supermarkets Inc. v. Old Bridge Township Planning Board, 420 N.J. Super. 193 (App. Div. 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3765-09.opn.html .

Objectors challenged the preliminary and final site plan approval with ancillary waivers granted by a planning board for a 150,000 square foot retail store. The objectors challenged the adequacy of the public notice which had failed to state specifically that Wal-Mart would be located on the site. The Appellate Division re-evaluated its prior holdings in *Perlmart of Lacey, Inc. v. Lacey Tp. Planning Board, 295 N.J. Super. 234 (App. Div. 1996)* and *Pond Run Watershed Assoc. v. Tp. of Hamilton Zoning Bd. of Adj., 397 N.J. Super. 335 (App. Div. 2008).* The court held that a "common sense" approach would lead to the conclusion that an ordinary layman could make an informed decision whether to participate or not based on the information contained in the notice here—whether or not Walmart had been specifically named. (7/2011)

LAND USE

- **NONCONFORMING USE; SPECIAL REASONS; BALANCING**

United Water New Jersey v. Zoning Bd. of Adjust. of Montvale (Unpub. App. Div., August 17, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a2526-09.opn.html

The Board of Adjustment of Montvale denied a variance that would permit United Water Company to expand a nonconforming water tower to add a pumping station and a system for injecting sodium hypochlorite, a hazardous substance, into the water. The trial court reversed but the Appellate Division reinstated the denial. The court found that United Water had not proven that either expansion was an inherently beneficial use and therefore had not shown special reasons for the pumping station. As to the storage and injection of sodium hypochlorite, the court found that the board had not balanced the positive and negative criteria. Therefore, it remanded that portion to the board. (10/2011)

LAND USE

- **NONCONFORMING USE; RELIGIOUS USE**

Congregation Anshei Roosevelt v. Planning and Zoning Board of the Borough of Roosevelt (Unpub. App. Div., February 9, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a1390-09.opn.html

Two congregations began operating a yeshiva at a synagogue that existed as a nonconforming use in the Borough of Roosevelt. After the zoning officer ruled that a variance was not required, the land use board reversed and declared that a variance was, in fact, required because a yeshiva was a different use from a synagogue and had different land use impacts, so conducting both

uses was an expansion of a nonconforming use. The Appellate Division found that the board had not acted arbitrarily. Plaintiffs argued that the evidence failed to establish a change in use and that the board's decision violated the antidiscrimination provisions of *N.J.S.A.* 40:55D-66(b). It was proper in this case for the court to give deference to the board and not decide the issue *de novo* because the case involved more than an interpretation, as a matter of law, of a zoning ordinance. There was a mixed question of law and fact. On the discrimination claim, a public school was permitted in the district in which the synagogue existed. *N.J.S.A.* 40:55D-66(b) prohibits discrimination between public and private schools in a zoning ordinance. However, the court reasoned that even if the congregation had leased its property for a public school, it would need a variance for expansion of a non-conforming use, because then there would be two uses on the property – one permitted, and one a non-conforming use. (10/2011)

LAND USE

- **NONCONFORMING USE**

Picardo v. Hoboken Zoning Board of Adjustment (Unpub. App. Div., April 20, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3705-09.opn.html
Plaintiffs owned an apartment building in an area zoned for one and two-family homes. They claimed that before the zoning ordinance had been amended to reduce the number of allowable units in the zone to a maximum of two, they had five pre-existing units. The board of adjustment denied plaintiffs a variance to expand their alleged pre-existing nonconforming use. The Appellate Division found that plaintiffs had failed to prove the scope of their pre-existing use. They had not produced any competent evidence as to the existence of the five units and therefore had not met their burden. (7/2011)

LAND USE

- **INTERPRETATION**

Manila Avenue LLC v. Jersey City Zoning Bd. of Adjustment (Unpub. App. Div., Dec.3, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a6226-08.opn.html
The Appellate Division and trial court reversed a board of adjustment in an interpretation case. The interpretation involved the question of whether a residential use was permitted in a redevelopment area of Jersey City. One person, signing his name as the "Zoning Official" said that residential use was permitted; one person, claiming her duties included that of "Zoning Officer" ruled that it was not. The board of adjustment ruled that residential use was not permitted. The court found that the redevelopment plan did not supersede the zoning ordinance – which permitted residential development— but, instead was an overlay. Under those circumstances, the underlying zoning remained in effect and residential use was permitted. There were questions of timeliness of the filing of an application for interpretation or an appeal, but they were resolved in favor of the applicant. (1/2011)

LAND USE

- **INTEPRETATION; HOME OCCUPATION; VARIANCE**

Columbro v. Lebanon Township, Law Div., Hunterdon, HNT-L-469-10, April 8, 2011, Buchsbaum, JSC

A welding business was held to be a permitted "home occupation" in a residential district. While the question of interpretation of the ordinance is one for the court, the trial court here relied on the findings as to credibility made by the board of adjustment in an interpretation and variance proceeding before the board. The court looked at *Adams v.DelMonte, 309 N.J. Super. 572 (App. Div. 1993),* as establishing the parameters for determining whether a use was truly a home occupation. However, factually, there was a great deal of difference in the impacts here of the welding business when compared to the septic tank pumping business that was denied home occupation status in *Adams*. During the pendency of the matter, the township changed its ordinance regulating home occupations to make them conditional uses so long as the size of such uses was limited to 2,000 sq. ft. Applying the conditional use variance standards of *Coventry Square v.Westwood Zoning Bd. of Adjustment, 138 N.J. 285 (1994),* the court found that a conditional use variance allowing a 2,150 sq. ft. building, and other similar minor relief, not to be arbitrary, capricious and unreasonable. A variance for a third non-resident employee on the site in contravention of the conditional use requirements was reversed and stricken. (7/2011)

LAND USE

- **HOMEOWNERS ASSOCIATION; BUILDING RESTRICTIONS**

Nisch v. Ocean Beach & Yacht Club (Unpub. App. Div., March 31, 2011)

The Ocean Beach and Yacht Club (Club), includes approximately 490 homes in which all residents are required to be members of the Club. By restrictive covenants, the Club has authority to regulate certain aspects of building, construction, renovation, and maintenance in the community. In upholding the restrictions in the Club's rules, the court rejected the plaintiffs' arguments that allowing a common interest community to enforce such restrictions is a violation of the property rights granted by the New Jersey Constitution. Further, the court rejected the argument that the Club's building restrictions were invalid because zoning power rests exclusively in municipalities through the Municipal Land Use Law (MLUL), *N.J.S.A.* 40:55D-1 *et seq*. The MLUL does not preempt the entire field of restrictive covenants in common interest communities. Here, the Club acted in conformity with its foundational documents, rules and by-laws. (7/2011)

LAND USE

- **ENTIRE CONTROVERSY; PRECLUSION**

Rodsan v. Borough of Tenafly, 2011 U.S. Dist. LEXIS 70686 (D.N.J. 2011)

A land use case involving the denial of plaintiff's right to use his garage as a pool cabana was tried and dismissed in the New Jersey courts. Plaintiff then filed in the federal courts seeking constitutional remedies. The federal case was barred by *res judicata*, claim preclusion and issue preclusion. (10/2011)

LAND USE

- **ENLARGEMENT OF TIME**

Hopewell Valley Citizens' Group Inc. v. Berwind Property Group Development Co., 204 N.J. 569 (2011)

http://lawlibrary.rutgers.edu/courts/supreme/a-83-09.opn.html

This site plan application went through 13 hearings over 5 months, with an active group appearing in opposition. After the approving resolution was passed, the applicant caused a notice of the resolution to be published on September 27, 2008. On October 1 the applicant filed an affidavit of publication with the board secretary indicating that the 45-day appeal period would expire on November 11. On October 2 the Board also published notice of the resolution. In October an objector telephoned the secretary and asked when and where the notice had been published and was informed that the notice had been published on October 2– the date of the board's publication. Plaintiff filed the complaint 45 days thereafter (but more than 45 days after the applicant's publication). Under these circumstances the Supreme Court determined that enlargement of the 45-day appeal period under R. 4:69-6(c) was justified in the "interests of justice." The court determined that it was entirely reasonable for the objector to call the board secretary for this information. Because the information from the secretary was inadvertently misleading and because the six-day delay would not result in any substantial prejudice the complaint was reinstated. (4/2011)

LAND USE

- **DEVELOPERS AGREEMENT; MAINTENANCE**

Township of White v. Castle Ridge Development Corporation, 419 N.J. Super. 68 (App. Div. 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a2790-09.opn.html

A carefully drafted resolution and developer's agreement between White Township and a developer was upheld and construed by the Appellate Division to award a judgment to the township for reimbursement of expenses incurred for winter maintenance services on an uncompleted, not accepted, road in a development of single family homes. The agreement provided for attorney's fees so they were also granted. This was a 15 lot subdivision. The

developer completed seven houses and partially completed the road and other public improvements before stopping for financial reasons. Originally, the developer provided snow plowing and other winter maintenance services on the road but stopped in 2008. Responding to complaints from the owners of the seven houses, the township undertook those services. The developer then asserted that it was no longer obligated to provide them, and the township sought reimbursement. To those attorneys who routinely do developer's agreements it is worthwhile looking at this case to see the importance of provisions sometimes regarded as "boiler plate" in resolutions and agreements. (4/2011)

LAND USE

- **DEED RESTRICTION**

Valleybrook Country Club, L.L.C. v. Gloucester Twp. Council (Unpub. App. Div., Nov. 3, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a1516-09.opn.html

The Appellate Division upheld the dismissal of the property owner's complaint to set aside a deed restriction preserving certain lands as a golf course in perpetuity. The deed restriction had been originally imposed in conjunction with a development application which allowed cluster development of townhouses and condominiums on a portion of a large tract of land, in lieu of single family homes on the entire property, thereby preserving the golf course. The court upheld dismissal by summary judgment of a count alleging that some of the restrictive language was vague, determining that the documents on their face had given adequate notice to subsequent purchasers that the lands were restricted against any use except a golf course and related uses. Further, the court upheld the dismissal, after trial, of a count alleging abandonment of the restriction, finding that existing encroachments were not pervasive and, when viewed objectively, did not demonstrate intent by township officials or property owners to abandon the deed restriction. (1/2011)

LAND USE

- **CONDITIONS OF APPROVAL**

Dalrymple v. Planning Bd. of the Township of Lakewood (Unpub. App. Div., July 19, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a6135-09.opn.html

S & H Developers purchased a two-lot residential subdivision from Dalrymple. Dalrymple retained a neighboring residential property. At the time of the initial subdivision approval obtained by Dalrymple, the municipality required public water for lots of the size in this subdivision. Following transfer of title, the municipality eliminated that requirement. S & H secured well and septic permits for both lots, and began construction on one. Dalrymple objected, and S & H applied to the planning board to be relieved of any requirement to install public water that may have arisen from the initial subdivision approval. The board approved S & H's request, and the court sustained the board. (10/2011)

LAND USE

- **CONDITIONAL USE VARIANCE**

Dreskin v. Zoning Board of Adjustment of the Twp. of Jackson (Unpub. App. Div., Nov. 30, 2010)

The Jackson Township Zoning Board of Adjustment granted a conditional use variance to defendants Elite Wrestling and Stephen Rivera under the Township's home occupation ordinance, allowing the defendants to use a pole barn on Rivera's property for a wrestling school. The neighbors challenged the board's decision. They argued that a wrestling school was not cognizable as a home occupation. The trial court found that the wrestling school constitutes only a part of Rivera's livelihood and was being pursued in a secondary building, and therefore concluded that the school was permitted as a home occupation, provided the conditions of the ordinance were met. The Appellate Division affirmed without discussion. (1/2011)

LAND USE

- **CONDITIONAL USE VARIANCE**

Paks Fast Service Inc. v. Zoning Bd. of Adj. of Mahwah (Unpub. App. Div., June 6, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a1948-10.opn.html

The board of adjustment granted Pilot Corporation a conditional use variance under *N.J.S.A.* 40:55D-70d(3) to transform a deteriorated truck stop on Route 17 into a conventional gas station and convenience store. The variance was needed because the property was within 500 feet of Mahwah High School and that violated one of the ordinance conditions for the use. Pilot's plan provided for landscaping, buffering and fencing along the side of the property by the high school, and also for the closing one of the property's access points, so that access to the gas station could only be gained from Route 17. The board's approval of the application was challenged by Paks Fast Service, a competitor of Pilot. The court concluded that Pilot had demonstrated that the "site would accommodate the problems associated with the use even though the proposal did not comply with the conditions in the ordinance established to address those problems," as required by *Coventry Square, Inc. v. Westwood Zoning Board of Adjustment, 138 N.J. 285, 299 (1994).* It therefore sustained the board's approval of Pilot's project. (10/2011)

LAND USE

- **BULK VARIANCES**

Cortesini v. Hamilton Twp. Planning Board, 417 N.J. Super. 210 (App. Div. 2010), certif. denied, 207 N.J. 35 (2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3309-09.opn.html

A Walmart store was granted site plan approval for a store and parking lot. When, eight years later, Walmart sought site plan approval for an addition to the building as well as the

construction of new parking spaces, objectors claimed that certain of the pre-existing parking stalls – none of which were being changed by the amended site plan approval—required a bulk variance because they violated the setback standards of the zoning ordinance. The court held that the appeal on this ground was untimely. All of the pre-existing stalls in question had been shown on the original site plan, no variance application had been made at the time, and no objections were raised. The objectors also contended that a planner for the applicant was disqualified from testifying because he had previously worked for the planning board. The Court summarily dismissed this claim because neither the Local Government Ethics Law (*N.J.S.A.* 40A:9-22.1 to -22.5) nor the Municipal Land Use Law (*N.J.S.A.* 40:55D-23(b)) govern the post-employment activities of former government consultants. (The court did not decide whether such conduct could be regulated by ordinance, because there was no such ordinance in effect in Hamilton). (1/2011)

LAND USE

- **BULK VARIANCES**

McGinley v. Zoning Bd. of Adj. of Sea Isle City (Unpub. App. Div., April 26, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3532-09.opn.html
In the renovation of an existing duplex, mistakes made by the municipal construction official and builder resulted in the building violating setbacks. Neighbors objected to the owner's variance application approved by the board of adjustment. The court remanded the matter to the board because it had not made adequate findings of fact in rendering its decision. (7/2011)

LAND USE

- **BULK VARIANCE; TELECOMMUNICATIONS**

T-Mobile Northeast, LLC v. Township of Cherry Hill Zoning Board of Adjustment (Unpub. App. Div., March 24, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a6020-07.opn.html

