

# SOLUTIONS

NEWSLETTER | FIRST QUARTER 2005

## LEVELING THE PLAYING FIELD THROUGH THE RHODE ISLAND EQUAL ACCESS TO JUSTICE ACT

It is often frustrating for individuals and companies that are active in Rhode Island to navigate the regulatory waters and, when necessary, challenge the actions or determinations of one of the State's many administrative bodies. State and local agencies, boards and commissions exercise broad authority, and their actions and determinations are reviewed deferentially on appeal by agency hearing officers and Superior Court judges. Agency decisions will be reversed only if they are found to be arbitrary and capricious. This appellate deference combined with relatively arduous procedural requirements for appeal

often causes regulated individuals and companies to capitulate to unreasonable

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administrative demands, rather than bear the cost (and risk) of an appeal.

There is a little-known and rarely used statute, however, that may help level the playing field by providing some leverage to individuals and small businesses that are the subject of unreasonable or arbitrary agency action. Under the Equal Access to Justice for Small Business and Individuals Act ("EAJA"), R.I. Gen. Laws § 42-92-1 et. seq., an individual or small business may recover the expenses (including limited attorneys' fees) incurred in response to unreasonable agency actions. The statute is intended not only to compensate the victims of administrative overreaching, but also to deter such conduct in the first instance.

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## DOCUMENT RETENTION POLICIES: ONE SIZE DOES NOT FIT ALL

The adoption and application of a document retention policy is an absolute necessity of sound business practice in the twenty-first century. All too often document retention policies are an afterthought. The recent spate of high profile accounting scandals, however, demonstrates that a little bit of sound planning and discipline with respect to a document retention policy can be very effective at avoiding future expense, liability and headache. Be warned: it is not as easy as it sounds. There are many considerations that go into a document retention policy and one size certainly does not fit all – a document retention policy must be tailored to fit each individual business.

The first set of considerations that go into a document retention policy focus on the environment in which the company operates. This requires an identification and appreciation of all the relevant legal regulations and industry standards that govern the organization. Many of these overarching requirements are immediately obvious. An employer's obligation to obtain and retain evidence of an employee's citizenship is such an example. Less obvious are the requirements imposed by OSHA, the Patriot Act, NAFTA, the Sarbanes-Oxley Act, SEC Regulations, ERISA and many other sources.



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# ATTORNEY SPOTLIGHT: ELIZABETH NOONAN



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**“BY PRESENTING A COMPLETE RECORD OF EXPERTS AND EXHIBITS, LOCAL BOARDS RECOGNIZE THAT YOU ARE PREPARED NOT ONLY FOR THE HEARING BEFORE THEM, BUT THAT YOU ARE PREPARED TO CHALLENGE THE BOARD’S DECISION IF UNFAVORABLE OR IMPROPER.”**

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Beth Noonan is a partner in Adler Pollock & Sheehan’s litigation department who specializes in land use law, an area of practice that encompasses residential and commercial development, eminent domain, inverse condemnation and all other litigation related to the use of real property. She regularly represents many commercial and residential developers in Rhode Island and oversees development on behalf of clients with projects throughout New England, including Brooks Pharmacy, which has just located its corporate headquarters in East Greenwich, Rhode Island. According to Beth: “We worked closely with the Town and were able to develop a 200,000 sq. ft. office campus in just five months. Construction is currently underway.”

Originally from California, Beth obtained her undergraduate degree from the University of California, Berkeley, and her law degree from the University of California, San Francisco, Hastings College of Law. She moved to Rhode Island after marrying Bill Noonan, who is currently a magistrate in state court, and began her career with the unique opportunity to serve in the Rhode Island Supreme Court law clerk pool. Until beginning her career at AP&S in 1992, she never anticipated practicing land use, but now, having discovered it, enjoys her practice immensely. Practicing land use law draws upon a unique set of skills that include understanding the law of development, working closely with experts, including engineers, architects and planners, appearing before and working with local boards and establishing an administrative record that will withstand an appeal to higher courts. Beth says that one of the common mistakes made by practitioners in this area is the failure to create such a record: “By presenting a complete record of experts and exhibits, local boards recognize that you are prepared not only for the hearing before them, but that you are prepared to challenge the board’s decision if unfavorable or improper.”

