Los Angeles lawyers Richard H. Lee (left) and Jay M. Lichter explain California’s new energy regulations for commercial buildings page 20

The Star System

Los Angeles Lawyer

JANUARY 2014 / $4

EARN MCLE CREDIT

PLUS

Cell
Tower
Approvals
page 30

RULLCA Replaces Beverly-Killea
page 25

Tenant
Bankruptcy
Basics
page 8

Condo
Hotels
page 11

Koontz
Curbs
Takings
page 14
WHERE SPORTS AND THE LAW COLLIDE:
UNDERSTANDING THE LEGAL CLIMATE
OF THE SPORTS INDUSTRY

FRIDAY, FEBRUARY 7, 2014 ■ 9 A.M. TO 5 P.M.

Presented by
CHAPMAN UNIVERSITY FOWLER SCHOOL OF LAW’S
ENTERTAINMENT AND SPORTS LAW SOCIETY

The business of sports is continuously evolving, creating new challenges and opportunities for sports lawyers and other legal professionals. Prime time sports have become one of the last forms of live broadcast entertainment, with advertisers and sponsors injecting unprecedented amounts of money into the industry. Concussion litigation and challenges to old guard institutions such as the NCAA are set to alter the landscape even further. The 2014 symposium will provided a better understanding of the legal implications of these complex issues.

The symposium includes continental breakfast, lunch and admission to a post-symposium reception. Attendees will receive MCLE credit.

For a full schedule and panelist information, or to register, please visit www.chapman.edu/sports-law-symposium

PANEL I
How Legal Skills Translate into Sports Agency
Keynote Luncheon:
Featuring a Special Guest
Keynote Presentation

PANEL II
Contemporary Developments in Athlete Employment Law

PANEL III
Legal Issues Facing Today’s General Counsels in the Sports Industry
When the waters are uncertain, experience matters.

Divorce  •  Support  •  Premarital Agreements

Walzer & Melcher
EXCLUSIVELY FAMILY LAW.
walzermelcher.com
Lawyers’ Mutual Insurance Company

California’s Pioneer Since 1978
Insuring Our State’s Lawyers for 35 Years

Extensive FREE Online
MCLE Library – Over 50 hours!
Always at no charge for our members

Solo Practice Resources

Virtual Law Practice Guidance

Lawyer-to-Lawyer
Loss Prevention Hotline

Specialty Practice Rates
ADR, Appellate, Criminal,
Immigration, Insurance Defense

Easy Renewal Process

Member Dividends*

LMIC thanks you
for 35 years
of member support

www.LMIC.com or call (800) 252-2045

* Dividends are paid at the sole discretion of the Company’s Board of Directors and past dividends do not guarantee the payment or amount of future dividends.
FEATURES

20 The Star System
BY RICHARD H. LEE AND JAY M. LICHTER
New regulations will make energy consumption information available for all nonresidential buildings in California

25 The New LLC
BY LORYN DUNN ARKOW
RULLCA’s default provisions must be considered when drafting operating agreements for real estate LLCs

Plus: Earn MCLE credit. MCLE Test No. 231 appears on page 27.

30 Tower Building
BY LYNN WHITCHER AND CYNTHIA HANSON
The Telecommunications Act of 1996 provides municipalities and service providers with a framework for the approval process for cell towers

DEPARTMENTS

7 Barristers Tips
How to help a veteran who seeks pro bono legal aid
BY STEPHEN HODGES

8 Practice Tips
Analyzing the basics of a tenant bankruptcy
BY JEANNE C. WANLASS

11 Practice Tips
Treatment of condominium hotels as securities after Salameh
BY TIMI A. HALLEM AND JASON T. TAKETA

14 Practice Tips
Koontz curbs government power to impose development fees
BY FERNANDO VILLA

36 Closing Argument
Los Angeles gets a new mural ordinance
BY ERIC BJORGUM
The holiday season is traditionally a time of gift giving and gift receiving. Like Ralphie for a Red Ryder BB gun, we may pine for some object that has singularly captured our attention, and like Ralphie we may end up with pink bunny pajamas from Aunt Clara instead.