Plaintiff sought approval from a board of adjustment for a communications pole and associated structures, which were allowed in the zone only as accessory uses. There were pre-existing commercial enterprises on the site including a restaurant and bank. The application was bifurcated so that the use and height variances could be addressed first. The board granted those approvals on certain conditions, among which was the need for site plan approval, and a number of aesthetic and locational considerations. At the second phase, the plaintiff sought site plan approval and a bulk variance for an inadequate setback. The board denied the setback variance approval both under *N.J.S.A.* 40:55D-70(c)(1) ("hardship") and (c)(2) ("benefits outweigh the detriments". The Appellate Division agreed with the board on the denial of the "hardship" variance. However, because the use approval had already been granted, the court said that, under the case of *Meridian Quality Care, Inc. v. Bd. of Adjustment of Wall, 355 N.J. Super. 328, 332 (App. Div. 2002),* the board was bound to consider only the negative criteria in its later site plan and bulk variance determination. The court found that the denial of the setback variance was arbitrary, capricious and unreasonable. (7/2011)

LAND USE

- **BULK VARIANCE; INSUFFICIENT REASONS**

Ten Stary Dom Partnership v. Mauro (Unpub. App. Div., June 1, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a1083-10.opn.html

The denial of the property owner's bulk variance application for lot frontage was arbitrary and capricious. The property complied with all other bulk requirements and the Board's legitimate concern on the issue of drainage was properly dealt with in the Board resolution, which required the applicant to provide specifications for a storm water management plan, to be approved by the Board Engineer before construction of the home. The applicant properly proved the "positive criteria," showing that he would suffer an "exceptional and undue hardship" if the variance was denied, due to the odd shape of the lot, and the "negative criteria," in that the variance would not result in "substantial detriment" to the public good. (*N.J.S.A.* 40:55D-70 (c) and -(d). (10/2011)

LAND USE

- **BULK VARIANCE; FENCE**

DeVito v. Zoning Board of Adjustment of Middletown (Unpub. App. Div., Dec. 9, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a1416-09.opn.html

Plaintiff removed a stockade fence and replaced it with an opaque vinyl fence. This was done

without approval. The Middletown zoning ordinance requires that fences that are not open fences and are located in a required front, street side or street rear yard to be no higher than three feet. Plaintiff's fence was six feet high. The Board of Adjustment denied the variance but the trial court reversed. The Appellate Division found that the trial judge had improperly substituted her judgment for that of the board. Plaintiff's alleged hardship did not arise from the unusual nature of the property because the shape of the lot did not cause the need to erect a 6-foot fence. The Board's resolution gave clear reasons for the denial of the application and was therefore entitled to be upheld. (1/2011)

LAND USE

- **BULK VARIANCE; ESTOPPEL**

Fernandez v. Township of Bloomfield Zoning Board of Adjustment (Unpub. App. Div., Nov. 17, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a5977-07.opn.html

Fernandez began construction of a second story on his home pursuant to a zoning and construction permit from the zoning official of Bloomfield. However, after work had begun, the zoning official issued a stop work order because the addition would violate bulk and setback requirements. Fernandez continued to work on the house pending a variance application to the board of adjustment which ultimately denied the variance because the addition would hover over one neighbor's lot and overlook another neighbor's backyard. The irregular shape of the lot was not sufficient to support a hardship variance and the board found detriment to the zoning ordinance and the public good. The Appellate Division affirmed the board's denial. On the issue of estoppel, the court held that the requirements of the ordinance were not debatable, the opinion of the zoning official was wrong in issuing the permit, and therefore, he could lawfully subsequently correct his wrong by a stop work order. (1/2011)

LAND USE

- **BOARD OF PUBLIC UTILITIES**

In re Appeal of Jersey Central Power & Light Company (Unpub. App. Div., Feb 22, 2011), certif. denied, 207 N.J. 65 (2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3068-09.opn.html

The Appellate Division, following *In Re Public Service Electric and Gas Company, 35 N.J. 358 (1961)*, reinforced the primacy of utility companies over municipal land use. The Board of Public Utilities authorized Jersey Central Power and Light (JCP&L) to construct an electrical substation in Tewksbury Township. JCP&L had been denied site plan and variance relief by the Tewksbury Land Use Board and filed a Petition with the BPU for permission to construct the facility notwithstanding the municipal action. Following a hearing, the BPU ordered that JCP&L be permitted to build the substation based upon a finding that the substation was necessary for the service, welfare and convenience of the greater public. It noted a surge in customers in the area

by thirty percent over the preceding seven years, and a need to provide system reliability and improved voltage. The Board further found that JCP&L had examined twenty-eight alternate sites. In the subsequent appeal taken by a local group, Friends of the Fairmont Historic District, the Appellate Division not only upheld the Board's proceedings and order, but reinforced legislative policies and judicial pronouncements that proper regulation of public utilities transcends municipal jurisdiction and is allows an agency with the experience and expertise to provide for safe and adequate service throughout the state. (4/2011)

LAND USE

- **AGE RESTRICTED HOUSING**

Norwood Gardens LLC v. Norwood Zoning Bd. of Adj. (Unpub. App. Div., September 6, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a5108-08.opn.html
An application for use variance relief to permit an age restricted development pursuant to *N.J.S.A.* 40:55D-70d(1) and (6) was properly denied because the applicant failed to discuss the suitability of any other sites in the municipality and the testimony concerning advancement of the purposes of planning was vague, speculative and anecdotal. (10/2011)

LAND USE

- **AGE RESTRICTED HOUSING**

Northwood Manor at Old Bridge, LLC v. Woodbridge Board of Adjustment, Law Div. Middlesex, MID-L-5636-10, January 20, 2011, Hurley, JSC.
A board of adjustment denied the proposed conversion of age restricted housing into standard housing. The trial court found the board's reasoning to be arbitrary, particularly because one reason was an unsafe driveway design which the board had approved 2 years earlier for the age restricted housing. The decision was published in the July 2011 issue of the Local Government Law Review. (7/2011)

LAND USE

- **AGE RESTRICTED HOUSING**

Heritage at Towne Lake, L.L.C. v. Planning Board of the Borough of Sayreville, 422 N.J. Super. 75 (Law Div. 2010)
This now published Law Division opinion, which we included in full in 33 Local Government Law Review 295 (October 2010), states the principles to be applied by a land use Board when considering the conversion of an age-restricted project to a non-age-restricted project pursuant to the "Conversion Statute," *N.J.S.A.* 45:22A-46.3 to 46.15. In reviewing the denial of a conversion, Judge Hurley noted that that under the statute the non-age-restricted use is to be deemed a permitted use, leaving the applicant to demonstrate that the conversion can be granted without substantial detriment to the public good and without substantially impairing the intent and

purpose of the zone plan and zoning ordinance (the so called "negative criteria"). The court found that the board's reasons for denying this application on the negative criteria were unpersuasive, unsupported by the record, and therefore arbitrary. The board was therefore ordered to adopt a resolution of approval containing only a reasonable condition relating to a "tot lot." (10/2011)

LAND USE

- **ACCESS EASEMENT**

Rodano v. Craig (Unpub. App. Div., May 17, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a0863-09.opn.html
This action concerned a dispute over easement rights by neighboring property owners. When the plain language of the easement required one property owner "to create" an access area, that property owner was required to physically construct the access area and a bulkhead to support it. The property owner was further required to pay a *pro rata* share of the construction costs. (7/2011)

LAND USE

- **ABANDONMENT OF APPROVALS**

Price v. Martinetti, 421 N.J. Super. 290 (App. Div. 2011)
315 7th Street, LLC obtained site plan approval and variances from the Union City Board of Adjustment for the construction of a seven story 20-unit apartment building. Subsequent applications made to the board resulted in approvals of increasingly larger apartment building projects. There was evidence that the applicant and the building department had agreed that the prior approvals would remain in effect notwithstanding the applications for different approvals. When the developer elected to proceed with the first approved project, an objector filed suit to stop construction, asserting that the developer had abandoned the prior land use approvals. In an opinion by Judge Skillman, the Appellate Division determined that as a matter of law, subsequent land use approvals do not result in the automatic rescission of prior approvals unless the subsequent approvals are conditioned upon such rescission. There is no provision in the Municipal Land Use Law, *N.J.S.A.* 40:55D-1 *et seq*., that automatically voids an old approval when application for a new approval is made. (10/2011)

LICENSING

LICENSING

- **AMUSEMENT PARK**

The Falls Group, LLC v. Township of Mount Laurel (Unpub. App. Div., Jan 10,2011)
http://lawlibrary.rutgers.edu/courts/appellate/a4172-09.opn.html
The owner of an amusement park sought recognition from the Township of Mount Laurel that it was a recognized amusement park under the Amusement Games Licensing Law, *N.J.S.A.* 5:8-l00 to -130. The court found that by referendum the township had approved the operation of the licensing law within the township, and that there was ample evidence that the facility qualified as an amusement park. This finding enables the facility to proceed with replacing some existing games with skill-based redemption games. (4/2011)

MUNICIPAL VACANCY LAW

MUNICIPAL VACANCY LAW

- **RESIDENCY**

Fay v. Medford Township Council, Chan. Div., Burlington, C-24-11, May 13, 2011, Hogan, P.J.Ch.

This opinion by Judge Hogan deals with the "Municipal Vacancy Law," *N.J.S.A.* 40A:16-3. It upheld the determination by Medford that one of the seats on the council was vacant because a member had moved out of town. The decision was published in full in the July 2011 issue of the Local Governemnt Law Review. (7/2011)

OFFICERS AND EMPLOYEES

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- **BOROUGH; APPOINTMENT**

Pizzuto v. Borough of Oradell, Law Div., Bergen BER-L 2018-11, April 7, 2011, Joseph S. Conte, JSC

Under the Borough Law, *N.J.S.A* 40A:60-5(g), the mayor appoints the Borough Attorney subject to council confirmation within 30 days. The council does not have to wait 30 days after the appointment to reject the mayor's appointment and to appoint someone else. The opinion was published in the July 2011 issue of the Local Government Law Review. (7/2011)

OPEN PUBLIC MEETINGS ACT

OPEN PUBLIC MEETINGS ACT

- **NOTICE**

McGovern v. Rutgers, 418 N.J. Super. 458 (App. Div. 2011)

An alumnus of Rutgers, the State University brought action against the university alleging that its board of governors was violating the Open Public Meetings Act (OPMA), *N.J.S.A* 10:4-6 to -21. The regular practice of the Rutgers board of governors was to give notice of an opening public session which would not contain a comment session by the public, then a closed session of indeterminate length, and then a return to a public session at which the public could be heard. The Appellate Division held that this practice was a violation of OPMA and enjoined further use of it. In addition, the court found that a particular notice of a closed session challenged in this case had failed to contain a specific description of the matters to be discussed. Finally, the discussion of new "policies and procedures" for the athletic department that will be implemented "over the next several months and years" was one that could only be held in public, not in a closed session. (4/2011)

OPEN PUBLIC MEETINGS ACT

- **OFFICIAL NEWSPAPER**

North Jersey Media Group, Inc. v. Bergen Newspaper Group, LLP, Ch.Div., Bergen, Docket No. C-252-10, October 8, 2010, Carroll, J.S.C.

North Jersey Media Group, Inc. (North Jersey) brought an action for injunctive relief and sought a preliminary injunction to enjoin the Bergen Newspaper Group (Bergen), a competitor, from accepting official advertisements for publication in Bergen County. North Jersey claimed that Bergen did not meet the requirement of *N.J.S.A.* 35:1-2.2, which, among other things, requires that an eligible newspaper must have been entered for 2 years as second-class mail matter under the postal laws and regulations of the United States. While Bergen claimed to have met the paid circulation requirements of the United States Postal Service, North Jersey alleged that false information had been submitted by Bergen to the postal authorities. The Court denied the application based upon finding that North Jersey had failed to satisfy three of the four prongs of *Crowe v. DeGioia, N.J. 126 (1982),* because it failed to show that it could not be compensated through money damages, that there were material controverted issues of fact and that the hardship to the Bergen would be substantially more severe than to the North Jersey and would drastically alter the *status quo.* (1/2011)

OPEN PUBLIC MEETINGS ACT

- **ENTIRE CONTROVERSY**

Cresci v. Bayonne Parking Authority (Unpub. App. Div., Jan. 10, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3165-09.opn.html
Plaintiff filed a complaint alleging violations of the Open Public Meetings Act (OPMA), *N.J.S.A* 10:4-6 to -21, in connection with his termination from employment. At the time plaintiff filed his complaint, there was ongoing litigation in the federal court on the same subject. The state court case was properly dismissed under the entire controversy doctrine. The events stated in the state action were so related to the federal action that plaintiff should have amended his federal suit, which was seeking essentially the same relief. (4/2011)

ORDINANCES

ORDINANCES

- **SOIL REMOVAL**

State of New Jersey v. Paramount Marinas, LLC (Unpub. App. Div., March 18, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a5264-09.opn.html
Paramount Marinas owned property that straddled the boundary line between Millstone and Upper Freehold Township. Millstone's soil removal ordinance prohibited the movement of soil on any premises in the township without a soil removal permit unless the soil was placed on the same property or on a contiguous property within the township. Pursuant to a DEP-approved plan Paramount moved soil around on its property between the two townships. Millstone cited Paramount for violating its soil removal ordinance. The Appellate Division upheld the conviction of Paramount for the violation. Even though the properties had been acquired by the same deed, they were distinct properties in each town and therefore the removal of soil from the portion in Millstone and placing it in Old Bridge violated the Millstone ordinance and did not fall within any exception. (7/2011)

ORDINANCES

- **PROPERTY MAINTENANCE; CONTINUING VIOLATION; MERGER**

Borough of Somerdale v. Rigolizzo (Unpub. App. Div., Mar. 7, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a0695-09.opn.html
Defendant was found guilty of multiple separate violations of two sections of the Somerdale's property maintenance code. On appeal, defendant argued that because both sections dealt with the appearance of premises, the violations should have been merged. The court disagreed. It acknowledged that merger is based on the principle that an accused who has committed only one offense cannot be punished as if for two. Here, however, one of the sections dealt with the appearance of the exterior of the premises and structures, whereas the other dealt with landscaping and lawn maintenance. The court found that these sections were distinct from one another and required different proofs. Therefore merger was not mandated. (4/2011)

ORDINANCES

- **PARKING LOT LICENSING**

Jersey City v. Liberty Harbor Holding, LLC (Unpub. App. Div., May 10, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a0428-10.opn.html
Liberty Harbor Holding (LHH) entered into lease agreements by which it agreed with the Jersey City School District and the New Jersey Schools Construction Corporation (SCC) to construct a parking lot. The rent was $95 per month per parking space, although the rent was not broken

down that way in the SCC Lease. The Appellate Division found that Liberty Harbor Holding was not required to obtain parking lot licenses or to pay the city's parking tax for these spaces. The ordinance in question required parking lot operators to be licensed but LHH was not operating a parking lot within the meaning of the ordinance. The lot was not open to the public generally and the schools had complete discretion as to the allocation of the parking spaces. Patrons were not charged for use of the spaces. A parking tax is authorized by the Local Tax Authorization Law (LTAL), *N.J.S.A.* 40:48C-1 to -42. However, that law authorizes a tax only on "fees" collected by parking lot operators from "customers" for parking services, not to "rent" paid to lease the property. In addition a lessee is not a "customer" within the meaning of the LTAL. Therefore Jersey City did not have authority under the LTAL to collect a parking tax on rent paid by the school district and the SCC. (7/2011)