Through her professional focus, Beth has the opportunity to impact progress in a very tangible way in the world around us. What makes her practice unique is that “it provides an ability to effect great change and work towards the future, while at the same time preserving our past.” Of great interest to Beth in this regard are the mill rehabilitation projects she is involved with in Rhode Island’s Blackstone Valley. Currently, she is working on the redevelopment of the Slatersville Mill in North Smithfield, the first planned mill village in America. She believes that “rehabilitation saves these historic buildings from collapse, preserves the structures and allows a structure that was once the central focus of many people in the community to become vital again.”

While many of the projects she works on start at the local level, several have ended up in the Rhode Island Supreme Court where Beth has had a remarkable string of success, resulting in outstanding results for our clients and the creation of new law in Rhode Island. In particular, Beth’s work on the cases of *Munroe v. Town of East Greenwich*, 733 A.2d 703 (R.I. 1999) and *P.J.C. Realty, Inc. v. Barry*, 811A.2d 1202 (R.I. 2002) helped establish the authority of Planning Boards and the duties of a municipality to comply with zoning provisions. Beth was also involved in the trial and appeal of the groundbreaking case of *L.A. Ray Realty et al v. Town Council of Town of Cumberland*, 698 A.2d 202 (R.I. 1997), in which she alleged that a local town council illegally adopted and enforced a zoning ordinance that halted

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## LEVELING THE PLAYING FIELD THROUGH THE RHODE ISLAND EQUAL ACCESS TO JUSTICE ACT *(continued from page 1)*

Although the statute covers most administrative proceedings, it is not universally available. It applies only to individuals with a net worth of less than \$500,000 at the time of the agency proceeding. Similarly, business entities, associations and private organizations are only able to invoke the EAJA if they (1) do business and are located in the state; (2) are independently owned; (3) are not dominant in their field; and (4) employ 100 or fewer individuals. Neither the General Assembly nor the Rhode Island courts have defined the characteristics that disqualify a business organization from the EAJA because it is “dominant in its field.” Despite this lack of guidance, at least one company (represented by AP&S) has been able to demonstrate a lack of dominance and, thereby, take advantage of the statute.

If the party seeking an award of expenses satisfies all of the statutory pre-requisites to liability, the statute dictates that an adjudicative officer (or a reviewing court) “shall” award that party its reasonable litigation expenses. However, an agency may avoid liability if it can demonstrate that it was “substantially justified” in its actions both leading up to and during the adjudicatory

hearing. An agency decision will be deemed substantially justified if it “has a reasonable basis in law and fact.” The Rhode Island courts have interpreted the substantial

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### **DESPITE THE FACT THAT THE EAJA HAS BEEN IN EFFECT SINCE 1985, IT IS REMARKABLY UNDERUTILIZED.**

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justification standard of the EAJA to require the agency to demonstrate that its position was “at least clearly reasonable, well founded in law and fact, solid though not necessarily correct.” Alternatively, even if the agency cannot show that it was substantially justified in its actions, an adjudicative officer or reviewing court “may” exercise discretion to deny expenses if “special circumstances” exist that render an award unjust.

Despite the fact that the EAJA has been in effect since 1985, it is remarkably underutilized. The EAJA is most commonly

invoked in appeals from the Rhode Island Department of Human Services. There are reported cases, however, involving the Division of Taxation, the Division of Environmental Management, the Building Contractors’ Registration Board, the Department of Labor and Training, the Department of Children, Youth and Families, the Division of Motor Vehicles and even a local zoning board decision. Despite this underutilization, it is clear that the EAJA is effective; reviewing courts have upheld or awarded fees and expenses in approximately fifty percent of all published decisions involving the EAJA.



**Kristin R. Sherman** is a partner in the Litigation Group who has more than 10 years experience in environmental law and litigation matters, including permitting, land use, coastal development, hazardous waste and products liability cases.

# DOCUMENT RETENTION POLICIES: ONE SIZE DOES NOT FIT ALL

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All too often, businesses become aware of these regulations only after they have been targeted by a regulator and have become the subject of an investigation. The last minute scramble that inevitably results from such an experience can be avoided by ensuring that all applicable regulatory requirements are built into the company's document retention policy. Some documents must be retained for specific periods of time, while others need not be retained for any reason other than good business practice. Sorting out which is which is an endeavor that clearly benefits from the assistance of a seasoned legal professional. Indeed, depending upon the industry, it may be necessary to adopt a multi-disciplinary approach that draws upon the expertise of tax attorneys, litigators, employment lawyers, securities practitioners and others.