As you peruse the 2014 annual Real Estate Law issue on the heels of your holiday season and in the throes of the start of a new year, you will see a number of articles on several different topics pertaining to real estate. Ranging from a discussion of securities law as it applies to condominium hotels to a primer on the California Revised Uniform Limited Liability Company Act, this issue is a wide and varied assortment of brightly colored gifts. We hope that, within these pages, we can metaphorically offer you the gift of your equivalent of Ralphie’s Red Ryder.

The holiday season is also traditionally a time of reflection. As we enter 2014, a year already being described as feeling like the middle innings of our recovery from the Great Recession, the varied nature of this issue offers a unique opportunity for that reflection. Emerging trends can be seen, for example, in this issue’s focus on wireless communication facilities as well as the discussion of new energy use disclosure requirements affecting commercial real estate. While we can rejoice that development is the focus of several of the articles in this issue, we must also note that bankruptcy law as it applies to real estate remains an important topic for our audience.

Also of note is the diversity of the sources of law important to our practitioners. Our authors discuss new state statutes, federal statutes, state regulations, municipal ordinances, and U.S. Supreme Court precedent. Many of the new legal requirements discussed in these articles were enacted or developed directly as a result of the Great Recession. As we continue through the middle innings, the legal landscape will likely continue to change. The variety of topics and sources covered in this issue reminds us how nimble we must be as practitioners, even as we delve into concepts that may date back to Blackstone or earlier.

The annual real estate law issue is one of two special issues published regularly each year by Los Angeles Lawyer magazine and is the product of months of hard work by our authors, the Editorial Board, and the staff. We sincerely thank our contributors for making this issue an engaging collection of articles. We also thank the staff and our fellow Editorial Board members for their hard work. As we reflect on 2013, we cannot help but remember Sam Lipsman, the longtime editor and publisher of the magazine, who passed away last summer. He helped shepherd many a real estate issue through to completion and would have been proud of this one.

Thank you also to our readers and our advertisers. Without you, we would not have this opportunity to showcase the outstanding work of our contributors, make our contribution to the bar through this labor of love, or, most important, wax poetically about Ralphie’s Red Ryder. We are very pleased with this special issue and hope you enjoy reading it and incorporating some of the tips and information into your practice.

Ted M. Handel is a partner in the Business Solutions practice group of Haight Brown & Bonesteel, LLP, where he represents businesses and nonprofits in real estate transactions. Heather Stern is a partner with Kralik & Jacobs LLP, where she specializes in real estate and business litigation. Paul Obico is an attorney at Allen Matkins Leck Gamble & Mallory LLP, where he practices in the firm’s business and tax planning group.
How to Help a Veteran Who Seeks Pro Bono Legal Aid

HELPING LOW-INCOME OR HOMELESS VETERANS is a noble cause that many attorneys want to join. By volunteering at a stand down or for a public interest legal services provider, lawyers can improve the lives of veterans. Matching an attorney’s practice area with a veteran’s legal needs is often more easily said than done, but a lawyer’s skills, knowledge, and effort can go a long way toward helping a low-income or homeless veteran change the trajectory of his or her life.

Lawyers who volunteer to help veterans should first recognize who veterans are and what makes them unique. A veteran is generally defined as somebody who served in a branch of the U.S. Armed Forces: the Air Force, Army, Marine Corps, or Navy. Veterans may not have served in combat or during a time of military conflict, but their common experience is that of being asked to set aside their personal desires, fears, and safety in order to accomplish a mission that may involve armed conflict or other personal sacrifice or danger. Unlike many other jobs in the civilian world, military service involves the sacrifice of short- and long-term wants in order to accomplish something for the benefit of something greater than the individual—a military unit, a branch of service, or the national security interests of the country.

Self-Sacrifice

Many veterans have sacrificed their own well-being for the greater good for so long that they cannot focus on fixing personal issues that only affect themselves. Additionally, the can-do attitude that the military instills into its members makes it difficult for many veterans to acknowledge problems that they cannot overcome alone. This is why psychological or emotional wounds from war are so hard to cure; many veterans find it difficult to admit that something intangible is hindering their ability to live normal, peaceful lives as civilians.