ORDINANCES

- **HOTEL TAX; STANDING**

Township of Lyndhurst v. Priceline.com Inc., 657 F. 3d. 148 (3rd Cir. 2011)

Lyndhurst, on behalf of itself and similarly situated New Jersey municipalities, brought a putative class action against Priceline.com, a hotel booking agent, alleging that Priceline owed unpaid hotel occupancy taxes. Priceline acquires inventories of hotel rooms at negotiated (so-called "wholesale") rates and then rents those rooms to consumers at higher (so-called "retail") rates. It paid a hotel occupancy tax on the wholesale rate, but Lyndhurst contended that it was entitled to be paid a tax on the retail rate. The court held that Lyndhurst lacked standing on prudential grounds to sue defendants for failure to pay those taxes. Lyndhurst had the authority to enact the tax under *N.J.S.A.* 40:48F-1 to 5. Under that act, however, the State Director of Taxation had the sole authority to collect the tax. (10/2011)

ORDINANCES

- **PREEMPTION**

McMullen v. Maple Shade Township, 643 F.3d 96 (3rd Cir. 2011)

Plaintiff, arrested for public intoxication in violation of a local ordinance, sued Maple Shade and others, alleging that the ordinance was invalid under New Jersey law and that, therefore his arrest violated the Fourth and Fourteenth Amendments to the United States Constitution. The claim of invalidity of the ordinance was based upon an asserted preemption of such ordinances by the Alcholism Treatment and Rehabilitation Act (ATRA), *N.J.S.A.* 26:2B-6 to 9.3,-11 to -39. The court concluded that, in certain circumstances, an arrest pursuant to a law that was unambiguously invalid for reasons based solely on state law grounds, could constitute a Fourth Amendment violation actionable under 42 *U.S.C.* §1983. However, here the plaintiff could not show that the ordinance was unambiguously invalid. It was unclear to the court whether ATRA had preempted such ordinances. ATRA did not prohibit simple public intoxication and there was

a conflict between ATRA and *N.J.S.A.* 40:48-1, which created additional ambiguity as to the invalidity of the ordinance. (10/2011)

PINELANDS COMMISSION

PINELANDS COMMISSION

- **MODIFICATION OF CONDITIONS**

Knight v. Township of Shamong (Unpub. App. Div., June 27, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1780-10.opn.html
The Township of Shamong is within the area encompassed by the Pinelands Protection Act, *N.J.S.A.* 13:18A-1 to -58. It obtained approval from the Pinelands Commission to expand its recreation fields. Neighbors close to site objected to the commission approval. Eventually, the township and the neighbors reached a settlement that limited the hours of operation and the intensity of lighting at the fields. This settlement agreement was approved by commission. Thereafter, the township sought to add more lighting on another field by way of modification of the settlement agreement, agreed to by most of neighbors and approved by commission. The remaining neighbors objected and filed action to prevent additional lighting but the court rejected the challenge because both the original agreement and the modification had been approved by the commission. (10/2011)

PINELANDS COMMISSION

- **SUBDIVISION**

O'Brien v. Woodland Township Joint Land Use Board (Unpub. App. Div., Dec.14, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a3577-09.opn.html
Plaintiff challenged the denial of a variance to subdivide 39 acres into 4 building lots all located in the Preservation Area of the Pinelands National Reserve (Pinelands). The Appellate Division recognized that the Pinelands Protection Act, *N.J.S.A.* 13:18A-27, overrides regulations in the Municipal Land Use Law *N.J.S.A.* 40:55D-1 *et seq*. Strict regulations severely prohibiting subdivisions are permitted by the Pinelands Protection Act and the denial was therefore lawful. (1/2011)

PROPERTY

PROPERTY

- **BEACHES; INVERSE CONDEMNATION**

City of Long Branch v. Jui Yung Liu, 203 N.J. 464 (2010)
http://lawlibrary.rutgers.edu/courts/supreme/a-9-09.opn.html
In the July 2010 edition of the Local Government Law Review [33 Local Government Law Review 168 (July 2010)] we reported on the United States Supreme Court case of *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, ___ U.S. ___, 130 S.Ct. 1592, 177 L.Ed. 2d. 184 (2010)*, which held that, under Florida law, an avulsion (a sudden change in the high water mark) did not become the property of the upland property owner, as an accretion would. This rule of property law did not result in an unconstitutional taking. The New Jersey Supreme Court has now reached the same result. Long Branch had an extensive beach renourishment program which resulted in a shift of the high water mark seaward. In a condemnation case a property owner sought to be compensated for all land out to the new mean high water line. The Supreme Court held that this was an avulsion, that the upland owner had no property right in the portion of the beach between the old high water line and the new high water line and that, therefore, the upland owner was not entitled to compensation for that land. The opinion, written by Justice Albin, was joined by all. (1/2011)

PUBLIC CONTRACTS

PUBLIC CONTRACTS

- **TIMELINESS**

New Jersey Citizen Action, Inc. v. County of Bergen (Unpub. App. Div., August 3, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a2161-09.opn.html
The court dismissed most of the claims challenging the transfer of the management and operation of a County-owned hospital to a private entity on *res judicata* and entire controversy grounds. But a disputed "working capital loan" from the county to the private entity had not yet been made at the time of the prior litigation and therefore was not barred on those theories. Nonetheless, the challenge to the loan was barred by the forty-five day limitation period for filing of a prerogative writ action in Rule 4:69-6(a). The claims in this case were not filed for more than seven years after the action approving the loans. The court rejected the argument that the limitations period does not apply to the complaint because it was brought under the Declaratory Judgment Act (*N.J.S.A.* 2A:16-50 to -62), which does not have a statute of limitations. The limitations period of an action in lieu of prerogative writs cannot be avoided simply by styling a complaint as a declaratory judgment action. Further, there were no grounds for enlargement of the time for filing a prerogative writ. (10/2011)

PUBLIC CONTRACTS

- **STATE BIDDING LAW**

T.N. Ward Inc. v. South Jersey Transportation Authority (Unpub. App. Div., Oct. 27, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a3900-09.opn.html
Rejecting an appeal by an unsuccessful bidder, the court determined that the South Jersey Transportation Authority was clearly a state agency and therefore subject to the State Bidding Law (*N.J.S.A.* 52:32-2) rather than the Local Public Contracts Law (*N.J.S.A.* 40A:11-1 *et seq*.). Jurisdiction of the dispute was in the Appellate Division, as an appeal from a State agency, [R. 2:2-3(a)(2)] rather than in the Law Division by prerogative writ. The case turned on whether certain defects claimed by the unsuccessful bidder were waivable. The court relied on the standards for determining waivability set forth in *Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307 (1994).* One of the claims was that the low bidder had named two steel contractors and thus engaged in illegal "bid shopping." Bid shopping is prohibited by the Local Public Contracts Law *N.J.S.A.* 40A:11-16, but the court found no similar provision in the State Bidding Law. The other claims dealt with interpretation of the specifications and the appellate division, which assumed all facts stated by the unsuccessful bidder to be true, found no exceptions. The stay previously granted by the court was vacated. (1/2011)

PUBLIC CONTRACTS

- **REJECTION OF BIDS; NONCONFORMING BID**

Suburban Disposal, Inc. v. Borough of Chatham (Unpub. App. Div., Feb. 16, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1482-10.opn.html
A bid package for a solid waste contract prescribed a time, date and place for the receipt and opening of bids and said that late bids would be rejected. The municipality changed the time for bid submission to an earlier time by an announcement in the newspapers that was faxed to most but not all bidders. Two bids, including that of the plaintiff, were submitted on time and one was submitted late, but on or before the original time. The municipality determined to open the late bid and found that it was the lowest. It rejected all bids. Plaintiff sued to have the contract awarded to it as the lowest timely bidder. *N.J.S.A.* 40A:11-13.2e allows for the rejection of bids if the governing body determines that the purposes or provisions of the public bidding laws have been violated. In various cases, courts have held that a contracting agency cannot act arbitrarily, capriciously or unreasonably in rejecting all bids. In this case, the unequal notice to some but not all potential bidders of the change in the bid time was sufficient justification for the rejection of bids. The Court further noted that the municipality had caused a problem for itself by opening a late bid. Indeed, the court said, it should have rejected the individual late bid without opening it. (4/2011)

PUBLIC CONTRACTS

- **REJECTION OF BIDS**

Cetco Contracting Services Company v. Cumberland County Improvement Authority (Unpub. App. Div., May 17, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a6116-09.opn.html
Public bidding was advertised for expansion of a solid waste facility for Sewage Authority. All bidders and their subcontractors were required to complete a "Contractor Responsibility Certification" which verified a satisfactory past history of performance, competency and integrity. Failure to provide the certification or falsification of the document would result in rejection of bid. Two bids were submitted and lowest bidder chosen for award of contract. After award of contract but before execution, the low bidder provided certifications for itself and subcontractors. The next lowest bidder challenged award of contract for failure of the lowest bidder to provide certifications on time or, in the alternative, for filing by the lowest bidder of a false certification that did not disclose the criminal record of one of the subcontractors. After service of action, the authority held a closed meeting and then decided to reject all bids and re-bid. The authority acknowledged that legal action caused them to rethink the approval and now reject bids. Also, according to the authority, a reevaluation of the budget of the project would need to be done so that the extent of the project could be reconsidered. The Appellate Division concurred that the low bid was flawed because it did not have the certification as required at the time of the bid. When bidder did provide the certification, it was false because it did not identify

the prior criminal conviction. Even though the authority had awarded the contract, the bidding was not completed until a proper certification had been provided. The sixty day window to reject bids had not closed. The rejection of all bids and the determination to rebid was upheld. Moreover, the court said that rejection and re-bid was warranted under *N.J.S.A.* 40A:11-13.2, because Authority chose to reconsider the scope of the project. (7/2011)

PUBLIC CONTRACTS

- **REJECTION OF BIDS**

CFG Health Systems, LLC v. County of Hudson, Law Div., Hudson, HUD-L-6428-10, March 15, 2011, Gallipoli, AJSC

The County of Hudson has been engaged in a procurement process to provide medical and health services at the Hudson County Correctional Center and the Hudson County Juvenile Detention Center. In the first process, the incumbent provider of those services, Correctional Health Services (CHS) was awarded the contract based upon a $29,700,000 bid but the contract was set aside, at the insistence of another bidder, CFG Health Systems, because there had been a change in the specifications that was so substantial as to result in an award without public bidding. In the second procurement process, carried out as a competitive contracting process under *N.J.S.A.* 40A:11-4.1 *et seq*., CFG submitted the lower bid. After evaluation one of the members of the evaluation panel admitted that he was "tainted" because he was a doctor who had for years been working with the incumbent CHS. Primarily on this basis, the County adopted a resolution rejecting all bids. The Court set this resolution aside and ordered that the contract be awarded to CFG, the lower bidder. The court rejected findings that CFG's bid contained material defects, while holding that the CHS contract contained such defects. One of the reasons for looking carefully at rejections of all bids was the risk of the potential for rebidding until the "favorite son" is awarded the contract. *See Bodies by Lembo, Inc. v. County of Middlesex, 286 N.J. Super. 298,308 (App. Div. 1996)*. The trial court here determined that just such a risk was present here. (7/2011)

PUBLIC CONTRACTS

- **PREQUALIFICATION**

I/M/O Protest of John's Main Auto Body Requests for Prequalification for Routine Towing Services (App. Div. Jan. 6, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a6118-08.opn.html

The New Jersey Turnpike Authority established a prequalification process for bidders seeking to provide both routine and heavy towing and emergency services on the Turnpike and the Garden State Parkway and established prequalification requirements. Based on unannounced inspections, which were contemplated by the specifications, it found that John's Main Auto Body did not meet the requirements which included things such as the cleanliness of the waiting areas and toilets at the bidder's garage, code compliant premises, the preparation of detailed driving

directions from the bidder's garage to the Turnpike and five years' experience performing towing services on certain enumerated major New Jersey highways such as Routes 80, 287 and 280. Based on unannounced inspections, the Authority found that John's had failed to meet the criteria in many respects. The Appellate Division refused to interfere with the agency action without a showing of bad faith, corruption, fraud or gross abuse of discretion. The Court elected not to discuss Appellant's arguments referring to "The Sopranos" television series or the book, "The Soprano State." (4/2011)

PUBLIC CONTRACTS

- **PREQUALIFICATION**

In re Protest of B&C Towing, Inc. (Unpub. App. Div., Dec. 23, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a0420-09.opn.html
The court upheld the Turnpike Authority's denial of prequalification to bid on a towing contract, finding the matter to be within the Authority's area of technical expertise and thus entitled to deference. There was sufficient evidence to support the finding that applicant's facility was not as secure as required and that it did not submit proper driving directions required for prequalification. Further, plaintiff proceeded with the bid process without first objecting to a specification provision it now sought to challenge and therefore lacked standing to challenge that specification. (4/2011)

PUBLIC CONTRACTS

- **PREQUALIFICATION**

In re Protest of Nick's Towing Service, Inc. (Unpub. App. Div., Dec 23, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a0959-09.opn.html
The New Jersey Turnpike Authority's experience requirements in its RFP process for towing services were not unduly restrictive or arbitrary, unreasonable or capricious and were therefore upheld. (4/2011)

PUBLIC CONTRACTS

- **INTERPRETATION; ESCALATION**

Meco Inc. v. Township of Freehold (Unpub. App. Div., April 13, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a5674-09.opn.html
Meco Inc. (Meco) was the successful bidder for a road improvement and resurfacing contract from Freehold but, during the job, submitted a request for a change order to recover added costs due an increase in the cost of asphalt from the time the job was bid to the time it was completed. Like the contractor in *American Asphalt Company v. County of Gloucester (Unpub. App. Div., March 29, 2011), infra,* this contractor claimed that it had relied on the Standard Specifications for Road and Bridge Construction of the New Jersey Department of Transportation (NJSS). The

court dismissed the claim on finding that the bid specifications were clear that only the technical requirements of NJSS had been incorporated into the bid specifications. Further, even if they applied, Meco had failed to follow the procedural requirements set forth in those specifications. (7/2011)

PUBLIC CONTRACTS

- **INTERPRETATION; ESCALATION**

American Asphalt Co. Inc. v. Delaware River Port Authority (Unpub. App. Div., Augsust 2, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a0277-10.opn.html

