



# LEGAL NOTES

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### **KEY PROVISIONS OF THE NEW ESTATE AND GIFT TAX LAW**

**By Richard J. Shapiro, J.D.**

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On December 17, 2010, President Obama signed into law the Tax Relief/Job Creation Act of 2010. This new law has dramatically changed the federal estate & gift tax rules – but only through 2012. Here is a summary of the key modifications:

- The individual exemption amount for estate, gift and generation-skipping tax for 2010, 2011 and 2012 is \$5 million per person, \$10 million per couple.
- The estate, gift and generation skipping tax rate through 2012 is 35%
- The estate tax exemption amount is indexed for inflation
- Estates of descendants dying in 2010 can choose *either* to apply the new estate tax rules *or* the modified carryover basis rules that had been effect under the estate tax "repeal" for 2010
- The new law provides for "portability" of the individual estate tax exemption from one spouse to another; that is, a decedent's executor can transfer any unused exemption amount to the

surviving spouse without the requirement that the deceased spouse's exemption amount pass into a credit shelter trust

- The estate and gift tax exemption is "reunified" in 2011 and 2012

The spousal portability rule is the most dramatic change under the new law. Previously, a married couple would "forfeit" the estate tax exemption of the first spouse to die if, like with most couples, the surviving spouse inherited all the deceased spouse's assets. The only way to preserve the deceased spouse's federal estate tax exemption was to fund all or a portion of the deceased spouse's assets into a "family trust." Under the new law, however, the surviving spouse can inherit the deceased spouse's asset outright and still utilize the deceased spouse's estate tax exemption by entering the appropriate information on a form 706 estate tax return. Notwithstanding the portability option, there are many cases where use of a family trust will provide significant non-tax related benefits to the surviving spouse and children, including: remarriage protection; creditor protection; protection for the children's inheritance in "blended" family situations; and protection in the event the new law "sunset" at the end of 2012 and we see the return to a much lower federal estate tax exemption amount.

Through at least 2012, only truly large estates will be subject to federal estate and gift tax liability. Note, however, that for residents of states (like New York) that have "decoupled" from the federal estate tax regime, much smaller estates will remain subject to a state estate tax. In New York, for example, the state estate tax exemption remains at \$1 million per person. *For a decedent with a \$5 million taxable estate, the New York State estate tax in 2011 will be \$391,600.*

Without further action by Congress, the new estate and gift tax law will "sunset" at the end of 2012. Depending upon which way the political winds blow, we could very well find ourselves in the same state of uncertainty in two years that we faced at the end of 2012. But in the meantime, the new law provides a number of wonderful tax planning opportunities for larger estates. Those with "smaller" estates should not postpone estate planning even though they may believe they no longer have estate tax concerns. All the standard personal planning goals -- asset protection, divorce protection, catastrophic health protection, disability planning, long-term care planning -- remain as important as ever.

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## ***ZONING LAW 101: WHAT'S WITH ALL THESE MUNICIPAL BOARDS***

**By Jay R Myrow, J.D.**

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An important factor in purchasing real estate, especially investment properties, is in determining what a particular parcel of land can be used for. Invariably, the manner of use will be governed by the zoning laws adopted by the municipality in which the property is located. A visit to the building inspector may get you introduced to "planning boards," "zoning boards of appeals," and/or "village boards," "town boards" and "city councils". Here is a look at

why these boards exist and what they do in the context of zoning laws.

Nearly all municipalities in the region have adopted zoning laws. The laws are intended to regulate the use of property within the municipal boundaries and the manner in which such uses can be implemented. Village and Town Boards and City Councils (the "Municipal Board") are comprised of elected officials empowered to adopt laws, including zoning ordinances. Prior to adopting a zoning ordinance, the municipality must adopt a Comprehensive Plan, and the zoning law later adopted must be consistent with the goals and directives in the Comprehensive Plan.

Zoning laws will empower planning boards and zoning boards of appeals to perform certain functions. The New York State Town Law, Village Law and City Law contain provisions that limit the functions that may be assigned to each board.

The planning board is typically empowered to consider subdivision, site plan and special permit applications. As to subdivisions, most municipalities will have a law setting forth specific subdivision regulations that is distinct from the zoning law. There are regulations in both sets of laws that the planning board must apply before approving a proposed subdivision of land.

Site plan regulations are set forth in the zoning law and govern the proposed use of a parcel of land. The planning board is typically required to make sure the site plan complies with regulations in the zoning law regarding parking, lighting, landscaping, traffic flow, size of buildings, and other matters meant to insure orderly development of the property. Certain uses in the zoning law may require a "special permit," which sets forth additional requirements for particular uses designated in the zoning law. Typically, the planning board or the zoning board of appeals is authorized to grant the special permit.