An attorney who seeks to give legal assistance to a low-income or homeless veteran should not underestimate how effective his or her initial tone can be at setting the foundation for a successful partnership. As in any other good relationship, a lawyer must first seek to establish trust and build rapport with the veteran with whom he or she is working. An effective first step towards establishing trust is to clearly explain that anything the veteran says will be kept confidential. A lawyer must also make sure that the environment in which the veteran and lawyer interact is private; otherwise, the promise of confidentiality will look like an empty one.

A lawyer must first seek to establish trust with the veteran. The easiest way to do so is for the lawyer to listen to what the veteran needs. Such open-ended questions as, “What can I help you with?” or “How can I be of assistance?” are a great start toward getting veterans to talk about their most pressing problem. Veterans, like most people, want a professional to listen to them and understand their perspective regarding what they are going through before they disclose anything personal or confidential.

An attorney must also make every effort to manage expectations when interacting with a veteran. Veterans often have the same perceptions that many people have of lawyers; as a result, a veteran in a meeting with a volunteer lawyer may have unrealistic expectations about what a lawyer has the power to do. The best way for a lawyer to manage expectations while building trust and rapport is to clearly explain the area of law in which the lawyer has expertise and be sensitive to the fact that the veteran’s legal problem may be completely outside the lawyer’s practice area.

At a stand down or other similar event, matching a veteran with a specific legal need with an attorney who has expertise in the relevant area of law is always a goal. What is just as important, however, is how a lawyer reacts to a veteran who has a pressing legal issue that is outside of the lawyer’s practice areas. It is important not to be dismissive. A veteran may quickly distrust an organization—even if that organization’s only mission is to help veterans—if the veteran has a problem that cannot be addressed with the services that the organization provides. The veteran should not be left with the feeling that the organization hosting the stand down is unconcerned with his or her circumstances or unwilling to look beyond what the organization traditionally does.

The best way to address this issue is with honesty. A volunteer attorney should inform a veteran without hesitation what area of law the attorney practices. If a veteran has a legal issue outside of an attorney’s practice areas, it is critical that the attorney or host organization of a pro bono event follow through, even if the only help provided is a referral to another lawyer, agency, or organization. The simple act of checking up later with a veteran to ask if the veteran found a legal resource that can help can mean the difference between a veteran who feels overwhelmed by his or her circumstances and a veteran who feels empowered and able to weather the problem that he or she faces.

Finally, heed the advice of the proverb: “If all you have is a hammer, everything looks like a nail.” Avoid assuming that since a veteran has been paired with a lawyer, the most pressing issue the veteran faces is a legal one. The focus should always be on helping the veteran. Not every veteran in need has a legal problem that needs to be solved. Often, matching nonlegal resources for veterans with veterans in need is what a veteran needs most.

Stephen Hodges is an attorney and Operation Iraqi Freedom veteran.
Analyzing the Basics of a Tenant Bankruptcy

LANDLORDS WHO RECEIVE NOTICE that a tenant has filed for bankruptcy face having their property sit for months without generating rent. In addition, counsel for landlords in such a situation face having to enter what may be the unfamiliar arena of bankruptcy court, which has its own code and rules. Regardless, every attorney should be prepared to assess the basics of a tenant bankruptcy.

Upon notice of a tenant’s bankruptcy, one of the initial matters to assess is the lease. For example, a basic question is whether the lease has expired. No automatic stay applies against landlords seeking to obtain possession of their nonresidential real property when the lease has expired before the bankruptcy was filed. If the landlord’s efforts to obtain possession of the property may proceed although some clients still prefer to obtain an order from the bankruptcy court confirming that there is no stay. This order may be sought to forestall the tenant from making any allegations that the landlord has acted improperly, thereby violating the automatic stay.

Another initial matter to consider is whether the property is residential or nonresidential. The Bankruptcy Code makes important distinctions regarding the treatment of these different types of property but does not define the difference. The majority of courts narrowly construe the term “residential” and generally hold that if people are living on the property, it is residential, even if the property has a commercial use as well.