A contractor's claim for compensation stemming from additional work resulting from an additional half inch of milling was not ripe for summary judgment because material facts were in dispute. The contractor's claim for additional compensation because of a spike in market prices for asphalt was, however, properly dismissed on summary judgment. The contract was clear that all costs of construction were included and there was no escalation provision. The asphalt contractor protections contained in an amendment to *N.J.S.A.* 40A:11-16 were not applicable because the amendatory legislation had been adopted in 2010 after the award of the contract. (10/2011)

PUBLIC CONTRACTS

- **INTERPRETATION; ESCALATION**

American Asphalt Co. Inc. v. County of Gloucester (Unpub. App. Div., March 29, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a4360-09.opn.html

Plaintiff was the successful low bidder on a contract to supply the county with hot mix asphalt (HMA) materials for use in repairing and repaving the county's roads. The bid proposal had included detailed specifications regarding the materials to be supplied, including the requirement that "all materials herein specified shall comply with the 2001 New Jersey State Highway Department standard specifications for road and bridge construction . . . ." The bid proposal also contained specific provisions with respect to pricing, stating among other things that "prices shall include all charges that may be imposed in fulfilling the terms of the contract," and that "the bid prices shall remain in effect for the entire contract period." After plaintiff began supplying the county with HMA, the price of oil and other petroleum prices spiked. Plaintiff therefore sought an escalation in the HMA prices payable under the contract, claiming that it was entitled to a price adjustment because the bid specifications incorporated DOT's Standard Specifications, which in turn included price escalation provisions. The trial court agreed with plaintiff but the Appellate Division reversed. It found that the contract unambiguously stated that the bid prices were to remain in effect for the entire contract period, and contained no qualifying language such as "subject to escalation if the market price of asphalt sharply rises" or "subject to escalation pursuant to [the] DOT Specifications." The court held that there was no proof that price

escalations were mutually contemplated by the parties or that plaintiff in entering into the contract was entitled to relief because of its understanding that it would be entitled to such an escalation if the petroleum market spiked. The court concluded that under these circumstances, there was no reason to retrospectively construe the contract as having an ambiguity as to price, nor would it be appropriate to resolve that alleged ambiguity by giving plaintiff a contractual benefit that could not reasonably have expected. (7/2011)

PUBLIC CONTRACTS

- **CONTRACTOR QUALIFICATION; SUBCONTRACTORS**

Brockwell & Carrington Contractors Inc. v. Kearny Board of Education,, 420 N.J. Super. 273 (App. Div. 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a1806-10.opn.html

N.J.A.C. 17:19-2.13(c) limits the amount of public work a contractor can obtain by setting an aggregate limit for its public contracts, based upon the size of its business operation. The intent of the aggregate limit rating is to ensure that bidders are responsibly undertaking work. This case decided that the rule also applied to subcontractors. The ccurt noted that several statutes relative to school construction projects required certifications from both contractors and subcontractors. This ruling, the court said, promoted the legislative purpose of public bidding laws to ensure a level playing field for public bids. Because the subcontractor here had failed to submit a certification relative to its aggregate limit and had not properly accounted for all of its outstanding work and associated deductions, the prime bid of the contractor was defective. The contract, therefore, had to be awarded to the next lowest responsible bidder. (10/2011)

PUBLIC CONTRACTS

- **BID BOND**

Garden State School Bus Contractors Association v. Board of Directors of the Passaic County Education Services Commission (Unpub. App. Div., June 1, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a1383-10.opn.html

K&M Transportation submitted bids for pupil transportation to the Passaic County Educational Services Commission (PCESC) but repudiated 6 of its 8 bids. The Commissioner of Education, in a suit filed by the Garden State School Bus Association, refused to allow the PCESC to forfeit the bid bond supplied by K&M. The ostensible reason for the commissioner's ruling was that PCESC had never tendered a contract which K&M had refused to sign. The Appellate Division reversed, saying that the actual tender of a contract would have been a futile act so the bid bond should be forfeited. (10/2011)

PUBLIC HOUSING

PUBLIC HOUSING

- **EVICTION; PROCEDURAL DUE PROCESS**

Bell v. Pleasantville Housing Authority, 2011 U.S. App. LEXIS 18048 (3d Cir. 2011)

A *pro se* plaintiff filed a complaint against a housing authority for denial of due process in an eviction proceeding. The court said that it was error for the district court to dismiss his complaint. Plaintiff was asserting that he believed his Fourteenth Amendment rights were violated when he was evicted from public housing without a grievance hearing first having been held. (10/2011)

PUBLIC HOUSING

- **EVICTION; PROCEDURAL DUE PROCESS**

Baldwin v. Housing Authority of The City of Camden,2011 U.S. App. LEXIS 17729 (3d Cir. 2011)

A Section 8 tenant who failed to file annual recertification documents was evicted. She claimed a violation of due process. The court said that, in this context, due process requires only that the decision maker to state the reasons for his or her decision and indicate the evidence relied on. Letters from the Housing Authority denying recertification all identified the failure to comply with the recertification process as the reason for the eviction. (10/2011)

PUBLIC HOUSING

- **EVICTION; ACCOMMODATION FOR DISABILITY**

Housing Authority of the City of Camden v. Williams (Unpub. App. Div., April 6, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3249-09.opn.html

A certified judgment of conviction was not required as a prerequisite to eviction of a tenant from public housing pursuant to 42 *U.S.C.* §. 3604(f) (9) when the tenant admitted to violating the law by threatening a security guard with a knife. (7/2011)

PUBLIC LANDS AND BUILDINGS

PUBLIC LANDS AND BUILDINGS

- **REVERTER**

Lebanon Township Post 115 First Aid Squad v. Township of Hunterdon, Law. Div, Hunterdon, Docket No. HNT-L-232-10, October 22, 2010, Buchsbaum, J.S.C.

This is another round in the dispute between the Lebanon First Aid Squad and the Township of Lebanon. We reported on an earlier round in 33 Local Government Law Review 266 (October 2010). The First Aid Squad owned its headquarters and the land on which it was situated pursuant to a deed from the Township. As required by statute, *N.J.S.A.* 40A:12-21, the deed contained a clause requiring a reverter in the event the land was no longer used for a public purpose. The Township is attempting to make the volunteer fire department, rather than the first aid squad, the first responders to emergencies, because the first aid squad contemplated charging for its services. In this round, the squad sought to amend its complaint to nullify the deed's reverter clause based upon an estoppel argument – it had raised funds, including incurring mortgage debt, to build its building. The court refused to allow the complaint to be amended, finding that the statutory reverter was required by the New Jersey Constitution, Article VIII, Section 3, Paragraph 3 which prohibits gifts of public property to private entities. Thus, the court said, it lacked authority to nullify the reverter. (1/2011)

PUBLIC LANDS AND BUILDINGS

- **COURTESY REVIEW; RIPENESS**

Carter Road Homeowner's Association, Inc. v. Lawrence Township Planning Board (Unpub. App. Div., March 2, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a4156-09.opn.html

Objectors challenged a "courtesy review" by the planning board for a cell tower located on municipal land but leased to a tower operator. The land had been dedicated to the township for an emergency services substation pursuant to the condition of a subdivision resolution at the time it was acquired. The deed creating the public lot stated that the purpose of the conveyance was for emergency purpose. While municipalities are bound by deed restrictions just as private landowners are, the deed here did not restrict the land solely to emergency purposes and a cell tower therefore was not contrary to the terms of the deed.

As to the "courtesy review" the trial court and the appellate division found no authority of the planning board to issue an advisory opinion about the compliance of a proposed use or site plan with applicable laws and regulations. The trial court held that the matter was not ripe for determination until the project was "shovel ready." The municipality argued that it did not have

to obtain variances and site plan approvals to construct the tower. For specific support of this proposition in cell tower cases it cited the Law Division case of *Hills of Troy Neighborhood Association v. Township of Parsippany, 392 N.J. Super. 593 (Law Div. 2005).* That case held that the municipality had authority to construct a communications tower at its police headquarters without zoning approvals but its construction plans were subject to review to ensure they were reasonable and the public had a right to notice and public comment on the plans. That court also held that private entities who were co-locators on the tower were also exempt from zoning regulations so long as the public interest outweighed the private benefit. The Appellate Division here did not decide the correctness of the statements in *Hills of Troy*. It agreed with the lower court that plaintiffs may again challenge, when ripe for adjudication, the procedures the township has followed in authorizing use of the site for a communications tower. (10/2011)

PUBLIC LANDS AND BUILDINGS

- **BREACH OF CONTRACT**

First Fidelity Realty LLC v. Bayonne (Unpub. App. Div., July 25, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a0800-10.opn.html
A bidder for property to be purchased from the City of Bayonne was denied specific performance of the purchase contract. The resolution authorizing the sale provided that if the bidder failed to perfect the purchase of the property within 90 days of the date of the resolution the bidder would forfeit the deposit and the property could be placed on the market again. It made time of the essence for a closing. The bidder executed the contract but did not close, even though the city tendered a quitclaim deed. (10/2011)

PUBLIC RECORDS

PUBLIC RECORDS

- **UNFILED DISCOVERY**

Drinker Biddle & Reath. L.L.P. v. New Jersey Department of Law and Public Safety, Division of Law, 421 N.J. Super. 489 (App. Div. 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a2387-09.opn.html

Plaintiff sought access to unfiled transcripts of oil company experts from the Division of Law. Under the Open Public Records Act (OPRA) *N.J.S.A.* 47:1A-9(b) that discovery was exempted. However, the case was remanded to the Law Division for a determination as to the common law right of access because the court had mentioned the factors set forth in *Loigman v. Kimmelman, 102 N.J. 98, 106 (1986)*, but had not considered them or evaluated whether access to the transcripts would vindicate a public interest. (10/2011)

PUBLIC RECORDS

- **TELEPHONE RECORDS**

LiVecchia v. Borough of Mount Arlington, 421 N.J. Super. 24 (App. Div. 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a4501-09.opn.html

Under the Open Public Records Act (OPRA) *N.J.S.A.* 47:1A-1 to -13, LiVecchia sought cell phone records for all borough employees for two months. The borough redacted the records by eliminating the phone numbers and destinations of the calls. The Government Records Council (GRC) ordered that the redaction be limited to the phone numbers, but that the destinations needed to be disclosed. The Appellate Division upheld the ruling of the GRC. The Appellate Division said that the borough had failed to show that the destination location of the calls made by municipal employees triggered a protected privacy right, similar to that sheltering the release of telephone numbers or names of persons called. The GRC properly applied the balancing test of *Doe v. Poritz, 142 N.J. 1, 87-88 (1995)* in concluding that the interest of the public in knowing whether public funds were being properly spent outweighed any privacy interest in the destination of calls. The court also affirmed the GRC's order requiring the reimbursement of a substantial portion of a blanket $5 charge per tape, imposed by ordinance, for the duplication of an audiotape. The borough, said the court, had failed to produce proof that fee charged reasonably reflected its actual cost. Instead of $5, the charge was reduced to 79 cents. (10/2011)

PUBLIC RECORDS

- **PUBLIC AGENCY**

Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011)

http://lawlibrary.rutgers.edu/courts/supreme/a-36-10.opn.html

The Supreme Court unanimously found that the New Jersey State League of Municipalities is a "public agency" and is accordingly, obliged to produce "government records" pursuant to the Open Public Records Act (OPRA), *N.J.S.A.* 47:1A-1 et.seq. In 2008, Fair Share Housing Center, Inc. requested documents from the League about proposed regulations promulgated by the Council on Affordable Housing. The League responded that it was not covered by OPRA and declined to produce the requested documents. The Law Division and the Appellate Division both found that the League was not a public agency. The Supreme Court, in reversing, relied on *N.J.S.A.* 47:1A-1.1 which includes in the definition of a "public agency", as an "instrumentality…created by a …combination of political subdivisions." The lower courts had held that the League was not performing a governmental function and that, therefore, it was not a "public agency." The Supreme Court, however, said that the "governmental function" test applied by it in *Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 183 N.J. 519 (2005),* in an Open Public Meetings Act (OPMA) case was not applicable in an OPRA case because the definition of "public body" in OPMA was different from the definition of a "public agency" in OPRA. (10/2011)

PUBLIC RECORDS

- **PUBLIC AGENCY**

Sussex Commons Associates v. Rutgers, the State University, 416 N.J. Super. 537 (App. Div. 2010), certif. granted, 205 N.J. 519 (2011)

http://lawlibrary.rutgers.edu/courts/appellate/a1567-08.opn.html

Plaintiffs filed a request under the Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq*. (OPRA) with the Rutgers Environmental Law Clinic seeking documents about the clinic's finances and the contributions of two private citizens' groups that were opposing plaintiffs' development of an outlet mall. The Appellate Division, reversing a contrary law division ruling, found that clinic was subject to OPRA because it met the definition of public agency. The court remanded the case for trial to determine whether specific documents requested by plaintiff were exempt from disclosure under the definition of "government record" in *N.J.S.A.* 47:1A-1.1. A-3623/S-2615, currently pending in the Legislature, would, if enacted, reverse this ruling. ***[Editor's note: certification has been granted and as of November 11, 2011 the matter was still pending before the Supreme Court.]*** (1/2011)

PUBLIC RECORDS

- **PERSONNEL RECORDS**

Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581 (2011)

Kovalcik was indicted and, through discovery in the criminal case, sought training records for two detectives in the Somerset County Prosecutor's Office. The discovery request was denied by the criminal court. He then made a request for the same records under the Open Public Records Act (OPRA), *N.J.S.A.* 47:1A-1 *et seq*. The court ruled that the mere denial of a motion to compel discovery in a criminal case does not operate, for OPRA purposes, as an order of confidentiality. As a general rule "personnel records" are exempt from disclosure under *N.J.S.A.* 47:1A-10. However, there are statutory exceptions, including "data contained in information which disclose conformity with specific experiential, educational or medical qualifications for government employment." The court determined that this exception is narrow and mandates only disclosure of education or training when there is a specific educational prerequisite for the job. The court ordered a remand because the record was not clear as to what educational requirements are needed for employment as detective in the Prosecutor's office. (10/2011)

PUBLIC RECORDS

- **PERSONNEL RECORDS**

Kovalcik v. Somerset County Prosecutor's Office (Unpub. App. Div., Jun. 28, 2010), aff'd in part, rev'd in part, and remanded, 206 N.J. 81 (2011)

http://lawlibrary.rutgers.edu/courts/appellate/a5432-08.opn.html

As a general rule, personnel records are exempted from the definition of a public record under the Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, and particularly *N.J.S.A.* 47:1A-10. However, there is an exception to the rule for "data contained in information which discloses conformity with specific…educational qualifications required for government employment…" A two page document containing a list of courses taken by a detective in the Somerset County Prosecutor's Office was found by the Appellate Division to be a "public record," even though the Prosecutor's Office argued that these courses were not prerequisites to the job. ***[Editor's note – see Supreme Court decision excerpted above.]*** (1/2011)