The second set of considerations underlying document retention policies arises out of the specter of potential litigation. Documents are the backbone of all commercial litigation and usually play a prominent role in non-commercial cases as well. In the litigation context, a good document retention policy can serve both offensive and defensive purposes. Offensively, a document retention policy can ensure that a company is able to locate, produce and offer into evidence any and all documents that it needs to prove the merits of its position. From a defensive perspective, a well thought out and consistently applied document retention policy may assist a company avoid a finding that it has wrongfully destroyed or spoliated relevant documentary evidence. The spoliation issue cannot be overstated. Some jurisdictions have recognized the destruction of potential litigation evidence as an independent tort akin to that of interference with prospective economic advantage. At a minimum, most jurisdictions provide that the spoliation of evidence justifies a presumption by the judge or jury that the evidence was harmful. Both of these alternatives usually are less desirable than permitting the document to be offered into evidence and arguing its probative value to the trier of fact.

A well-maintained and consistently applied document retention policy, however, is usually an exception to the doctrine of spoliation. When relevant and non-relevant documents are all destroyed or disposed of in the regular course of a company's business, there is no basis upon which a court can base either a separate cause of action or an adverse inference. Of course, even a good document retention policy is not a silver bullet; when a company becomes aware that certain documents in its possession are or may be relevant to a pending or potential litigation matter, an obligation to preserve those documents may arise, and this obligation will supercede the document retention policy.

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## ONE SELLING POINT IS THE FACT THAT COORDINATING OR EVEN CENTRALIZING THE RETENTION AND DESTRUCTION OF DOCUMENTS MAY SAVE MONEY BY ELIMINATING REDUNDANT STORAGE SPACE THAT COULD BE USED FOR OTHER, MORE PRODUCTIVE PURPOSES.

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Another set of considerations that go into a document retention policy concern what is practical, given the nature of the business. These factors include, the size of the company, its history, the number of employees, and whether it has multiple geographic locations. The document retention policy must be comprehensive enough to protect the company as much as possible, but not so restrictive and consuming that it distracts employees from their regular activity. The need to undertake this balancing act requires that the adoption and enforcement of a document retention plan has the full support of the company's management. One selling point is the fact that coordinating or even centralizing the retention and destruction of documents may save money by eliminating redundant storage space that could be used for other, more productive purposes.

Finally, given the prevalence of electronic imaging and computer technology, a

document retention policy must address a company's electronic files. It is important that computer files, server back-up tapes and other "modern" storage devices be included in the policy. Because electronic data is discoverable and increasingly requested both by litigants and regulators, it has the potential to provide a back door to even the best intentioned document retention policy. Indeed, it is very difficult (and some experts say impossible) to completely delete electronic files from a computer's hard drive. This makes it incumbent upon the company to ensure that its electronic files are accounted for and subject to the same retention rules as its paper documents.

All of these considerations must be combined like pieces to a puzzle in the course of answering the following five questions at a minimum:

- What documents must the company retain?
- For what period(s) of time should the documents be retained?
- Where and in what form should the documents be retained?
- How and when should they be destroyed?
- Who should be in charge of overseeing and directing the document retention policy?

The answer will be different for each company. Adler Pollock and Sheehan has confronted these issues and can help your company formulate a plan that will provide maximum protection, with minimum disruption and cost.



**Geoffrey W. Millsom** is a Partner in the Litigation Group. His practice includes intellectual property, employment, insurance coverage, environmental, products liability, as well as general commercial litigation.

# ATTORNEY SPOTLIGHT: ELIZABETH NOONAN

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ongoing property development. This case marked the first time the Rhode Island Supreme Court found a civil rights violation related to land use. In another case, Beth persuaded the Rhode Island Supreme Court to adopt the Doctrine of Diminishing Assets to allow quarries, and other similar facilities, to continue their operations despite the passage of restrictive laws.

