

# AZRAK & ASSOCIATES

L.L.C.

A T T O R N E Y S A T L A W

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## HOLIDAY GREETINGS FROM AZRAK & ASSOCIATES, L.L.C. FREDRIC F. AZRAK, ESQ.

WE HAVE ONCE AGAIN MADE OUR ANNUAL DONATION TO WORTHWHILE CHARITIES IN OUR CLIENTS NAME IN LIEU OF SENDING HOLIDAY CARDS TO YOU.

WE AT AZRAK & ASSOCIATES, L.L.C. WANTED TO INCLUDE ALL OF OUR CLIENTS IN A VERY SPECIAL HOLIDAY GREETING THROUGH DONATIONS TO THE WANAQUE PEDIATRIC CENTER. THIS YEAR AZRAK & ASSOCIATES, L.L.C. DONATED AN ELECTRONIC KEYBOARD AND BOOKS FOR THEIR LIBRARY. THIS DONATION WILL HELP UNDERPRIVILEGED AND SEVERELY DISABLED CHILDREN. THANK YOU FOR HELPING THOSE THAT ARE IN NEED. WE HOPE THIS HOLIDAY GREETING WILL BRING A SENSE OF THE SPIRIT OF THE SEASON.

THIS NEWSLETTER HOPEFULLY PROVIDES YOU WITH INFORMATIVE AND INTERESTING INFORMATION ABOUT THE LAW AND OUR FIRM, AND SERVES AS THE MESSENGER FOR A HEARTFELT HOLIDAY GREETING FROM ALL OF US TO ALL OF YOU.

## A DWI PRIMER PART II John A. Snowdon, Jr., Esq. Fredric F. Azrak, Esq.

Now that you are an expert on how the breathalyzer test operates we will discuss in later issues the alternative ways that a person can be convicted.

When charged with this offense the attorneys at AZRAK & ASSOCIATES can immediately review the evidence in order to protect your rights.

It must be remembered, however, that it is not necessary for the police to produce a breathalyzer result or a blood or urine test in order for a person to be found guilty of DWI. Police frequently use a series of psychological and physical roadside tests to determine if the driver appears to be under the influence of alcohol or drugs so as to justify requiring him to take the breathalyzer; that is, to establish probable cause for requiring the breathalyzer test. Also, the test results can be used, along with observations of the driver's demeanor, appearance and behavior, as circumstantial evidence to draw an inference that the driver is under the influence of alcohol or drugs.

In cases where a driver has refused to take the breathalyzer test, (an issue we will deal with in some detail later) the results of the field sobriety tests alone may be enough to convict a driver of DWI. While the tests vary from department to department, generally they consist first, of an observation of the driver, that is whether his eyes are red and watering, whether he appears disheveled or whether he appears to have difficulty walking. Frequently, a driver will be asked to recite the alphabet and the officer will note any mistakes or left out letters (singing the alphabet as we all learned in grade school is a dead give away that the driver is intoxicated). The officer may also employ certain physical tests which usually attempt to determine whether or not a person has the usual abilities of an unintoxicated person to perform simple tests of balance and coordination: standing on one foot with one's arms extended, head back and eyes closed, or touching the tip of your nose repeatedly with alternating hands while your eyes are closed are common tests. Since, as we noted previously, alcohol affects first those parts of the central nervous system which controls speech, reasoning, balance and coordination, these tests can constitute circumstantial evidence indicating that a person is, in fact, intoxicated.

If an officer determines that he has probable cause to suspect that the driver is driving while under the influence, the officer will transport the driver to the police station for the

**NEWS WORTHY**

- \* **AZRAK & ASSOCIATES wins Appellate Court decision (Court Agrees with our argument - legislative bodies cannot be forced to take action by taxpayer's demand - Burlington County)**
- \* **AZRAK & ASSOCIATES wins municipal land use application for a major client (Passaic County)**

purposes of requiring him to submit to a breathalyzer test. Some drivers may refuse to take the test. The refusal to take the test is, in and of itself, an offense. Also, one can be held to have refused to take the test even if he verbally assents to the taking of the test. For instance, if a driver remains silent when a police officer asks him whether or not he will take the test, if the driver pretends to take the test but provides an insufficient number or amount of breath samples, if the driver puffs lightly on the machine rather than deeply exhaling, if the driver finds some way to delay the administration of the test to the point where its reliability would be questionable, or the driver's consent is conditioned upon some other act such as using the bathroom, calling a relative and so forth, or, he pretends to be too confused, scared, or suffering from some physical incapacity which renders him incapable of taking the test. All of these things are considered to be a refusal.