PUBLIC RECORDS

- **PERSONNEL RECORDS**

Kieffer v. High Point Regional High School (Unpub. App. Div., Dec. 28, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a1737-09.opn.html

Plaintiff appealed from an order denying access to a public school district employee's letter of resignation as the high school varsity baseball coach. Plaintiff argued that the baseball coach's resignation letter was a public document under Open Public Records Act (OPRA) *N.J.S.A.* 47:1A-1-13 or the common law and should be disclosed. The appellate division disagreed. Under OPRA, a personnel record is subject to very limited disclosure. *N.J.S.A.* 47:1A-10. The Appellate

Division conducted its own in camera review of the letter and agreed with the trial judge's assessment that the letter contained personal information beyond what is required by law to be released regarding the former coach's resignation. (4/2011)

PUBLIC RECORDS

- **INTERLOCUTORY RELIEF**

Gannett Satellite Information Network Inc. v. Borough of Raritan (Unpub. App. Div., Feb. 10, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3525-09.opn.html

Plaintiff, a news organization, sought payroll records from the Borough of Raritan in a prescribed format. The borough offered the records in the format in which they were kept and, alternatively, offered the records in the requested format for the fee that would be charged by its payroll company to convert the records. Plaintiff sued under the Open Public Records Act (OPRA), *N.J.S.A.* 47:1A-5, and the common law asserting the right to the records in the requested format. The trial court declined to grant plaintiff preliminary relief in an order to show cause but did not dismiss the case in its entirety. Plaintiff took an interlocutory appeal to the Appellate Division, which dismissed the appeal and remanded the matter for further proceedings. Local government law practitioners should keep an eye on this case as it continues to develop because a final disposition adverse to the muncipality could place additional strain on tight budgets. (4/2011)

PUBLIC RECORDS

- **INADEQUATE REQUEST**

Allen v. Mercer County Prosecutor's Office Records Custodian (Unpub. App. Div., Jan. 5, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a2972-09.opn.html

Plaintiff was a defendant in a criminal matter prosecuted by the Mercer County Prosecutor's Office. He served a lengthy request on the County pursuant to the Open Public Records Act (OPRA), *N.J.S.A.* 47:1A-1 *et seq.*, which the County denied for a variety of reasons. Both the GRC and the Appellate Division sustained the denial, holding that the request was overly broad, failed to identify with reasonable clarity the records sought, and sought access to information rather than to specifically-identified government records. (4/2011)

PUBLIC RECORDS

- **DELIBERATIVE PROCESS PRIVILEGE; PERSONNEL RECORDS**

McGee v. Township of East Amwell, 416 N.J. Super. 602 (App. Div. 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a1233-09.opn.html

Joan McGee, East Amwell Township Planning Board Administrator, sought access to email

communications among various township officials and former officials about McGee's performance and a lawsuit she had filed against the township and some individual officials. The Township asserted that the email communications were protected against disclosure under the Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq*. (OPRA) because they were personnel records or advisory, consultative, deliberative (ACD) material. The court rejected McGee's assertion that the emails could not be considered personnel records because they were not contained in her personnel file. Under OPRA's "expansive" definition of "public records" and the important privacy concerns implicated by communications about an employee's job performance, such emails are personnel records regardless of whether they are physically placed in a personnel folder. McGee also asserted that she had waived the right to confidentiality of her personnel records as permitted by OPRA. Because McGee did not raise that issue earlier, the court remanded it to the Government Records Council (GRC) to provide the Township the opportunity to present arguments on the waiver issue to the GRC. The court also sustained the GRC's decision that certain of the emails were subject to OPRA's ACD exception. The fact that some emails included a former member of the planning board who was no longer an official, but who had been McGee's supervisor, did not cause the emails to lose their ACD protection. The former Planning Board member's departure from public office did not preclude her from engaging in ACD communications. (1/2011)

PUBLIC RECORDS

- **COMPETITIVE ADVANTAGE EXCEPTION**

Lagerkvist v. New Jersey Dep't of Environmental Protection (Unpub. Law Div., July 12, 2011)
Under the competitive advantage exception to the Open Public Records Act, *N.J.S.A.* 47:1A-1.1, the Department of Environmental Protection was not required to disclose the identity of the buyers of state issued carbon dioxide permits sold at regional greenhouse gas initiative auctions. (10/2011)

PUBLIC RECORDS

- **ATTORNEYS FEES**

Spectraserv Inc. v. Middlesex County Utilities Authority, 416 N.J. Super. 565 (App. Div. 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a1080-09.opn.html
The Appellate Division upheld a Law Division ruling denying a request for attorney's fees by Spectraserv Inc. who asserted that it was the "prevailing party" under the Open Public Records Act (*N.J.S.A.* 47:1A-1 *et seq*.) The Court held that the request for documents was overly broad and generalized. Several requests sought "any and all" documents, failed to specify documents by date, title or author and sought records that "reflect", "explain" or "demonstrate" information of a technical and complex nature. The requests involved more than 150,000 documents and were so lacking in specificity that agency had to review vast files to analyze and to select potentially relevant public records. In addition to the holding that the document request exceeded

the obligation imposed upon custodians by OPRA, the Court found that a compromise offered by the agency (to achieve the same result by simultaneous discovery in related construction litigation involving the same parties) was reasonable. (1/2011)

PUBLIC RECORDS

- **ATTORNEYS FEES; DEFENSE OF PUBLIC RECORDS CUSTODIAN**

Shore v. Borough of Paramus (Unpub. App. Div., July 8, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a6246-09.opn.html
In 32 Municipal Law Review 57 (March 2009), we published the Law Division opinion in *Shore v. Borough of Paramus*, in which the court rejected a rule that required the borough clerk to submit all OPRA requests to the borough attorney before complying. The clerk had requested legal representation through governing body but had been rebuffed and, instead had hired his own counsel. The clerk brought the current application under *N.J.S.A.* 40A:9-134.1, which provides for municipal clerks to be given the necessary means for defense relating to clerk's official duties. The court found that the underlying OPRA lawsuit was properly related to the clerk's function. The payment of fees to an attorney retained by a clerk is limited only to reasonable costs and fees, but not precluded, because the attorney was not chosen by the municipality. The clerk was not barred by entire controversy doctrine and could bring this action separately because the cause of action for fees arose after the conclusion of the prior action. (10/2011)

PUBLIC RECORDS

- **ATTORNEYS FEES**

Smith v. Hudson County Register (Unpub. App. Div., April 25, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a4113-09.opn.html
Under the Open Public Records Act (OPRA), *N.J.S.A.* 47:1A-1 *et seq*., Smith challenged the 25 cent per page fee charged by the Hudson County Register for copies of public documents made on self-service copiers. The court in *Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010),* held that the practice did not comply with OPRA but made its ruling prospective only. In this case for counsel fees under *N.J.S.A.* 47:1A-6, the county argued that the statute allowed counsel fees only to requestors who had been "denied access" not to those who had been granted access under improper conditions. The Appellate Division rejected this argument even though the trial court had agreed with it. The court found that Smith was a "prevailing party" because his action had resulted in rejection of the county's position that he had been a "volunteer" (because he had paid the fee rather than awaiting litigation). In addition his action had caused the court to construe OPRA in a way that –although not free from doubt—found the flat charge of $0.25, without regard to the cost of copying, to be invalid. The action by the denying authority does not need to be willful in order to trigger the obligation for counsel fees. (7/2011)

PUBLIC RECORDS

- **ATTORNEYS FEES**

Burke v. Margiotta (Unpub. App. Div., May 20, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a0731-10.opn.html

Plaintiff sought documents under the Open Public Records Act (OPRA), *N.J.S.A.* 47:1A-1 to -13. The documents requested related to the township's expert and counsel fees in a pending case in which the plaintiff was involved. After first being told that the documents were protected by the attorney-client privilege, the clerk, acting pursuant to the opinion of a new township attorney, subsequently supplied redacted documents. On an application by plaintiff for counsel fees in the OPRA action, the trial court found that the plaintiff was entitled to reasonable counsel fees as the catalyst for the production of the documents. As to the amount, the court ordered payment of $10,626, which was the amount suggested by the township, and denied the plaintiff's counsel's request for $29,009.55 plus a "lodestar enhancement" of 50%. On appeal, the Appellate Division upheld the denial of the lodestar enhancement noting that the unusual circumstances which should attach such an award -- such as public importance of the OPRA request, novelty of issues and risk of failure in securing the documents -- were not present. However, the Court reversed and remanded on the amount of counsel fees in light of the trial court's failure to make explicit findings of fact and conclusions of law. (7/2011)

PUBLIC RECORDS

- **ATTORNEYS FEES**

Newark Morning Ledger v. Sports & Exhibition Authority, Law Div., Essex County, Docket No. ESX-L-5408-09, January 11, 2011, Kennedy, J.S.C.

The Star Ledger, under the Open Public Records Act (OPRA), *N.J.S.A.* 47:1A-1 *et seq.*, and the common law, sought unredacted contracts between the New Jersey Sports and Exposition Authority (NJSEA) and the concert and event promoters who provided entertainment at the various venues operated by the NJSEA. The NJSEA argued that it would be at a competitive disadvantage in dealing with promoters because other private venues had no obligation to make their contracts public. Judge Claude Coleman (now retired) held that this was a case of first impression on the issue of what constitutes "information which if disclosed would give an advantage to competitors or bidders" under *N.J.S.A.* 47:1A-1.1. Nevertheless Judge Coleman entered an order compelling the disclosure. The NJSEA took an appeal and sought a stay. In this case, Judge Kennedy ordered a stay because of potential irreparable harm from enforcement of the order while it was on appeal. The court ordered counsel fees and disbursements to the Star Ledger, as the prevailing party, in the amount of $126,135.95 for 351 hours of legal work. (4/2011)

PUBLIC RECORDS

- **ATTORNEY-CLIENT PRIVILEGE; REDACTION**

Moon v. County of Hudson (Unpub. App. Div., March 28, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3649-09.opn.html
Moon, an attorney, sought the unredacted transcript of a closed session discussion by the Hudson County freeholders in which the freeholders received legal advice on the award of a public contract. Moon's client was one of the bidders for the contract. Moon's client was not awarded the contract by the freeholders, but, in a separate legal challenge, was awarded the contract by a court. Moon asserted that because the board failed to adopt the proper resolution under the Open Public Meetings Act (OPMA), *N.J.S.A.* 10:4-6 *et seq*., he was entitled to the transcript. The court held that the Open Public Records Act (OPRA), *N.J.S.A.* 47:1A-1.1 *et seq*., exemption for privileged attorney-client information was not vitiated by the board's failure to comply with the OPMA. Moon's second claim that the board had waived the attorney-client privilege by discussing some of the advice in open session was remanded to the trial court because of an insufficient record below. (7/2011)

REDEVELOPMENT

REDEVELOPMENT

- **NOTICE; TIMELINESS**

Coalition for Friendly Environmental Expansion Inc. v. Borough of Magnolia (Unpub. App. Div., August 22, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a4138-09.opn.html

The Coalition for Friendly Environmental Expansion, Inc. (COFEE) in 2008 filed a suit to challenge the validity of Magnolia's designation, in 2005, of an area in need of redevelopment and its concurrent adoption of an amendment to the redevelopment plan. It also challenged an action by the council in 2005 vacating a deed restriction. The court held that the matter was time barred. To a contention by COFEE that the notices of the redevelopment actions were invalid, the court held that the notices were in compliance with statutory requirements and the dictates of *Harrison Redevelopment Agency v. DeRose, 398 N.J. Super. 361 (App. Div. 2008)*. Further, neither COFEE nor any of its individual members owned any property located within the redevelopment area. Therefore, relying on *Town of Kearny v. Disc. City of Old Bridge, Inc., 205 N.J. 386 (2011)* and *Iron Mountain Info. Mgmt., Inc. v. City of Newark, 202 N.J. 74 (2010)*, the court held that non-record property owners such as COFEE were not entitled to particularized notice of redevelopment actions. The court refused to enlarge the time for filing the complaint because substantial activities had been undertaken to further the redevelopment. (10/2011)

REDEVELOPMENT

- **NOTICE**

62-64 Main Street LLC v. Mayor and Council of Hackensack (Unpub. App. Div., Jan. 24, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a0342-09.opn.html

A property owner in a proposed area in need of redevelopment did not get notice of the hearing because the tax assessment records contained a wrong address. The owner attended a number of hearings but did not participate, missing only one of the meetings because of lack of notice. On the challenge to the redevelopment designation, the Appellate Division upheld the planning board action. The Local Redevelopment and Housing Law (*N.J.S.A.* 40A:12A-1 *et seq*.) requires only notice to the last known address on the tax assessment list. Even under the holding of *Harrison Redevelopment Agency v. DeRose, 398 N.J. Super. 361 (App. Div. 2008)*, the statutory requirement is constitutional. In addition to challenging the planning board proceeding the property owner challenged the subsequent action of the governing body approving the planning board designation of the area in need of redevelopment asserting that the governing body's action violated the Open Public Meetings Act (OPMA), *N.J.S.A* 10:4-6 to -21. The governing

body had rescinded its resolution within the 45-day period permitted by *N.J.S.A* 10:4-15. The dismissal of the complaint on that ground was therefore upheld. (4/2011)

REDEVELOPMENT

- **AREA IN NEED OF REDEVELOPMENT; TIME BAR**

Chambers v. Township of Neptune (Unpub. App. Div., Oct. 5, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a0981-09.opn.html
An objector's challenge to a resolution designating an area in need of redevelopment was properly dismissed as untimely because it was filed more than forty-five (45) days after the adoption of the resolution and there were no claims of eminent domain abuse, inadequate notice or other constitutional issue. The challenge to the subsequent adoption of the redevelopment plan was also properly dismissed because all procedural requirements had been satisfied and there was merely a disagreement over land use policy. (1/2011)

RENT CONTROL

RENT CONTROL

- **EXTENSION**

Brownstone Associates v. Mayor and Council of Twp. of Little Falls (Unpub. App. Div., Mar. 1, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a4005-09.opn.html

A landlord sought to void an ordinance extending rent control claiming there had been a lack of studies or evidence of need to continue the controls. The power to institute rent control has a long history as one of the general police powers of the municipality. The questions in determining the validity of a rent control ordinance are: (a) whether the legislative body rationally could conclude that the marketplace for housing should be restrained (b) whether a landlord can obtain a just and reasonable return on apartments, and (c) whether the means of the ordinance are related to its purposes. It is up to the party challenging the ordinance to show that the decision was arbitrary and capricious and that there was no public interest in establishing rent control. Here the landlord produced no such proof and the Court said that there was no requirement that the municipality hold a special hearing on rent control or conduct any special studies. The extension ordinance was upheld. (4/2011)

RENT CONTROL

- **ADMINISTRATION**

Exton Realty v. Rent Leveling Board of Township of North Bergen (Unpub. App. Div., June 22, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a0110-09.opn.html

In a rent controlled building, five tenants paid a portion of their rent to Exton, the landlord, and the remainder was paid to the landlord by the North Bergen Housing Authority under the federal "Section 8" voucher program, 42 *U.S.C.* §1437f (2006) and 24 *C.F.R.* §982.1(a)(1) (2010) . The amount paid by the tenants was below the township's rent limitations but the additional Section 8 subsidy made the total rent exceed the limitations. The Housing Authority filed claims with the Rent Leveling Board (Board) seeking to recover over $85,000 in excessive Section 8 subsidies for the five units. The board found in favor of the authority. Exton brought suit claiming that the board's resolution against it was invalid because it was arbitrary, capricious and inconsistent with law. Exton also argued that the authority lacked standing to bring complaints to the board, that the board action was preempted by federal law, the board had denied it due process and the Board's attorney had a conflict because his law partners represented housing authorities in other municipalities. The Appellate Division affirmed a Law Division dismissal of Exton's case. The

court specifically found that the housing authority had standing as the payor of part of the subsidized rent. (10/2011)

SOLID WASTE MANAGEMENT

SOLID WASTE MANAGEMENT

F&M Holdings, LLC v. Mercer County, Law Div, Mercer, MER-L-1807-10, April 13, 2011, Feinberg, A.J.S.C.