In the areas of eminent domain, Beth has represented both condemning authorities and individuals or entities whose property has been the subject of condemnation. Representing both condemners and condemnees provides valuable insight into the use of the eminent domain power and the ability to quantify damages. "People forget that property rights are entitled to the same constitutional protection as other rights and frequently they can be abused. It is the role of an eminent domain lawyer to ensure that the process is fair and just." Along with the power of eminent domain is the issue of economic development. AP&S has been involved recently in creating the first Municipal Economic Development Zone in Rhode Island, which is essentially a joint venture between the municipality and the developer that benefits the municipality through the receipt of sales tax revenues for use in the community.

Despite this active and challenging practice, Beth has remained involved in the community. She is past President of the Rhode Island Women's Bar Association. She is a graduate of Leadership Rhode Island and is a recipient of the Rhode Island Bar Association's Pro Bono Publico Award for her public service work for the Volunteer Lawyers Association and the Homeless Legal Clinic. She served on the Board of the Slater Mill Historic Site and in 1996, was elected in the First Congressional District to serve as a delegate to the 1996 Democratic Convention.

Although Beth admits her work is challenging, she claims it is exactly what she wants to do and AP&S is right where she wants to be. "Land use in New England is exciting and dynamic. I enjoy the practice of law at AP&S, which has not only provided me with the support to carry out this practice but also is poised for the future with the recent relocation of our offices and increased capacity for growth." This fits nicely with a land use practice that will continue to grow in importance not only to our clients, but to our communities and geographic region.

## RHODE ISLAND SUPREME COURT CALLS FOR OVERHAUL OF STATE'S MECHANICS' LIEN STATUTE

For decades, Rhode Island, like many other states has provided contractors, architects and engineers the right to file mechanics' liens against the real property they improve and build upon. A mechanics' lien constitutes a legal interest in the improved property for the purpose of securing payment from the owner. The Rhode Island mechanics' lien procedure involves little more than filing a lien notice in the land evidence records of the city or town where the property is located.

The constitutionality of this procedure recently came under attack due to the lack of notice and opportunity to be heard afforded the property owner. In fact, several Rhode Island Superior Court judges dismissed mechanics' lien actions and declared the Mechanics' Lien Statute unconstitutional on due process grounds. In an effort to avoid judicial review of the statute, Rhode Island's General Assembly amended the Mechanics' Lien Statute to provide for a hearing shortly after the filing of a lien notice. This amended statute was also declared unconstitutional by at least one

Superior Court judge. Almost all of these decisions were appealed to the Supreme Court.

On February 22, 2005 the Rhode Island Supreme Court issued a decision holding that the Mechanics' Lien Statute passes constitutional muster and affords property owners due process and the right to challenge the lien in a meaningful manner. Although the decision puts to rest several due process and procedural issues, it creates some uncertainty by calling for a complete overhaul of the statute.

While the constitutionality of Rhode Island's Mechanics' Lien Statute was in question, AP&S's litigators developed a creative, but aggressive, approach to navigating the uncertain legal waters. By combining statutory, contract and other common law causes of action, we were able to vigorously pursue and defend claims on behalf of clients who might otherwise have been forced to wait for the Supreme Court's ruling before resolving their disputes. Similarly, AP&S's transactional

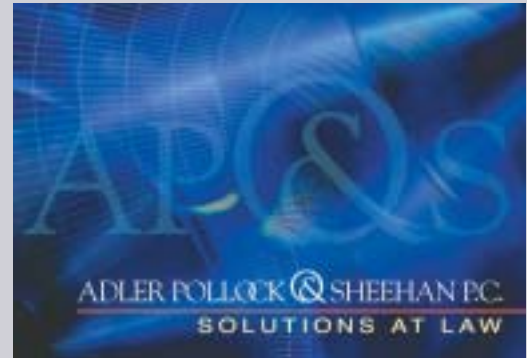
attorneys advised clients to be proactive by employing contract language that accounted for the questionable validity of the Mechanics' Lien law and the need for additional security. Now that the Supreme Court has spoken and raised additional mechanics' lien issues, it is more important than ever that parties involved at any stage of real property development be wary and protect themselves to the extent possible.



**James A. Hall** is an attorney in the Litigation Group. His practice includes matters of construction, zoning and land use law.

# WEB VIDEO HIGHLIGHTS FIRM'S GROWTH AND NEW OFFICES

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Please address any comments or inquiries to:

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