

## *What's New?*

As we put 2009 behind us and head into the next decade, we are optimistic that the turmoil of the past two years is beginning to recede. There certainly have been difficult times, but there are signs that the economy is improving. No doubt, 2010 will be challenging, but challenges bring opportunities.

The start of a new year in our legal world means new legislation, new rules, and new processes. Some legislation seems hardly worth the effort like declaring the Chinook the State dog of New Hampshire. Not that long ago, the pumpkin became our State gourd. On a more practical note, the jurisdiction of the small claims court has been raised to \$7,500, which means more disputes can be resolved in that less burdensome process.

Other legislation has serious consequences for how we do business in New Hampshire. New tax rules apply to limited liability companies which are, by far, the most common form of structure for new businesses. Before the new year, distributions from LLCs to owners were not subject to this tax. This gave LLCs a significant tax advantage over corporations. However, in an effort to find additional sources of revenue in a difficult budget year, the legislature passed a bill imposing the 5 percent interest and dividends tax on distributions to owners above "reasonable compensation." This change will reportedly raise \$15 million in new revenue in 2010 from NH LLCs. As 2009 came to a close, the Department of Revenue Administration had begun conducting hearings on proposed rules to implement the

### *Bertrand A. Zalinsky Joins the Firm*

We are pleased to have welcomed Bertrand A. Zalinsky to the firm. Some of our clients have worked with Bert before and many are aware of Bert's reputation as a principal in the former Manchester-based law firm Scotch & Zalinsky. This year will mark Bert's thirtieth anniversary as an attorney. He is admitted to practice in New Hampshire and Massachusetts. Before joining us, Bert was inside general counsel to a New Hampshire technology products and professional services firm. In that role, he gained extensive knowledge helping to solve business and legal challenges facing business owners. Before moving to inside counsel, Bert was in private practice advocating for his clients before all New Hampshire courts and various administrative tribunals.

Bert has extensive experience in a diverse array of business matters including entity formation, mergers, acquisitions and restructurings, employment law, commercial negotiations, and contracts and dispute resolution. At Cronin & Bisson, Bert will focus his practice in these areas, as well as other areas of expertise including financing arrangements, land use development, loan workouts, and bankruptcy.

new law. There appeared to be much confusion and at least the glimmer of legislative effort to reconsider the impact of this change. In addition, our firm has filed a challenge to the constitutionality of the legislation on behalf of a number of LLCs. Our best advice at the moment is to stay tuned as the year progresses.

The Legislature also attempted to change a critical issue in land use development. Many who have sought relief from land use ordinances in the form of a variance are familiar with the struggle of establishing "unnecessary hardship." Zoning boards throughout the State have struggled with applying this concept. Two Supreme Court decisions which purportedly clarified the concept did not appear to help. As a result, the Legislature rewrote the statute governing variances

effective January 1, 2010. Any new application for a variance will need to follow the new requirements which we have explained in greater detail in this newsletter.

We also face new life safety building codes and laws. As many know, over the past few years, municipalities have been enforcing new health-safety codes against older structures. Beginning this year, multi-family unit owners must install carbon monoxide detectors in all units. New residential structures also require carbon monoxide detectors, and sprinkler systems will be required beginning 2012.

These are just a few examples of what we face. It's a new year, with new laws, new questions, and new answers. We thank you for your business and look forward to working with you in the new decade. Happy New Year.

## *A “Red Flag” For Businesses*

Under new Federal regulations to take effect on June 1, 2010, businesses which provide credit to customers must have an identity theft protection program in place and take certain other actions to protect against identity theft. The Federal Trade Commission (FTC), acting with Federal bank regulatory agencies, and the National Credit Union Administration, have jointly issued regulations under the Fair and Accurate Credit Transactions Act of 2003, called the “Red Flags Rules,” requiring certain businesses to develop and implement written identity theft prevention programs. Although targeted at finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies, the regulations cover any business that is a “creditor.” A creditor is defined by the regulations very broadly as “any entity that regularly extends, renews, or continues credit; any

entity that regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who is involved in the decision to extend, renew, or continue credit.” Accepting credit cards, however, does not in and of itself make a business a “creditor.”