In a complicated case, the action of the Board of Chosen Freeholders to eliminate a recycling facility, previously approved, from its Solid Waste Management Plan was struck down by Judge Feinberg as "arbitrary, political and unreasonable" similar to facts in *Waste Disposal, Inc. v. Monmouth County Bd. of Chosen Freeholders, 254 N.J. Super. 205 (Law Div. 1991).* (7/2011)

TAXATION

TAXATION

- **VALUATION**

Greenblatt v. Englewood City, 26 N.J.Tax. 41 (Tax Ct. 2010)
http://lawlibrary.rutgers.edu/courts/tax/15575-09.opn.html
In this tax appeal action, the property owner overcame the well established presumption of correctness afforded to original assessments and judgments of the county boards of taxation where the plaintiff's expert appraiser failed to provide any sources justifying the adjustments he used in his report. (7/2011)

TAXATION

- **UNCONSTITUTIONAL TAX STRUCTURE; STANDING; SUMMARY JUDGMENT**

Lincoln North Development Corp. v. Kearny (Unpub. App. Div., Jan. 28, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a2299-09.opn.html
Five industrial tax payers objected to paying both real estate taxes, which included sewer costs billed to the municipality by the Passaic Valley Sewerage Commission (PVSC) as a whole, and charges billed directly by the local sewer authority (KMUA) for industrial usage. The non-profit trade association had standing to bring the claims because they were confined to matters of common interest and did not include any claims that would pertain to one but not all of the businesses. The charges from the KMUA were not taxes, but were payment for services and, therefore, the allocation of charges by Kearny of the PVSC sewer costs did not violate the uniformity clause of the State Constitution, N.J.Const. Article VIII, §1, ¶ 1(a). Equal protection and due process claims were also rejected because plaintiff had presented nothing more than unsupported assertions that were insufficient to rebut the evidence from Kearny. Therefore, no genuine issue of material fact had been presented. (4/2011)

TAXATION

- **TAX SALE CERTIFICATE; TAX COURT JURISDICTION**

Sallo v. Borough of Westwood (Unpub. App. Div., April 5, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3512-09.opn.html
Plaintiff filed a complaint for damages against the borough arising out of his 1980 acquisition of a tax sale certificate. On the borough's motion, the case was transferred to the tax court pursuant to Rule 8:2(a). The Appellate Division affirmed the transfer order because the dispute and damage claims centered on a tax sale certificate and all of the claims asserted in plaintiff's complaint related to his purchase and ownership of the tax sale certificate. The court held that the

issues fell precisely within the unique expertise of the tax court as set forth in Rule 8:2(a) and met the requirement of Rule 4:3-4(a) authorizing the court in which an action is pending to order the matter transferred to the tax court provided the principal issue or issues raised in the matter are cognizable in that court. (7/2011)

TAXATION

- **TAX SALE CERTIFICATE; REDEMPTION; CONTRIBUTION**

Robinhood Properties, LLC v. NJ TLC Holdings (Unpub. App. Div., Jan 25, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3311-08.opn.html
Plaintiff acquired an interest in real property and subsequently filed a partition action against its co-owner, TLC, seeking contribution, in that action, for the redemption of a tax sale certificate. Phoenix Funding had begun a tax foreclosure proceeding on the property and had purchased a 2/3 interest in the property from the former cotenants, which it then conveyed to TLC. The other cotenant conveyed its 1/3 interest to the plaintiff, on condition that the plaintiff redeem the tax sale certificate. Plaintiff did, in fact, redeem the tax sale certificate. Applying customary partition rules, plaintiff was entitled to a contribution, in proportion to its ownership, for the amount it paid to redeem the tax certificate. (4/2011)

TAXATION

- **REVALUATION CRITERIA**

Keane v. Township of Monroe, 25 N.J.Tax 479 (Tax Ct. 2010)
http://lawlibrary.rutgers.edu/courts/tax/01147-07.opn.html
Plaintiffs – the owners of properties in Monroe Township-- filed a prerogative writ action seeking a statutory remedy for discrimination in assessments within a taxing district pursuant to *N.J.S.A.* 54:1-35a. The action was transferred from the Law Division to the Tax Court. The tax court held that exhaustion of administrative remedies – an individual tax appeal to the county tax board or the tax court --was not required when plaintiffs were not merely challenging their own assessments but rather were challenging the entire assessment list. The court further held the assessments violated the uniformity clause of the state constitution, N.J. Const. Article 8, Section 1, Paragraph 1(a), because different methodologies had been used for different classes of properties. The Township was therefore required to perform a new municipal wide assessment, even though the county tax board had consistently failed to order it. (1/2011)

TAXATION

- **RESCISSION OF ABATEMENT**

Lowe's Home Centers Inc. v. City of Millville, 25 N.J. Tax 591 (Tax Ct. 2010)
The court overturned Millville's revocation, after only two and a half years, of a five year tax exemption on the Lowe's property. Millville claimed that the original application was filed late,

and the exemption should never have been approved by the tax assessor or ratified by an earlier governing body. The stipulated evidence revealed that the tax assessor had inadvertently misled the property owner as to the deadline for filing of the exemption application, and that the application was in fact filed within the time frame set forth in the tax assessor's letter. In applying the "square corners" equitable doctrine [as applied to tax matters in *F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418 (1985)*] the court determined that the city fell short of the standards of fair dealing that taxpayers have a right to expect from public officials. Millville, therefore, therefore could not revoke the exemption based upon the alleged late filing. (1/2011)

TAXATION

- **PAYMENT OF TAXES; RELAXATION**

Dover-Chester Assocs. v. Randolph Twp., 419 N.J. Super. 184 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3445-09.opn.html
Under *N.J.S.A.* 54:51A-1(b), "[a]t the time that a complaint has been filed with the Tax Court seeking review of judgment of county tax boards, all taxes or any installments thereof then due and payable for the year for which review is sought must have been paid." The statute also provides, however, that "the Tax Court may relax the tax payment requirement and fix such terms of payments as the interests of justice may require." Here, neither taxpayer was current in its tax obligations at the time the complaints were filed, but by the return date of defendants' motions to dismiss, tax sale certificates had been issued, thereby paying the taxes. The Appellate Division rejected the argument that taxpayers on appeal from a tax board judgment should be given the same latitude to cure the tax delinquencies as that given to taxpayers who file a direct appeal with the tax court pursuant to *N.J.S.A.* 54:3-27. Specifically rejecting the analysis in *U.S. Land Resources v. Borough of Roseland, 24 N.J. Tax 484 (Tax 2009)*, the court held that allowing the delinquent taxpayer to cure the delinquency at some point after filing its complaint would subvert the legislative goal of maintaining an uninterrupted flow of revenue to the municipality and would open the floodgates for taxpayers not to comply with the strict letter of the law. Under these circumstances, the "interest of justice" exception could not justify relaxation. The court also held that issuance of a tax sale certificate does not satisfy the requirement under *N.J.S.A.* 54:51A-1(b) that taxes be paid at the time that the complaint is filed with the Tax Court. (7/2011)

TAXATION

- **LONG TERM ABATEMENT**

K. Hovnanian At 77 Hudson Street Urban Renewal Company, LLC v. City of Jersey City (Unpub. App. Div., July 21, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a0290-10.opn.html
Hovnanian and another developer, Second Street, entered into agreements with Jersey City for tax abatement on condominium projects. With the decline in the real estate market, the city

agreed to amend Second Street's agreement, but declined to amend Hovnanian's. Hovnanian claimed the city's actions were arbitrary and capricious, violated various constitutional provisions, and filed suit against the city. The trial court's early, summary dismissal of the suit based on the inadequacy of Hovnanian's pleading was reversed. (10/2011)

TAXATION

- **FORECLOSURE; VACATION**

Navillus Group v. Accutherm Incorporated, 422 N.J. Super. 169 (App. Div. 2011)

The Tax Sale Law, *N.J.S.A.* 54:5-1 to -137, provides the exclusive grounds upon which a tax foreclosure judgment may be vacated. The Industrial Site Recovery Act, *N.J.S.A.* 13:1K-6 to -14 therefore provides no such means for vacation. (10/2011)

TAXATION

- **FARMLAND ASSESSMENT**

Rosenblum v. Borough of Closter (Unpub. App. Div., March 30, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a1696-09.opn.html

The court reviewed in detail the tax court proceedings in this matter, criticizing that court for a tangled procedural web resulting from the tax court judge's failure to timely enter orders disposing of motions and judgments affirming assessments. The essence of the appeal was applications by a third party to upset farmland assessments made as far back as 2001. Although the court might have ordinarily remanded, the tax court judge had retired. In addition, the court needed transcripts of the trial conducted in the fall of 2001 and copies of all of the documentary evidence submitted to the judge during that trial. In the absence of those materials in plaintiff's submission, the court felt that it was required to affirm. (7/2011)

TAXATION

- **FARMLAND ASSESSMENT**

Atlantic Coast LEH, L.L.C. v. Township of Little Egg Harbor, ___ N.J.Tax. ___ (Tax Ct. 2011)

The Tax Court upheld the determination by the Little Egg Harbor Tax Assessor that a twelve-acre property did not qualify for farmland assessment under the Farmland Assessment Act of 1964, *N.J.S.A.* 54:4-23.1 *et seq*. The property owner collected rent from a communications company which had erected a 25-story-foot cell tower and related equipment on the property which occupied less than one acre of the land. The owner also paid an out-of state bee-keeper to maintain hives on the property. The bees foraged on the entire property for food. Beekeeping is a recognized agricultural activity under the Farmland Assessment Act. However, the landowner was not entitled to a farmland assessment because the predominant use of the property was the cell tower, a non-agricultural use. (10/2011)

TAXATION

- **EXEMPTION**

International Schools Services Inc. v. West Windsor Township, 207 N.J. 3 (2011)
http://lawlibrary.rutgers.edu/courts/supreme/a-114-09.opn.html
International Schools Services, Inc. (ISS), a nonprofit corporation with tax exempt status under the Internal Revenue Code, was denied a real property tax exemption under *N.J.S.A.* 54:4-3.6, for property it has owned and occupied in West Windsor Township since 1989. The Supreme Court affirmed the denial. ISS failed the third prong of the three part test enunciated in *Paper Mill Playhouse v. Millburn Township, 95 N.J. 503 (1984),* because it had a substantial and significant interrelationship with several for-profit entities. For example, it provided those entities with subsidies by way of below market value rents in the ISS property. *Paper Mill Playhouse* requires that an entity's operation and the use of its property must not be conducted for profit. *N.J.S.A.* 54:4-3.6, is to be strictly construed against persons claiming the exemption because public policy requires that the public tax burden be borne fairly and equitably. Application of the *Paper Mill Playhouse* criteria is fact-sensitive and the burden is on the claimant to establish the right to the exemption.

Justice Rivera-Soto, the solitary dissenter, argued that there was insufficient "quantifiable" evidence of the degree of commingling to support the conclusion that ISS was not entitled to any tax exemption for its property. (10/2011)

TAXATION

- **EXEMPTION**

Society of the Holy Child Jesus v. City of Summit, 418 N.J. Super. 365 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1126-09.opn.html
In 2007 the Tax Court ruled that the Society of the Holy Child Jesus, a tax-exempt non-profit entity affiliated with the Roman Catholic Church, was not entitled to a property tax exemption because the Society's use of a part of its property was in violation of the City's zoning ordinances. (*See 23 N.J. Tax 528 (Tax 2007)*). The Appellate Division reversed. It held that under the plain language of *N.J.S.A.* 54-4-3.6, the only requirements for an exemption were that the property be owned by a qualified non-profit and be used for the tax-exempt purposes for which the non-profit was formed. Whether or not the use is permitted under the applicable zoning ordinance is irrelevant to the exemption decision. The decision includes a rather strained analysis to distinguish the line of Farmland Assessment Act cases – reaching the opposite conclusion -- on which the Tax Court had relied. (4/2011)

TAXATION

- **EXEMPTION**

City of Newark v. (148) Block 1861, Lot 24, 605-611 Central Avenue (Unpub. App. Div., Sep.27, 2010)

http://lawlibrary.rutgers.edu/courts/appellate/a5494-08.opn.html

Yes Lord Ministries, a religious organization qualified for tax exemption, failed to pay property taxes on a vacant warehouse building with offices that it purchased with the intent of making renovations. Financial circumstances precluded the renovations. Newark foreclosed on the property for nonpayment of taxes. Yes Lord Ministries claimed the property should be tax exempt because a portion of the property was being used for meetings of some of its members, and it was also in the process of seeking grants for making the renovations. No certificate of occupancy permitting use of the building had been issued. The court sustained the city's foreclosure. The organization was not entitled to exemption during the period of time the building was under construction. Further, any "use" of the property for religious purposes was not legal because no certificate of occupancy had been issued. (1/2011)

TAXATION

- **EQUALIZATION**

Township of Jefferson v. Dir., Div. of Taxation, 26 N.J.Tax. 1 (Tax Ct. 2011)

The Tax Court upheld the methodology used by the Director of the Division of Taxation in promulgating the Table of Equalized Valuations, which is used to apportion state school aid and county taxes. The municipalities plaintiffs in the case did not show that the Director's methodology could not be reasonably justified and that the calculation had resulted in significant decrease in state school aid dollars. The challenge was brought by four Morris County municipalities who had undergone revaluations for 2009. They challenged the Director's use of an "average true value" over two tax years that exceeded the "equalized true value" in the year in question. In this case, the Director determined the "equalized true value" for 2009, and then averaged it with the "equalized true value" for 2008. Because the market had declined in 2009, the "average true value" for the two years was larger than the "equalized true value" for 2009, so the Director used the "average true value." He justified this method as having been approved on numerous occasions as a measure to avoid large swings in the ratio. This method was neither a violation of the uniformity clause of the New Jersey Constitution, N.J.Const. Art. VII, §1, ¶ 1, nor of applicable statutes. (4/2011)