Counsel should be aware that not all provisions in a lease are enforceable. For example, most leases contain a provision that the lease is breached or terminated by the tenant’s act of filing a bankruptcy petition. A lease may also require an additional security deposit or other protection for the landlord should the tenant file for bankruptcy. Bankruptcy law does not allow for the enforcement of these ipso facto clauses in unexpired leases.

Counsel should determine what type of bankruptcy case he or she faces. The debtor’s bankruptcy petition will identify the chapter under which the bankruptcy has been filed. Generally, a chapter 7 bankruptcy is filed by an individual or a business in order to liquidate assets. A chapter 7 trustee is immediately appointed to administer the debtor’s available assets and use the funds, if any, to pay creditors. A chapter 13 case, in contrast, may only be filed by an individual who has a regular income and debts below certain thresholds. In a chapter 13 case, the tenant seeks to propose a plan to pay debt. The court will appoint a chapter 13 trustee, but the tenant debtor still maintains control of certain aspects of the case, such as operating the tenant’s business.

A chapter 11 case, on the other hand, may be filed by either an individual or a business in order to attempt to reorganize the debt. In a chapter 11 case, a trustee is not automatically appointed, and the debtor remains in control and operates his or her assets (including a business) in order to pay creditors. The type of bankruptcy the tenant files affects how the landlord can and should respond.

When a debtor files a bankruptcy petition, Bankruptcy Code Section 362 imposes an automatic stay. This serves as an injunction against the commencement or continuation of a judicial proceeding against the debtor. The stay includes an injunction against any action to obtain possession of property of the estate, such as an interest in a leasehold. If the lease is not expired, and the landlord has not served a three-day notice to pay rent or quit or filed an unlawful detainer action before the bankruptcy case is filed, he or she is immediately stayed from doing so.

If the landlord filed an unlawful detainer action before the debtor commenced the bankruptcy, it is important to assess the legal basis pursuant to which the unlawful detainer was filed. The automatic stay does not remain in effect in every instance. For example, if the debtor is a residential real property tenant and the landlord has filed an eviction action based on endangerment of the property or the illegal use of controlled substances on the property, the stay expires 15 days after the landlord files a certification. The landlord must file and serve a declaration that this type of an eviction action has been filed or that the tenant “during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property.” However, if the unlawful detainer was filed due to nonpayment of rent, this option is not available, and the eviction action is stayed.

If the lessor obtains a judgment for possession of residential property before the date of the filing of the bankruptcy, the automatic stay under Bankruptcy Code Section 362 will not operate to stay an eviction or unlawful detainer action. Section 362(b)(22) of the Bankruptcy Code provides that a landlord may continue the eviction unless the tenant files a certification that the tenant would be allowed to cure the monetary default under state law and cures the rent deficiency by depositing it with the clerk of the Bankruptcy Court pursuant to Bankruptcy Code Section 362(l). However, the tenant must timely comply with the requirements of Sections 362(b)(22) and 362(l), or there is no stay.

Relief from the Automatic Stay

Under certain circumstances, a landlord can obtain relief from the stay by filing a motion for an order to proceed with the unlawful detainer or eviction. Grounds for relief include “cause.” This can include failure to pay rent. Tenants of nonresidential property in particular are specifically required to pay any rent that comes due after the petition was filed. Therefore, if a commercial tenant does not pay rent that comes due after the bankruptcy case has been filed, a motion for relief from stay can be brought for cause in order to allow the lessor to proceed with the eviction of the tenant. Likewise, relief from the automatic stay may be obtained if the debtor does not have equity in the property and if the property is not necessary to an effective reor-

Jeanne C. Wanlass practices bankruptcy law at Loeb & Loeb LLP in Los Angeles.
organization. Additionally, relief from the stay is possible if the landlord can establish that the tenant’s bankruptcy filing was part of a scheme to delay, hinder, or defraud creditors (including the landlord). The scheme may involve the filing of multiple bankruptcy petitions concerning the property.

If the automatic stay applies, and there are no grounds to obtain relief from it, landlord’s counsel should be aware that the treatment of an unexpired lease is largely governed by Section 365 of the Bankruptcy Code. Generally, a debtor has three options for how to treat an unexpired lease: assumption, assumption and assignment to a third party, or rejection.