If a business is covered by the regulations, it must develop written policies to identify patterns, practices, or specific activities, known generally as “red flags,” that could indicate the presence of identity theft. Just as varied as the businesses regulated under these new provisions, “red flags” can take many forms, but these certainly include the use of suspicious documents or personal identification, such as a phony address, unusual account activity, and alerts on credit reports. Appropriate procedures could include criminal background checks upon hiring staff, limiting

the distribution of information, and verification procedures for identification. A business covered by the regulations must also have procedures describing appropriate responses to prevent and mitigate an identity fraud, and a schedule for keeping the program up-to-date through periodic reviews. The program must be managed by the senior employees of the business, and provide for training and for the oversight of any service providers.

The new June deadline for compliance with the Red Flag Rule, represents a postponement from the previously announced enforcement date of November 1, 2009, which has been announced by the FTC in order to provide additional time for affected businesses to prepare. Compliance guides, templates and other helpful material is available through the Red Flags Rule website found at [www.ftc.gov/redflagsrule](http://www.ftc.gov/redflagsrule).

## *What’s New for Condominiums?*

Last year was a challenge for associations throughout NH. Receivables rose. Foreclosures increased. Banks bought units. Deferred maintenance issues came home to roost. Other areas have been hit hard. In Boston, condominium owners faced a \$75.6 million special assessment or \$70,000 to \$400,000 per unit. A property in Miami saw a staggering one out of six units in foreclosure. Thankfully, NH has not been the subject of these headlines.

These national trends have forced a review of lending rules which will impact all condominium properties. In December, the Federal Housing Administration imposed tighter lending standards because of the high delinquency and foreclosure rates. Since the FHA is a key source of mortgage financing for new condominium buyers, tighter rules will likely have consequences by limiting the number of buyers in a condominium that can get FHA insured loans. In addition, the rules restrict loans to buyers in properties with too many delinquent owners, a high number of renter-occupied units, and properties with poor finances.

In 2008 as the economy began its decline, the condominium market was hit first. Lenders Fannie Mae and Freddie Mac, before receiving federal subsidies, revised their underwriting rules to address mounting loan deficiencies by requiring a more active review of the financial strength of community associations through a loan application process known as “full project review.” This process requires lenders to verify that the association has developed an “adequate budget.” The budget must fund the capital reserve at the rate of 10 percent of the annual revenues. In addition, the association must have sufficient cash to cover the master insurance deductible. The rules also target receivables by limiting the number of delinquent units to no more than 15 percent. As the economy begins its recovery, the impact of these changes will come into focus.

On a local level, NH revisited condominium governance by imposing new rules on the boards of directors of associations. Prior to the amendment, boards were left to manage their affairs using broad discretion under a business judgment standard. In 2009, the Legislature imposed specific record keeping and reporting requirements. Effective January 1<sup>st</sup>, boards must make copies of the minutes of board meetings available to unit owners within 60 days of the meeting or 15 days of the date the minutes were approved, whichever occurs first. The statute does not provide a remedy for failure to comply. Thus, as we enter 2010, boards are burdened with the new review requirements of Federal lenders and record keeping requirements of NH law.

## *Defining Unnecessary Hardship — Again*

Development of real estate begins on a local level. Although there are numerous State building codes, a critical step in the development process is a comprehensive review of the impact of local ordinances. Often, the proposed development requires the relaxation of certain requirements.

The standard to obtain a variance from the impact of a local land use ordinance has always been defined, although somewhat ambiguously, by State law. That standard has been left to local zoning boards to interpret with the assistance of reported decisions from the New Hampshire Supreme Court. The Court created different standards between a “use variance” and an “area variance.” A use variance is required when a use not permitted by the zoning ordinance is proposed. An example of an area variance would be when a lot proposed for development does not meet the minimum size required in the ordinance.

Apparently, the New Hampshire Legislature disagreed with the approach taken by the Supreme Court and attempted to resolve the dispute through legislation. The

purpose of the bill was to eliminate separate standards but to otherwise codify the teachings of the Supreme Court. Under the new statute, regardless of the type of variance sought, the applicant must show the following: (1) the variance will not be contrary to the public interest; (2) the spirit of the ordinance is observed; (3) substantial justice is done; (4) the values of surrounding properties are not diminished; and (5) enforcement of the provisions of the ordinance would result in unnecessary hardship. Despite the vagueness of the first three requirements, the statute defines only “unnecessary hardship.”

An unnecessary hardship exists when “owing to special conditions of the property that distinguish it from other properties in the area: no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.” The statute goes further and provides a limited exception to the standard just articulated. If the standard is not met, “an unnecessary hardship will be deemed to

exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.” Although the Legislature debated the language at length, the end result is a standard with which zoning boards are familiar. Thus, uncertainty over the impact of the new statute on development will likely settle down as Boards review variance applications under the law.