From all of this, it is easy to see that the complexities of a DWI charge make it imperative that a driver retain the services of an attorney familiar with defending these types of cases. There are a variety of defenses that can be employed, however, they frequently involve detailed cross-examination of the arresting officer, the breathalyzer operator, the certification of the breathalyzer machine, and various other issues of which the average person is unaware. Coupled with the harsh penalties imposed for DWI convictions, it is not the type of case an individual would be well advised to attempt to defend himself. Plea-bargaining in these cases is restricted, but it is still possible for an attorney skillful in handling these matters to at least minimize the impact of the substantial license revocation and fines which attach themselves to a DWI conviction, something a layperson probably could not do.

In the next installment, we will talk about the penalties imposed on a driver for a DWI conviction and, in particular, recent changes in the law which can

make those penalties even more burdensome but, at the same time, provide the experienced attorney with ammunition to minimize the impact on his client.

In this Part II we explored probable cause and various tests by the police officer. In Part III we will explain the penalties of the new statute.

At **AZRAK & ASSOCIATES** we have a staff of investigators and experts to protect your interest. Call if you or anyone has been charged.

## **NEW REALTY TRANSFER TAX FEE**

### **Fredric F. Azrak, Esq.**

Selling your home, beach house, other real estate? It's going to cost you more than you think. Effective August 1, 2004, Governor McGreevey signed a new bill that raises, yet again, the realty transfer fee. Required to be paid when you sell your property in New Jersey, the realty transfer fee can significantly decrease your expected return from the sale of your property. Certain classes of people qualify for reduced rates. Senior citizens, blind or disabled persons and sales from low/moderate income housing, however; may qualify. AZRAK & ASSOCIATES can and will minimize your costs when applicable. However, the rest of us will incur this tax at closing on any property sold in

the State of New Jersey.

The amount of the realty transfer fee depends on a number of different things including the amount of consideration you are selling your property for, whether you fall into one of the exempted classes, and whether the property is being sold for new construction.

As an example, consider a person not in any of the exempted classes selling a home in New Jersey for \$300,000.00. The realty transfer fee on the first \$150,000.00 would equal \$600.00. The fee on the next \$50,000.00 would be \$335.00. For the remaining amount of \$100,000.00, the rate would be \$780.00. Therefore, the full realty transfer fee under the new law on the sale of a home for \$300,000.00 by a person or persons not within an exempted class would total \$1,715.00!

Not enough tax increase? Consider this ... for the first time in our states' history - the Governor now taxes PURCHASERS of homes one-million dollars and over! Purchasers now of these homes pay 1% - therefore, on a million dollar home you need to be prepared to add \$10,000 to your closing costs!

The real estate department of **AZRAK & ASSOCIATES** guides you through these land mines and will attempt to save you money. Call us for your real estate needs.

#### **ALERT I**

- \* **New Jersey Estate Tax Laws have changed.**
- \* **Many people, even of relatively modest means, now may have additional tax liability under the new law, especially in light of increasing real estate values.**
- \* **Wills can be structured to help minimize estate tax problems.**
- \* **For this reason, we are advising all of our clients to have their Wills reviewed.**
- \* **We strongly recommend that all our clients have Durable Powers of Attorney in place. This will insure that, in the event of a disability, someone is authorized to act on behalf of the disabled person.**
- \* **We have experienced circumstances where expensive guardianship proceedings were required because the party had not taken the simple and cost effective step of creating and signing a Durable Power of Attorney.**

**ALERT 2**

**\* Interest rates are again climbing - lock into the lower rates before its too late (it took years for rates to be at these levels - it may be years before they return)**

**FIRM HIGHLIGHTS**

**PEOPLE HELPING PEOPLE**

**DID YOU KNOW?**

Our firm wanted to help others less fortunate - so an idea was born - let's have voluntary contributions once a month to a fund.

The contribution collected is then "matched" by Fredric F. Azrak, Esq. Each employee takes their turn once a month to designate a charitable cause to receive the donations collected.

So far over 3 years this program has grown and thousands of dollars have been given, from just a few dollars from each employee each month.

Sound good? Maybe you can recommend it to your company.

We can only imagine what could be accomplished if all companies started this program.

**People Helping People** - isn't that what's it all about?

P.S. from Fredric F. Azrak, Esq.

"I am so proud of the people I work with. We instituted this idea and everyone embraced it. It is this commitment from everyone here at **AZRAK & ASSOCIATES** that makes our firm what we are. Thank you."

**USE VARIANCES:**

**BURDEN OF PROOF REQUIRED**

**Fredric F. Azrak, Esq.**

**Peter V. McArthur, Esq.**

To be sure the 6 "use" variances as set forth in the Municipal Land Use Law require the highest burdens of proof

before the Zoning Board of Adjustment. In addition to the negative criteria this article explores the legal quagmire of the other required element of proof sometimes called "special reasons" and sometimes called the positive criteria for these variances.