TAXATION

- **DISCOVERY**

Leeds Terminal Inc. v. Town of Kearny (Unpub. App. Div., April 26, 2011)

The underlying dispute here involved nine tax appeals regarding five parcels of property in

Kearny. The Tax Court dismissed the appeals for failure to answer discovery questions in "fully responsive manner." The plaintiff waited almost a year after the order of dismissal to file a motion under Rule 4:50-1 to set aside the dismissal order. The Appellate Division concluded that the totality of the circumstances warranted reversal to avoid a potentially inequitable result from the ultimate penalty of dismissal in a discovery dispute. However, it conditioned its reversal on prompt compliance with the discovery order and the payment by the plaintiff of counsel fees and costs of the town. (7/2011)

TAXATION

- **CORRECTION OF ERRORS**

Bida v. Township of Wayne (Unpub. App. Div., June 27, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a0170-10.opn.html
The *pro se* plaintiff owned vacant land in Wayne Township. In 2008, the plaintiff was granted a variance and building permit but did not make any of the approved improvements. In tax year 2009, the Township Tax Assessor mistakenly believed that the approved improvements had been made and increased plaintiff's tax assessment from $3,400 in tax year 2008 to $40,200 in tax year 2009. Plaintiff failed to file a timely appeal of the 2009 tax assessment to the County Board of Taxation and, instead, filed a complaint directly with the Tax Court requesting relief under the Correction of Errors Statute, *N.J.S.A.* 54:51A-7. The Appellate Division found that the tax court had properly dismissed the plaintiff's complaint because failure to file with the county board divested the tax court of jurisdiction. In addition, the Correction of Errors Statute could not be applied because the plaintiff had failed to establish what impact, if any, the granting of the "c" variance would have had on the 2009 assessment of the Property as vacant land. Under those circumstances, the correct assessment for tax year 2009 was not "readily correctible" or "subject to easy calculation based solely on the nature of the mistake" as required by that statute. (10/2011)

TAXATION

- **CHAPTER 91**

Town of Phillipsburg v. ME Realty, L.L.C., 26 N.J.Tax. 57 (Tax Ct. 2011)
http://lawlibrary.rutgers.edu/courts/tax/12362-10.opn.html
Phillipsburg filed a "Correction of Errors" tax appeal complaint under *N.J.S.A.* 54:51A-7, alleging that a typographical error had led to a substantially incorrect assessment. The taxpayer filed an answer and counterclaim asserting that even if Phillipsburg prevailed on the correction of errors claim, the assessment was nevertheless erroneous. Phillipsburg waited for 195 days after filing of its complaint to make a motion to dismiss the taxpayer's counterclaim for failure to comply with a request under *N.J.S.A.* 54:4-34 (Chapter 91) for income and expense information. The Tax Court held that the Chapter 91 notice was ambiguous and uncertain and, perhaps, impossible to answer, so the taxpayer was excused from making a response and, therefore,

dismissal of the complaint would be refused. The Tax Court also held that the Phillipsburg Chapter 91 motion was untimely because Rule 8.7(e) required that the motion be filed within 180 days of the date of filing of the complaint, not the counterclaim. (7/2011)

TAXATION

- **CHAPTER 91**

James-Dale Enterprises Inc. v. Township of Berkeley Heights, 26 N.J.Tax. 117 (Tax Ct. 2011)
http://lawlibrary.rutgers.edu/courts/tax/04384-10.opn.html
A tax assessor's request for income and expense information pursuant to *N.J.S.A.* 54:4-34 (Chapter 91), does not need to contain a separate explanation by the assessor of the consequences of the taxpayer's failure to make a timely response to the request. Chapter 91 requires the assessor to include a copy of the statute with the request. Because the statute explains the consequences, no separate statement is necessary. (10/2011)

TAXATION

- **ABATEMENT; UTILITY FEES**

Union Montclair Housing Associates v. Township of Montclair (Unpub. App. Div., April 4, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a2792-09.opn.html
Plaintiff had 50 year tax abatement for an affordable housing project and made a payment in lieu of taxes (PILOT) to the township for unspecified municipal services. While a municipal water bill had always been paid separately from PILOT, sewer services had always been covered by it. The township recently formed a sewerage authority and thereafter began charging everyone separately for the sewer charges. Plaintiff believed that it should not be charged again for sewer when it was included in its annual payment for "municipal services". On appeal of summary judgment granted to the township, the Appellate Division reversed. The court on appeal looked to contract law to determine the intention of the parties with respect to "municipal services" at the time the original agreement had been drafted and concluded that the term encompassed all those services then provided to other taxpayers or those services included in real estate taxes paid by property owners. The Court also examined Mount Laurel decisions and the Fair Housing Act (FHA) *N.J.S.A.* 52:27D-301 *et seq*., to decide on the question of the fairness of the charge against an affordable housing corporation. The court was concerned that if township separated out services to low-income housing authorities then rents would increase and the project will no longer be viable as an affordable project. There had been no new capital improvement in the sewer system, just a change in the method of payment for these services. Thus, the effect of the separation was to increase the cost to the housing authority without any increase in service. (7/2011)

TORTS

TORTS

- **WAIVER OF LIABILITY**

Marcinczyk v. New Jersey Police Training Commission, 203 N.J. 586 (2010)
http://lawlibrary.rutgers.edu/courts/supreme/a-19-09.opn.html
Marcinczyk, a police recruit, was injured during training at the Somerset County Police Academy. As a condition of participating in the training program, he had signed an exculpatory waiver under which he agreed not to assert any claim for injuries sustained during the training. A sharply divided Supreme Court held that even when a person had voluntarily and knowingly signed such an agreement, it may be unenforceable because it is contrary to public policy. The court found that the compelled exculpatory agreement contravened policies underlying the Tort Claims Act (*N.J.S.A.* 59:1-1 *et seq.*) primarily because it sought to immunize public employees from liability for which the Legislature had intended them to be liable. (1/2011)

TORTS

- **SUBSTANTIAL INJURY THRESHOLD**

Jackson v. Contento (Unpub. App. Div., Oct. 6, 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a5699-08.opn.html
A plaintiff involved in a vehicle collision with a police car did not suffer injuries sufficient to meet the injury threshold of the Tort Claims Act, *N.J.S.A.* 59:1-1 *et seq*. Her injuries did not rise to the level of substantial loss of bodily function. Further, she has been able to maintain gainful employment and continue many of the activities that she could do before the accident (1/2011)

TORTS

- **SIDEWALK LIABILITY**

Luchejko v. City of Hoboken, 207 N.J. 191 (2011)
http://lawlibrary.rutgers.edu/courts/supreme/a-38-10.opn.html
In this 4-2 decision, a residential-only condominium complex not liable in the tort for injuries resulting from snow and ice conditions on an abutting sidewalk. At common law, a property owner adjoining a sidewalk had no liability for the condition of the sidewalk, in the absence of active wrongdoing. *Stewart v. 104 Wallace Street, Inc., 87 N.J. 146 (1981)* changed that rule for commercial property owners, imposing liability on them but not on residential owners. This non-profit condominium association conducted no commercial activities but simply undertook the upkeep and maintenance of the condominium common areas —not including the public sidewalks--that were owned in common by the unit owners. The court inquired into the nature of the condominium and its governance. For the policy reasons stated in *Stewart*, it found that the

association was not liable as a commercial owner but was, instead to be treated as a residential owner, with no liability for the sidewalks. A rental apartment complex was distinguished because the object of the owner in that type of complex is to generate income. As evidence of the responsibility of condominium association, plaintiff cited portions of a municipal code that required property owners to keep walkways clear of snow. However, the court said that breaches of ordinance do not provide for individual rights of action but instead leave it to the local government to enforce as necessary.

The dissenters (Justices Long and Albin) sought to impose a balance of equities test to determine tort liability. These judges believed that the condominium association was in best position to ensure safety and to spread cost of insurance coverage. The dissent also suggested that non-commercial property owners in other cases had been found liable for snow removal activities and it saw no rationale for not including condominium complex in that group. (10/2011)

TORTS

- **LATE NOTICE**

D.N. v. New Jersey Div. of Youth and Family Services (Unpub. App. Div., June 13, 2011)
Plaintiffs were not entitled to file a late Tort Claims Notice when an eight-month delay before acting was unexplained. (7/2011)

TORTS

- **LATE NOTICE**

Mendez v. South Jersey Transportation Authority, 416 N.J. Super. 525 (App. Div. 2010)
http://lawlibrary.rutgers.edu/courts/appellate/a3409-09.opn.html
Plaintiffs were permitted to file a late tort claims notice under *N.J.S.A.* 59:8-9. They were seriously injured in a car accident and filed timely notices against some of the defendants, but did not file one against a municipal ambulance company. The court found extraordinary circumstances to allow the late filing because the extent of the injuries, including a coma, did not allow the plaintiffs to have any recollection of the events just prior to the accident or the accident itself. In addition, the possible involvement of the municipal ambulance came to light for the first time in a video tape produced in frequently delayed discovery in a motor vehicle violation proceeding against plaintiff in the municipal court. The notice of tort claim was filed immediately after that discovery. The court rejected the defendant's contention that the police report, which plaintiff had received earlier, contained sufficient information to put the plaintiff on notice of the involvement of the ambulance company. (1/2011)

TORTS

- **LATE NOTICE**

Ambrico v. Borough of Bellmawr (Unpub. App. Div., Jan. 26, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a2861-09.opn.html
Plaintiff worked at Camden County Department of Health and allegedly slipped and fell on ice and snow in the parking lot of the property where she worked. She filed a worker's compensation claim and received benefits. Four months later, plaintiff allegedly slipped and fell on an uneven sidewalk surrounding the property. Maintenance of the sidewalk on which she fell was the responsibility of the Borough of Bellmawr, not the County. She did not file a timely notice of Tort Claim against Bellmawr and, thereafter, sought to file, out of time, because of "extraordinary circumstances,." *N.J.S.A.* 59:8-8 and-9. The Appellate Division could find none. The fact that she had received worker's compensation benefits from the county for her first fall was not sufficient to excuse her lack of due diligence in ascertaining that the sidewalk was the responsibility of Bellmawr. The case was therefore governed by *Blank v. City of Elizabeth, 318 N.J. Super. 106, aff'd as modified, 162 N.J. 150 (1999),* and *Randazzo v. Township of Washington, 286 N.J. Super. 215 (App. Div. 1995),* in which "run of the mill" lack of due diligence does not create "extraordinary circumstances." (4/2011)

TORTS

- **LATE NOTICE**

Toscano v. Township of Cherry Hill (Unpub. App. Div., May 26, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a5372-09.opn.html
Plaintiff was injured when she fell on a sidewalk on Kings Highway in Cherry Hill Township. She filed a notice of tort claim with Cherry Hill, which was referred to its Claims Administrator, Scibal Associates. Plaintiff was in contact with Scibal on two occasions, inquiring as to whether there was anything further that she should do and Scibal did not respond to either inquiry. Almost 4 months after the filing of the original tort claim, Scibal notified Camden County that the sidewalk was on its property, not on Cherry Hill property. Plaintiff thereafter sought leave to file a late claim naming Camden County and the State. The trial judge decided that motion and the concurrently filed summary judgment motions on the papers instead of hearing oral argument as required by Rule 1:6-2(d). He denied the late claim motion and granted the cross motions for summary judgment without articulating any reasons for his conclusion. The trial court simply found that plaintiff had "failed to establish the existence of extraordinary circumstances". The Appellate Division reversed and remanded for a full hearing noting that the exception to the 90 day notice rule in *N.J.S.A.* 59:8-9 provides that the time for filing a notice can be extended "provided that the public entity or the public employee has not been substantially prejudiced" and further, that the applicant has showed sufficient reasons constituting "extraordinary circumstances". The fact that that plaintiff had exercised diligence and may have been led into

believing that she had sent the claim to the right public agency was clearly instrumental in the Appellate Division decision. (7/2011)

TORTS

- **LATE NOTICE**

Vega v. City of Newark (Unpub. App. Div., June 30, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1749-10.opn.html
A plaintiff sought to file late Tort Claims notice after the expiration of 90 days but within a year of the accident. Under the circumstances the late filing was allowed. After a severe car accident which caused brain injury, plaintiff had repeated surgeries, and was in a coma for a period of time. At the same time, a criminal investigation was begun by the County Prosecutor's office because of the death of plaintiff's passenger. Information given to the plaintiff's attorney by the prosecutor in that investigation was limited and redacted. Plaintiff's memory was also impaired. Plaintiff's attorney also tried to obtain 9-1-1 tapes to ascertain information about a witness to the accident, but the request was denied. The delay from the time of the attorney's retainer to the filing of the motion was four months. There had been no prejudice to the municipality from the late filing. The Court determined that under these circumstances a late filing would be permitted. (10/2011)

TORTS

- **LATE NOTICE**

Smith v. City of Newark (Unpub. App. Div., June 15, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1342-10.opn.html
Plaintiff filed a timely notice against the City of Newark for a fall on an uneven sidewalk; she did not file a notice against the Housing Authority, the owner of the property adjacent to the sidewalk. Summary judgment for both the city and the housing authority was reversed because plaintiff had not gotten discovery as to whether the city actually owned and controlled the sidewalk and as to the relationship between the city and the housing authority. Somewhat perversely, the plaintiff argued that the city should be liable for the sidewalk because the housing authority, as a nonprofit could not be liable under *Luchejko v. City of Hoboken, 414 N.J. Super. 302 (App. Div. 2010), aff'd, 207 N.J. 191 (2011)* (dealing with a non-profit condominium association). The court said that under *Bligen v. Jersey City Hous. Auth., 131 N.J. 124, 136 (1993)*, a "municipal" landlord, such as the housing authority, can be liable for failure to remove snow from its driveway. (10/2011)

TORTS

- **LATE NOTICE**

Potosi v. Union City Board of Education (Unpub. App. Div., June 8, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a0898-10.opn.html
A failure to properly investigate to determine the correct entity upon which to serve a Tort Notice of Claim within the time period set forth in *N.J.S.A.* 59:8-8, does not constitute extraordinary circumstances under *N.J.S.A.* 59:8-9, permitting the court to extend the time in which to serve such a notice. The incident complained of took place in a stairway in a school, giving notice from the outset that the location of the injury was operated by the Board of Education. *See Blank v. City of Elizabeth, 162 N.J. 150 (1999).* (10/2011)