Moving forward, an applicant for a variance must establish that the property is different in a meaningful way from others in the area and the zoning restriction must more severely restrict the property. Next, because of the special condition of the property, the specific application of the restriction to the property does not serve the general public purposes of the ordinance. Finally, because of the special condition of the property, the proposed use is reasonable. The reasonableness of the use is generally considered in light of how the proposal fits in with the surrounding area.

### *More Property for Section 1031 Exchanges*

When property held for investment is sold, the potential impact of the capital gains tax is often considered. Regardless of the tax rate, most would generally prefer to keep more proceeds and pay less tax. Section 1031 of the Internal Revenue Code allows a taxpayer to defer all or part of any gain on the sale that would otherwise be subject to capital gains tax into the future as long as the transaction is properly structured to comply with the requirements of the statute. The most common type of property involved in a 1031 exchange is real estate; the exchange of one parcel of investment property for another.

Although the majority of 1031 exchanges involve real estate, the scope of the statute is not so limited. The exchange of personal property held for investment can also be structured as a 1031 exchange. For this purpose, “personal property” includes any tangible depreciable asset held for use in a trade or business or investment. Thus, motor vehicles, aircraft, boats, and all types of business equipment can be exchanged. Intangible assets can also qualify for exchange treatment. These assets include trademarks or tradenames. The only requirement is that the intangible asset be valued separately from the goodwill of the business. Goodwill cannot be exchanged.

Often, a business owner is looking to get out of one business and try his or her hand at something new. In those circumstances, the selling owner may be able to structure the sale of certain assets of the business such that any gain on which capital gains tax may be due, is rolled into the purchase of new like-kind assets for the new venture. The tax on the gain would be deferred to some later date. In this economy, less tax today is likely a good business plan.



722 Chestnut Street, Manchester, NH 03104  
Phone: (603) 624-4333 Fax: (603) 623-5626  
[www.croninbisson.com](http://www.croninbisson.com)

### *Tax Abatement Deadline*

The deadline for filing municipal tax abatement applications for the 2009 tax year is March 1, 2010. If you are considering filing a municipal application and need assistance, please contact us.

visit us at [www.croninbisson.com](http://www.croninbisson.com)

**Cronin & Bisson, P.C. is committed to crafting creative, cost-effective solutions to satisfy our clients' individual needs.**



**John G. Cronin**

is licensed to practice law in the States of NH and MA. He received his Law Degree from Franklin Pierce Law Center in 1989 and also holds a Bachelor of Science Degree and a Master's Degree in Business Administration. Mr. Cronin is a member of the NH, MA, and Manchester Bar Associations and the NH Association for Justice. He is currently a member of the 2010 Leadership Manchester class. Mr. Cronin was previously an insurance claims adjuster.

[jcronin@croninbisson.com](mailto:jcronin@croninbisson.com)



**John F. Bisson**

is licensed to practice law in the States of NH and ME. He received his Law Degree from the University of Maine School of Law in 1993 and holds a Bachelor of Science Degree in Business Administration. Mr. Bisson is a member of the NH, ME, and Manchester Bar Associations and the NH Association for Justice. He is currently a member of the 2010 Leadership NH class. Mr. Bisson worked as a Superior Court law clerk prior to joining the firm.

[jbisson@croninbisson.com](mailto:jbisson@croninbisson.com)



**Daniel D. Muller, Jr.**

is licensed to practice law in the State of New Hampshire. He received his Law Degree from Tulane University in New Orleans, Louisiana in 1996 and holds a Bachelor of Arts in Political Science and International Affairs from the University of New Hampshire. Mr. Muller is a member of the New Hampshire and Manchester Bar Associations. Mr. Muller joined the firm after working eleven years as an attorney for the City of Manchester Solicitor's Office.

[dmuller@croninbisson.com](mailto:dmuller@croninbisson.com)



**Bertrand A. Zalinsky**

is licensed to practice law in the States of New Hampshire and Massachusetts. He received his Law Degree from Franklin Pierce Law Center in 1980 and holds a Bachelor of Arts Degree in Biology from Boston University. Mr. Zalinsky is a member of the New Hampshire, Massachusetts, and Manchester Bar Associations. Mr. Zalinsky joined the firm after working as general counsel to a technology company, and previously as a principal in a Manchester law firm.

[bzalinsky@croninbisson.com](mailto:bzalinsky@croninbisson.com)