The most common of the use variances is what we will call the traditional use variance. For example, this is a situation where you want to construct a factory in a zone in the community where the zoning ordinance either does not list the factory as a permitted use in that zone or the ordinance expressly prohibits the factory use in that zone. In this instance, the applicant must show that the proposed uses are "particularly suited" for the property in question. Some of the factors that a court or board should look at when making this analysis are: 1) Is there something about the topography or shape of the land you want to put the factory on that lends itself more for the factory use than the permitted uses in the zone? 2) Is there a community need for a factory? 3) Is there any other viable location in the community to put the factory? (It is imperative to have the assistance of an expert planner to give testimony in this regard as he or she will perform a community survey providing the requisite information in paragraphs 2 and 3 above). 4) Is there an economic hardship that exists with respect to your property such that your property has been zoned into idleness?

The next type of variance provided for by the statute is for the expansion of a preexisting nonconforming use. This is where your factory was in existence prior to the zoning ordinance provisions that prohibit factories in the zone your property is located in and you now want to add an addition to your factory. In these types of cases, the proofs are not as stringent on an applicant as those for a traditional use variance above as the courts will look to whether the purposes of the Municipal Land use Law have been advanced. These include but are not limited to does the proposed

expansion promote the general welfare of the community because it is healthy or safe? Does the expansion tend to alleviate dangerous parking or traffic conditions in the area? Does the proposed expansion provide for adequate light air and open space for the surrounding area? Will the proposed expansion degrade the environment? Does the expansion tend to promote a desirable visual environment?

The next type of a variance is known as a conditional use variance. This is where your factory is a permitted use in the zone where it is situated only if it satisfies all of the conditions set forth in the ordinance for the permission of a factory in your zone. If only one of the conditions of the ordinance cannot be met, then a conditional use variance is required. We have seen ordinances for conditional uses that have as few as 1 condition but as many as 20 conditions

**ARE YOU AWARE**

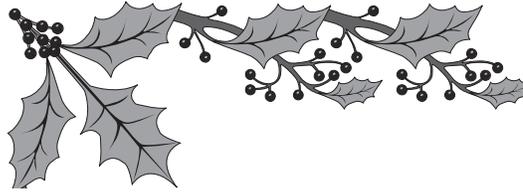
**AZRAK & ASSOCIATES handles all corporate needs:**

- \* **Establishing new corporations**
- \* **Handling any transfers or sales**
- \* **Contract negotiations and drafting**
- \* **All corporate litigation**

**Fredric F. Azrak, Esq. was once featured on the front page of the Wall Street Journal**

attached to them. Again, it only takes 1 condition that can't be met to require the variance. The proofs required here are again not as strict as for a traditional use variance because the courts recognize that the Governing bodies that create these conditional uses by ordinance have already made a presumption that the use is permitted in the zone (as long as all of the conditions are met) as opposed to being prohibited. The key factor that is looked at these cases is whether the property can somehow accommodate the problem that is associated with the condition that cannot be met. For example, there may be some room on the property for the provision of additional buffering by way

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of landscaping, beaming or fencing if the condition that can't be met is that the conditional use is located too close to a school, library or church.

The next type of variance is where the floor area ratio (the sum of all of the floor area of your factory compared to the total area of the site) permitted in the zone where your factory is located is exceeded by your factory. In these cases the same proofs that apply to conditional use variance cases discussed herein apply. In other words, the property will accommodate the problems associated with the floor area being larger than the zone permits. The fifth type of variance upon which a Zoning Board of Adjustment must pass is where the density provisions of the ordinance for residential uses have been exceeded. It should be noted that these provisions are substantially similar to the Floor area ratio requirements of

commercial uses in that they are designed to regulate the intensity of the proposed development and as such are handled in a manner similar to the floor area ratio cases.

**ALERT 3**  
**AZRAK & ASSOCIATES protects your rights in any accident case:**

- \* **Auto**
- \* **Slip and Fall**
- \* **Products Liability**
- \* **Medical Malpractice**
- \* **Workers' Compensation**

**Insurance reforms (although needed) may remove the rights of the seriously injured. Our attorneys know how to protect the rights of those who are permanently injured.**

The final type of variance is known as a height variance. This is where your factory as the principal building on your property exceeds the permitted height for principal buildings by either 10 feet or 10 %. Unusual topography and hardship as discussed above have been held by the courts as sufficient reasons for the grant of a variance in this instance.

Azrak and Associates has served clients in the residential and corporate settings both as applicants and objectors in these types of Land Use applications for many years and can be counted on to assemble the right professional staff and argue the appropriate legal principles for your application whether it is a simple residential application or the most complex commercial case.

If you would like to receive newsletter issues, informative flyers, and other data prepared by Azrak & Associates, L.L.C., please call us at 973-839-9062 or e-mail us at lawyers@azraklaw.com with your business or personal e-mail address. Feel free to include areas or particular interest to you.