Assumption of a Lease

If the lease is assumed, it becomes a postpetition obligation and may be enforced. The tenant must abide by the terms of the lease, or the landlord can pursue available remedies. If there has been a prepetition or postpetition default, before the bankruptcy trustee can assume the lease, he or she must cure, or provide “adequate assurance that the trustee will promptly cure, such default.” This is an opportunity for the landlord to have the unpaid rental obligations paid in full.

There are numerous situations in which a tenant may want to assume a lease. The lease terms may be favorable compared to others currently available. The lease may be for a prime location. The orderly liquidation of a business may require remaining at the location. The debtor may seek to sell a business as a going concern at that location. The attorney for the landlord should be aware that an assumed lease becomes a postpetition contract, and any later default gives rise to an administrative claim that will be due a higher priority of payment than almost all other claims.

If the rent is at below-market rates, the tenant may seek to assume the lease and assign it to a new tenant. If the lease can be assumed and assigned, the trustee must cure prepetition and postpetition defaults and assure the landlord that the new tenant can perform under the lease. Shopping center landlords in particular typically have certain protections. These include requirements that, for example, 1) the new tenant be at least as financially sound as the debtor was when the lease was originally signed, 2) the percentage rent be shown not to decline substantially, 3) the assignment not violate any radius, location, use or exclusivity provision of the lease, and 4) the assignment not disrupt the tenant mix and balance in the shopping center. A tenant cannot, however, assume and assign a nonresidential real property lease that was terminated according to state law before the bankruptcy case was filed. In such a scenario, if the bankrupt tenant files a motion seeking to assume and assign the lease, the landlord is thereby presented with the opportunity to have all past defaults cured as well as to proceed with a financially sound new tenant. Once the lease is assumed, any liability for any future breach of the lease is the responsibility of the new tenant, not the old.

Rejection of a Lease

Alternatively, the tenant may seek to reject the lease. The tenant is not required to wait to reject a lease. The rejection of an unexpired lease constitutes a breach of contract. The date of the breach is set as immediately before the filing date of the bankruptcy petition. When this happens, the unpaid prepetition rental obligations under the lease and any claim for future damages become an unsecured claim of the landlord-creditor in the tenant’s bankruptcy. However, when the tenant rejects the lease, the landlord can obtain an order from the bankruptcy court to force the tenant to vacate the premises.

If a tenant of residential real property has filed a chapter 7 liquidation case, his or her chapter 7 trustee must assume or reject an unexpired lease within 60 days after the date the tenant filed for bankruptcy. Otherwise, the lease is deemed rejected, unless the court finds cause to extend the deadline. Under chapter 11 or 13, however, the trustee may assume or reject an unexpired lease of residential real property at any time before the confirmation of a plan. In Chapter 13 cases, for example, a plan confirmation can take many months. Landlords may therefore request an early date for the tenant to assume or reject the lease. The court may therefore order the trustee to determine within a specified time whether to assume or reject a contract or lease.

As for nonresidential leases, the unexpired lease of nonresidential real property is automatically deemed rejected, and the landlord should immediately surrender the property to the landlord, if the trustee does not assume or reject the unexpired lease by the earlier of 120 days after the bankruptcy case is filed or the date of an order confirming a plan. This 120-day period may be extended for an additional 90 days upon a court order, for a total of 210 days after filing.

Another matter that a landlord’s counsel may be called upon to handle for a landlord client is the filing of a proof of claim or a request for payment of an administrative expense. Property of the estate will be distributed to pay claims in the order set forth in the Bankruptcy Code. Generally, secured claim-holders may look to payment from their secured property. Upon court approval, administrative expense claims are paid before other unsecured claims. Unpaid postpetition rent is generally an administrative claim because it
is an actual and necessary cost and expense of preserving the bankruptcy estate.38 Next in line for distribution of estate property are priority unsecured claims and, finally, general unsecured claims.39 Unpaid prepetition rent is usually a general unsecured claim and is thus in the class of claims that are last in line for payment. Furthermore, lease termination damages in such cases are capped by the provisions of Section 502(b)(6) to the greater of one year’s rent or 15 percent of the rent due under the lease, not to exceed three years’ rent plus unpaid prepetition rent. The cap does not always apply to all damages; however, it has been held not to apply to tortlike claims, for example physical damages to the property.40

While the field of bankruptcy is an area of law in which some attorneys may choose not to venture too often, a knowledge of the basics can go a long way in addressing the concerns and managing the expectations of their landlord clients.