The zoning board of appeals (“ZBA”) is empowered to grant variances from the requirements of the zoning law, and to hear appeals from decisions made by the building inspector. The ZBA can grant “use variances” and “area variances”. Use variances may be granted when the permitted uses in the zoning law render a particular parcel of land useless. It must be proven that the parcel of land cannot yield a reasonable economic return when used for approved use in the zoning district the property is located. Area variances are granted to provide relief from required “bulk requirement”, i.e. yard setbacks, area requirements, etc. The applicant must demonstrate that the benefit to the applicant will outweigh any detriment to the public if the variance is granted. Area variances are significantly easier to get than use variances.

The “appellate power” of the ZBA may be exercised when the building inspector acts to the detriment of the property owner. If a building permit is denied, a “stop work order” is issued or other action is taken by the building inspector that the property owner disagrees with, an application to review that decision may be made to the ZBA. The ZBA will review the contested action and, after a public hearing, either approve or set aside the action (sometimes with conditions). The ZBA also has exclusive power to review interpretations of the zoning law that are initially made by the building inspector. It is important to note that neither the planning board nor the Municipal Board have the power to interpret the zoning law.

If you are considering the purchase of land, your “due diligence” will typically start with a visit to the building inspector to inquire as to what exactly you can do with the land under the applicable zoning law. Knowing the functions of the Municipal Boards, planning boards and ZBAs will make it easier to interpret the information received from the building inspector. Any purchaser of real property is advised to consult with an attorney. A number of attorneys at Blustein, Shapiro, Rich &

Barone, LLP – including this author -- have decades of experience handling a variety of land use matters, including some of the most complex projects seen in the Hudson Valley.

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***SELLER BEWARE: YOU ARE STRICTLY  
LIABLE FOR SPILLED HEATING OIL!***

**By Gardiner S. Barone, J.D.**

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You might be familiar with the phrase, “*Caveat emptor*”, which is Latin for “Let the buyer beware; yet it is far from the truth that the peril is on the buyer for the faults and defects of the property being purchased.

In New York there are many laws that protect the buyer – even when the Contract of Sale states that the buyer is purchasing the property “AS IS.” Therefore, there are instances where a seller cannot shield itself from warranty and breach of contract claims filed by the buyer.

For example, the Oil Spill Law, enacted in 1977, provides that anyone who discharges petroleum without a permit - even a very small amount - is “strictly liable” (that is, liable without regard to fault) for all cleanup and removal costs. As a result, anyone who owned the oil tank during any period of time that oil leaked from the tank is strictly liable to anyone, including subsequent owners, for the cost to clean-up the leak. This law has been interpreted by the courts to impose strict liability on a homeowner whose heating oil tank leaks. Under this law a homeowner may be required to pay for the cleanup *regardless* of whether the homeowner's actions “caused” the spill or leak. The Courts have extended the reach of this law to former homeowners. As such, buyers are able to seek the payment of clean-up costs from the seller of the house.

Therefore, when you sell your home, you continue to be liable for the cost to clean-up oil that leaks from any oil tanks that were located on the property when you sold the house.



According to the NYS Department of Environmental Conservation, the cost to clean-up a leaking underground home heating oil tank can exceed \$20,000!

Given the sweeping interpretation the courts have given these laws, it is very important that you seek the advice of a qualified real estate attorney before you enter into a contract for the sale of your home. In fact, you should seek the advice of an attorney before you make any disclosures to the real estate broker who has listed your home for sale.

Often the broker will obtain from you a Real Property Condition Disclosure Statement that is provided to anyone who makes an offer to purchase your home. The delivery of this statement may be enough to create liability under applicable law. There are alternatives to making this disclosure, and you should consult with a lawyer before doing so.

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## EDUCATIONAL WORKSHOPS

**Blustein, Shapiro, Rich & Barone, LLP offers complimentary educational workshops to our clients and friends. Here's our upcoming workshop schedule:**

### **Elder Law and VA Pension Benefits**

February 24, 2011 – 4:00 p.m. to 6:00 p.m.

### **Estate Plans That Work™**

February 10, 2011, *or* February 16, 2011 – 3:00 p.m. to 6:00 p.m.

**To register for a workshop, call Donna at 291-0011 x.242, or register online at [www.mid-hudsonlaw.com](http://www.mid-hudsonlaw.com) by going to the "Event Calendar" link.**

**All workshops will be held in the BSRB Education Center at our 10 Matthews Street location.**

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