TORTS

- **JURISDICTION OF DEPARTMENT OF EDUCATION**

Rivera v. Elizabeth Board of Education (Unpub. App. Div., March 30, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a5365-09.opn.html
Plaintiff sought to bar defendants from using Board of Education (BOE) funds to investigate and bring suit against him for defamation, arising out of campaign material in a City Council election. After the Department of Education (DOE) determined the use of school funds for that purpose was improper and deducted the sum from the BOE's state aid, plaintiff sought an order requiring defendants to indemnify the BOE for the lost funds. In reviewing the doctrine of primary jurisdiction, which provides that the courts may defer a decision to an administrative agency with expertise in the area, the court determined that the authority vested in the DOE by *N.J.S.A.* 18A:6-9 applies only to issues arising under the school laws. Therefore, the court remanded the matter to the trial court for a decision on the issue of indemnification. (7/2011)

TORTS

- **IMMUNITY; PLAN AND DESIGN**

Seals v. County of Morris, 417 N.J. Super. 74 (App. Div. 2010), leave to appeal granted, 205 N.J. 270 (2011)
http://lawlibrary.rutgers.edu/courts/appellate/a5433-08.opn.html
Seals was driving on a Morris County road (Route 513) when he lost control of his vehicle and struck a JCP&L utility pole located on private property but within a county right-of-way easement. Route 513 was part of an old stagecoach road that was never designed or engineered by the county, and the utility pole had been installed sometime in the early 1900s without county consultation or involvement. JCP&L claimed that it was immune from liability under *Contey v. New Jersey Bell Tel. Co., 136 N.J. 582 (1994),* in which the Supreme Court held that "responsibility for the safety of motorists should rest with those who own, control, and maintain the thoroughfare[,]" and that "[a]lthough utility companies have a duty to foresee that motorists

will leave the traveled portion of the highway, the governmental bodies and highway planners are best suited to determine who the utilities should fulfill that duty." The county argued that it was immune from liability under the Tort Claims Act, *N.J.S.A.* 52:1-1 to 12-3, because it had not designed the road, had never approved the original placement of the pole, and had not elected to enact any ordinances regulating or otherwise directing the placement of utility poles. The Appellate Division held that Contey imposes a duty on governmental entities to establish standards both for the initial placement and the continued existence of utility poles along their roadways. It reasoned that without such a duty governmental entities would be able to avoid Contey's directive by simply doing nothing. The court also held that under *N.J.S.A.* 48:3-17.1, the existence of the pole within the county's right-of-way easement for more than ten years in the same location constituted the county's implicit approval of the pole's location. The court therefore ordered that summary judgment be granted to JCP&L. With respect to the county claims for immunity, the court held that the county might be immune from liability under *N.J.S.A.*59:2-3(c) or (d) which are part of the Tort Claims Act, *N.J.S.A.* 59:1-1 *et seq*. However, the record contained only conclusory certifications from county officials and lacked a proper factual foundation from which the court could determine whether the immunity applied. On remand the county will be able to produce proof as to the immunity for certain discretionary actions [Section (c)] or for operational decisions with respect to the utilization or allocation of resources. [Section (d)]. ***[Editor's note: Leave to appeal was granted and the case was argued before the Supreme Court on November 9, 2011.]*** (1/2011)

TORTS

- **IMMUNITY; PLAN AND DESIGN**

Casella v. Township of Manalapan (Unpub. App. Div., April 19, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3680-09.opn.html
In this auto accident case, Plaintiff claimed that the stop sign at the intersection of Mill Road and Tall Woods Drive was improperly placed too far back from the intersection and the resulting loss of sight distance contributed to the accident. The trial court granted summary judgment to defendant, Township of Manalapan, based on the "plan or design" immunity under the Tort Claims Act, *N.J.S.A.* 59:4-6(a). The Appellate Division reversed indicating that in order to prove plan or design immunity, a public entity has the burden to plead and prove that the plans sufficiently address the condition which is the subject of the claim. In this case, the stop sign was placed by a developer in connection with a subdivision approved by the township but none of the plans in connection with that approval showed the actual location of the stop sign. Thus it was improper to grant summary judgment on grounds of "plan or design" immunity. (7/2011)

TORTS

- **IMMUNITY; EMT**

Murray v. Plainfield Rescue Squad, 418 N.J. Super. 574 (App. Div. 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a2906-08.opn.html
Emergency medical technicians (EMTs) are statutorily immune from suit under *N.J.S.A.* 26:2K-29. Paramedics are also immune under a similarly worded statute. *N.J.S.A.* 26:2K-14. The "Good Samaritan Act", *N.J.S.A.* 2A:62A-1, does not provide immunity to EMTs and paramedics who are called to scene and have a duty to assist victims. In this case the EMTs promptly responded to an emergency call from plaintiff who found his son shot and lying on the front lawn of his home. Although they did not approach the victim until police advised them area was clear, the EMTs eventually provided some basic life saving services. Some services such as intubation and intravenous drugs could not be provided to the victim because of his size. The victim was transported, with on-board treatment in the ambulance, to a hospital in 2 to 5 minutes but was pronounced dead soon after arrival. The statutory immunities applied because there had been no valid proof that either the EMTs or the paramedics had acted in an objectively unreasonable manner or with subjective bad faith. The net expert opinion offered by plaintiff spoke only to ordinary negligence, from which the EMTs and paramedics were immune. (7/2011)

TORTS

- **IMMUNITY**

Ianni v. Bergen Regional Medical Center (Unpub. App. Div., May 11, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a5911-09.opn.html
Ianni was civilly committed to Bergen Regional Medical Center on two occasions following incidents on his property which required response by Leonia police officers. His claims against the hospital and police were dismissed. The facts of the case did not necessitate an in-depth legal analysis, but, nonetheless the court provided a useful description of the civil commitment process and immunities involved in it. (7/2011)

TORTS

- **IMMUNITY**

Ojinnaka v. City of Newark, 420 N.J. Super. 22 (Law Div. 2010)
Summary judgment on the immunity provided by the Tort Claims Act, *N.J.S.A.* 59:5-4, was denied to the Newark Police Department in this case involving unusual and tragic facts. The police were called to the scene of a one car accident and, based upon an assumption that the driver of the vehicle had voluntarily fled, failed to investigate fully and therefore did not discover that the driver had, in fact, been ejected from the car during the accident and was lying, critically injured, a couple of hundred feet away. When the driver was eventually found several days later by his parents he had died, but an autopsy indicated that he may have lived several hours after

the accident. In denying summary judgment this trial judge assumed non liability as a starting point under the New Jersey Tort Claims Act. Here, however, viewing the facts most favorably to plaintiffs, a trier of the facts could reasonably find that the police officers had unreasonably jumped to an erroneous conclusion that one exercising reasonable prudence would not have done. (7/2011)

TORTS

- **DEFAMATION**

G.D. v. Kenny, 205 N.J. 275 (2011)

http://lawlibrary.rutgers.edu/courts/supreme/a-85-09.opn.html

The Hudson County Democratic Organization and its chairman did not defame an opposition candidate when they referred in campaign literature to the candidate's drug conviction even though it had been expunged. The Supreme Court recognized the first amendment constitutional right to criticize candidates for office. In addition, it found that the fact of an expungement did not make the information about the conviction false. The Supreme Court further held that minor inaccuracies will not give rise to a defamation action and that only substantial accuracy is required of a statement. (4/2011)

TORTS

- **DANGEROUS CONDITIONS; WEATHER IMMUNITY**

Conforti v. Kantorowski (Unpub. App. Div., April 15, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3013-09.opn.html

Plaintiff was injured in a collision when he attempted to turn left from Old York Road onto Route 202, a State highway. The traffic lights at the intersection in question had been blown out of focus by the high winds generated earlier that morning by Hurricane Isabel, making it seem to plaintiff that he had a green light when in fact the light was red. Plaintiff sued the State for negligent maintenance of the traffic lights and intersection, causing defects to the traffic control light and ensuing accident. The trial court dismissed the claims. It held that the case fell squarely within the weather immunity provisions of the Tort Claims Act, *N.J.S.A.* 59:4-7, and that plaintiff had failed to establish the elements of a dangerous condition within the meaning of *N.J.S.A.* 59:2-1(a). The Appellate Division affirmed for the reasons set forth by the trial court, which it quoted at some length in its decision. The Appellate Division criticized the trial court, however, for attempting to turn an interlocutory order into a final judgment. Because there was another driver involved, the order granting summary judgment against the State in 2009 was interlocutory. Later, in 2010, the trial court dismissed the plaintiff's complaint against the other driver with a stipulation that if the appeal resulted in a reversal of the interlocutory order against the State, the case would be reinstated against both the State and the other driver. The Appellate Division said: "Where a dismissal without prejudice of a party contemplates further action and is entered for the purpose of rendering an otherwise interlocutory order appealable, such a

dismissal precludes finality and hence the appealability of the earlier order. This rule exists because the review of interlocutory orders is committed to our sound discretion, in the interest of justice . . . . It is not a discretion allowed to the trial courts." (7/2011)

TORTS

- **DANGEROUS CONDITIONS; IMMUNITY**

Champion v. Pugsley (Unpub. App. Div., Feb. 15, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3543-09.opn.html
Plaintiff was struck by a car and injured while crossing a street. Among other claims, plaintiff asserted that the township-owned street was a "dangerous property" condition under the Tort Claims Act, *N.J.S.A.*59:1-1 *et seq*. The court rejected this claim, finding that when used with due care for its intended purpose, the street was not dangerous. Risky or inattentive driving does not render an otherwise properly constructed street dangerous. (4/2011)

TORTS

- **DANGEROUS CONDITION; PALPABLY UNREASONABLE**

Charney v. City of Wildwood, 2011 U.S. App. LEXIS 13922 (3rd Cir. 2011)
In a diversity of citizenship case, a tort claim against the City of Wildwood was dismissed by the application of the New Jersey Tort Claims Act, *N.J.S.A.* 59:1-1 *et seq*. Plaintiff's fall was caused by a hole in the boardwalk. The court found that there had been no proof that this was a dangerous condition within the meaning of the Act. Even if there was a dangerous condition, the municipality had not acted palpably unreasonably. (10/2011)

TORTS

- **DANGEROUS CONDITION; KNOWLEDGE**

DiBartolomeo v. N.J. Sports and Exposition Authority (Unpub. App. Div., Feb. 16, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a2716-09.opn.html
While exiting Meadowlands Stadium at the conclusion of a Jets game, plaintiff was injured when a crowded escalator malfunctioned, resulting in patrons on the escalator falling and sliding to the bottom of the escalator. Both the N.J. Sports and Exposition Authority, as owner of the stadium, and Schindler Elevator Company, which provided maintenance services for the escalator, were defendants. The Appellate Division sustained the summary judgment as to Schindler and reversed as to the Authority. Based upon the deposition of plaintiff's expert, the court found that there was no proof of Schindler's negligence. As to the Authority however, the court said that there was a genuine issue of material fact as to the existence of a "dangerous condition" so that the Authority would not be covered by the immunity under applicable provision of the Tort Claims Act, *N.J.S.A.* 59:2-7. The escalator in question had a rated capacity of 300 pounds per step and, without the use of turnstiles or queuing barricades, the court said, it might be

foreseeable and even likely that greater loads would routinely be applied when two people stood on a step, thereby causing a "dangerous condition." (4/2011)

TORTS

- **DANGEROUS CONDITION; KNOWLEDGE**

Dupree v. City of Newark (Unpub. App. Div., April 1, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a5930-09.opn.html
Plaintiff stepped onto a street, fell into a hole and broke his ankle. The hole was a valve box attached to a water main which was missing its cover. In order to recover under the Tort Claims Act, *N.J.S.A.* 59:4-2b, the plaintiff had to prove actual or constructive notice to the city of a dangerous condition It failed to do so and, therefore, summary judgment was properly granted. (7/2011)

TORTS

- **DANGEROUS CONDITION**

Fiorello v. Wright (Unpub. App. Div., Jan. 25, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a1482-09.opn.html
Plaintiff's decedent was walking on the edge of New Jersey Transit train tracks with his back to the direction of the trains' travel and wearing earphones. An approaching train sounded its horn. Decedent did not stop or look around but instead abruptly turned onto the tracks into the path of the oncoming train. He had accessed the tracks through an opening in a fence that intersected a path leading to the tracks, which members of the public sometimes used as a shortcut to a county park. Plaintiff sued the county among others, contending that the path and fence were a dangerous condition that created a reasonably foreseeable risk of injury which the county had failed to correct. There was no evidence, however, that the county owned or controlled the property on which the path and fence were located, nor was there any evidence that the county took any action to create a dangerous condition on the tracks (or even that the tracks or surrounding property were in a dangerous condition). The Appellate Division affirmed a dismissal under Tort Claims Act because of the immunity afforded by *N.J.S.A.* 59:4-2. Among other things, the court held that that the death was not caused by a condition of the property itself but rather by decedent's own negligent and highly dangerous conduct. (4/2011)

UNJUST ENRICHMENT

UNJUST ENRICHMENT

County of Hudson v. Doric Apartment Corporation (Unpub. App. Div., March 17, 2011)
http://lawlibrary.rutgers.edu/courts/appellate/a3484-09.opn.html
Portions of a retaining wall had been constructed by a private property owner and other portions had been constructed by Hudson County. The wall was damaged by a storm. Hudson County repaired all damage and sought compensation from the property owner. A judgment was entered against the property owner for unjust enrichment. After the judgment, the New Jersey Department of Transportation (NJDOT) provided funding to the County covering all of the reconstruction costs. The property owner, however, was not entitled to any relief from the prior judgment because it had still received the benefit of the reconstruction without charge regardless of whether Hudson County eventually received full reimbursement from the NJDOT. Hudson County was not required to disgorge the amounts paid by the NJDOT for repair of the private portion of the wall because NJDOT had not demanded it. (7/2011)

UTILITIES

UTILITIES

- **BILLING**

Aventis Holdings, LLC v. Kearny Municipal Utilities Authority (Unpub. App. Div., March 4, 2011)

http://lawlibrary.rutgers.edu/courts/appellate/a3212-09.opn.html

Plaintiff challenged the "billing in arrears" method of the Kearny Municipal Utilities Authority (MUA). Under that method the MUA billed an owner for the current year based upon the usage of the building in the previous year. Plaintiff owned a vacant commercial site which used no water during the current year. Because water had been used in the prior year, the plaintiff was charged for that usage rather than the minimum charged to a non-user. This became a bone of contention at the closing of a potential sale. The MUA had followed the statutory procedure for fixing the rate methodology, and no comments had been made at the public hearing required by statute. The court held that the arrears billing method did not contravene the statutory rate scheme because, although, the arrears method was not specifically mentioned in the statute it was not specifically excluded. The Court suggested that the practical matter of adjustment of the water bill could be solved by an escrow as provided for the contract of sale. The time for filing a prerogative writ was extended in the interests of justice. (4/2011)

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