10 Id.
14 The U.S. Bankruptcy Court for the Central District of California has mandatory forms for relief from stay motions. See http://www.cacb.uscourts.gov.
19 In re Coast Trading Co., 744 F. 2d 686 (9th Cir. 1984).
20 In a chapter 11 case, the trustee is usually the debtor.
22 In re Frontier Props., Inc., 979 F. 2d 1358, 1367 (9th Cir. 1992).
23 11 U.S.C. §§365(b), (c), (f).
26 11 U.S.C. §365(g).
29 Id.
32 Id.
34 Id.
35 There is a federal form for proofs of claim. Administrative expenses are allowable after a request by an entity upon notice and a hearing. 11 U.S.C. §503.
Treatment of Condominium Hotels as Securities after Salameh

ALTHOUGH THE TERM “CONDOMINIUM HOTEL” is common in the hospitality industry, there is no standard definition of a condominium hotel. Rather, the term generally refers to variations on one theme: a real estate project that presents itself to the world as a traditional hotel in terms of appearance and operation, but in which some or all of the hotel’s rooms, units, or free-standing lodging quarters (such as bungalows and cottages) are actually condominiums owned by individuals.

Assertions that condominium hotel units may constitute securities are not novel. In 1946, the U.S. Supreme Court, in Securities & Exchange Commission v. W.J. Howey Company, created the test for determining whether a particular transaction qualified as an investment contract, hence a security. The Court found a security in any “contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or third party.”

Under the Howey test, if condominium units are sold with certain ancillary features, such as a pooling of rental income or certain restrictions on occupancy and use, the units will be deemed securities. By the early 1970s, a great deal of uncertainty had arisen about the proper application of the Howey test to offerings of condominiums and other interests in common-use developments. In response, in 1973, the SEC published the Securities and Exchange Commission Release No. 33-5347, which clarified the SEC’s position on the proper application of the Howey test to the offer and sale of condominiums. In summary, the release states that a condominium offering in conjunction with any one of the following collateral arrangements will cause the offering to be viewed as an offering of securities: 1) the offering or participation in a rental pool arrangement, 2) the offering of a rental or similar arrangement whereby the purchaser must use an exclusive rental agent, hold his unit available for rental for any part of the year, or is otherwise materially restricted in his occupancy or rental of his unit, or 3) the offering or selling of units with an emphasis on the economic benefits to the purchaser to be derived from the managerial efforts of the promoter, or a third party designated or arranged for by the promoter, from rental of the units.

Offering securities without strictly complying with state and federal securities registration requirements can have drastic consequences. For example, violations of securities laws can be grounds for civil lawsuits by private plaintiffs or civil or criminal actions by governmental agencies, such as the SEC or state securities agencies. Private plaintiffs are generally awarded rescission damages for securities laws violations but not punitive damages or attorney’s fees. When there are significant resale price declines, private plaintiffs are more likely to allege securities law violations, as evidenced by the sudden increase in securities law claims against developers in the wake of the financial crisis of 2008 and the accompanying downturn in commercial and residential real estate.

In light of the legal risks, real estate securities practitioners are often asked by condominium hotel developers to advise on the structure of the developer’s marketing, sales, and rental programs to avoid having the units later classified as securities. Unfortunately, there have been relatively few published decisions applying the Howey test to condominium hotels, so attorneys generally turn to the release along with the numerous no-action letters issued by the SEC since the publication of the release. In summary, based on the release and no-action letters, the following general legal framework for modern hotel condominiums has evolved.

Rental Programs. Rental arrangements that pool all rents received and all expenses attributable to rental of all the units in a development project, and allocate the net proceeds to the individual owners on a ratable basis, are strictly forbidden. However, a rotational method that assigns hotel guests to condominium units participating in a rental program based on the unit type desired by a given guest with the lowest historic occupancy, subject to accommodating a guest’s requests for different views, bed types, and unit types, is generally permissible, provided that participating owners receive the gross rental revenue derived from the rental of their specific condominium unit, less rental commissions and per-use charges.

Cost Sharing Arrangements. A continuing affiliation between the developers or promoters of a project and the project by reason of maintenance arrangements will not make the unit a security. The SEC has consistently advised that mandatory arrangements between a purchaser and a developer that pools the costs relating to maintenance, upkeep, repair, operation, and management of common areas will not cause the offering of condominium units to be a security.

Rental Program Structures. Permissible rental programs must be optional; the purchaser must retain the authority to decide to participate in the rental program, rent the property through an unaffiliated third party, or rent the property independently. The term of the program must not be for an unreasonable length of time, and participants must have a reasonable opportunity to terminate participation in the program. Finally, developers or promoters cannot offer material financial incentives to participate in an optional rental program.

Use and Occupancy Restrictions. The SEC has consistently advised that developers cannot mandate that unit owners make their units available for rent or impose material use restrictions, such as limitations on the number of days that the owner may occupy the unit. However, there is a line of no-action letters issued by the SEC implying that obligations to rent and restrictions on occupancy imposed by pre-existing governmental zoning regulations, and not by a developer, are permissible. The SEC has informally expressed reluctance to continue granting no-action letter relief on this basis, which has called this zoning regulation exemption into question.

Manner of Offering. Condominium hotel developers must consciously market their units without emphasizing any economic benefits of ownership and adopt strict sales guidelines to ensure uniform

Timi A. Hallem and Jason T. Taketa are partners at Manatt, Phelps & Phillips, LLP, who filed an amicus brief in Salameh on behalf of the Real Estate Roundtable and the National Association of Realtors.
implementation of marketing strategy. Developers’ sales programs must be separate and distinct from their optional rental program. Employees and operations of developers’ sales programs cannot overlap with employees and operations of their rental programs in any way and should be run independently of separate offices. Sales representatives may not discuss potential income or revenue to be derived from rental of the units, possible economic benefit from rental of the units, or rental experience with similar condominium hotel products.

The Intrawest Model

In 2002, the SEC issued a no-action letter in the matter of Intrawest that generally eased some of the rigid formalities separating condominium unit sales from the promotion of a developer-sponsored rental program. Intrawest posited that developers and their sales staff could disclose the existence of a rental program to prospective purchasers and introduce them to members of the developer’s rental management team to discuss the general terms of the rental program. Previously, the SEC had indicated in several no-action letters that a developer could only discuss its rental program with a prospective purchaser in response to a specific request. However, Intrawest argued that the SEC’s “don’t ask, don’t tell” policy concerning renting takes a “sound policy to an illogical extreme whereby an integral part of the purchase—what does the purchaser do with this resort property the other 50 weeks of the year?—is often excluded from the prospective purchaser’s investigation.” Ultimately, Intrawest successfully argued that mere disclosure of the existence of a rental program as one of the many services offered to unit owners does not involve the offer of a security.

Intrawest permits rental management representatives to generally discuss the rental program with prospective purchasers and provide raw, publicly available information regarding the rental of comparable units, such as occupancy history and rental rates, upon request.

Finally, Intrawest provides that once purchasers enter into agreements to purchase units, representatives of a developer’s rental management company may contact those purchasers and discuss the specific terms and conditions of the rental program and may also enter into agreements for rental management, provided that such agreements may only become effective upon the closing of the sale of the underlying unit. The reasoning upon which Intrawest relied, and the SEC accepted, is that once a unit purchaser has entered into a binding purchase agreement and paid a non-refundable deposit, that purchaser has made a decision and commitment to purchase the real estate. As such, although the closing of the sale of real estate may not occur for several weeks or months thereafter, discussing specific rental program terms and entering into rental agreements during such period is separate and distinct from the sales process.

The Salameh Decision

The challenge facing many modern real estate securities attorneys is that the release and the subsequent no-action letters are not binding precedent. There have been relatively few published cases addressing the modern condominium hotel structure (i.e., a condominium hotel that complies in all material respects with the release and prior SEC no-action letters). Thus, the ability to predict how a court may ultimately rule on the issue has been difficult.

In August 2013, however, the Ninth Circuit Court of Appeals issued an important opinion that could establish a safe harbor to protect condominium hotels from being characterized as securities under federal and state securities laws. Salameh v. Tarsadia Hotel arose in December 2009 when certain Hard Rock Hotel San Diego unit owners filed suit in district court in San Diego seeking to rescind their purchases and claiming that the units constituted securities under federal and state securities laws. In characterizing the Hard Rock Hotel San Diego units as securities, the plaintiffs alleged that the units and the optional rental management program operated by the hotel operator were offered as a single package; therefore, they expected to profit from their units based on the efforts of the hotel developer or hotel operator. However, most of the purchasers did not sign rental program agreements until eight to 10 months after they had signed their purchase agreements.

The Ninth Circuit affirmed the district court’s dismissal of the plaintiffs’ complaint, finding that it did not sufficiently allege facts to support claims that condo hotel units in the Hard Rock Hotel San Diego development constituted securities under federal and state securities laws. The court of appeals held that the plaintiffs did not adequately allege facts demonstrating that they were offered real estate and rental program agreements as a package or that they were induced to buy the condominiums by the rental program. The court also found that the plaintiffs did not allege that they were even aware of the rental program at the time they signed unit purchase agreements; therefore, they could not allege that they were induced to buy the condominiums by the opportunity to participate in the rental program. The court’s ruling was underscored by the large gap in time between the plaintiffs’ execution of the real estate purchase contracts and their execution of the rental management agreements.

The court also rejected what appeared to be the plaintiffs’ strongest argument: that the real estate sale combined with external factors—such as a zoning ordinance restricting the occupancy of the units to no more than 28 days in a calendar year and requiring that the units be offered to the public for rent as part of the hotel when not occupied—gave them no choice but to sign the rental management agreement when it was later presented. Although the court described this argument as having “some force,” it found flaws with the implicit assumption that the only viable use for the condominiums was as an investment property and posited that “there is no plausible reason why there cannot be a viable market for owner-occupied hotel condominiums for use as short-term vacation homes.”

Although Salameh represents just one of several lawsuits filed by condominium hotel buyers since the 2008 financial downturn in commercial and residential real estate, it is important in several respects.

First, Salameh is the only opinion to date that thoroughly examines a modern condominium hotel that, by all appearances, complied with prior SEC direction. For example, rather than pool all rents and expenses attributable and allocate the net proceeds to the individual owners on a ratable basis, the Hard Rock Hotel’s rental program employed a rotational method that allocated the gross rental revenue derived from the rental of a specific condominium unit, less rental commissions and per-use charges, directly to the owner of the unit. Furthermore, although Hard Rock Hotel unit owners were restricted from occupying their units for more than 28 days a year and obligated to make their units available to the public for rent as part of the hotel when not occupied, these restrictions were not imposed by the developer but rather by a pre-existing city zoning ordinance. Although the hotel did promote the rental program to unit purchasers, it does not appear that the hotel did so until after the unit owners had signed binding unit purchase agreements.

Next, the court reached its decision despite an SEC amicus brief arguing that the Hard Rock Hotel units were in fact investment contract securities, based on the totality of the facts and circumstances of the offering. Although courts often defer to the SEC’s opinions on the application of the securities laws, the court was unable to reach the same conclusion as the SEC. Because the Ninth Circuit is an influential court nationwide, the court’s divergence from the SEC’s position may prove to be extremely influential in other jurisdictions in the future.

Finally, although there appears to be ample evidence in the record that the prospective unit owners knew or should have known that
occupancy of their unit would be significantly restricted and that they would be required to hold their units out for rent as part of the hotel when not occupied, the court placed significant weight on the plaintiffs’ failure to allege that they relied on (or were even aware of) the actual rental program that the developer would later offer. Therefore, condominium hotel developers may be able to insulate themselves from future securities law claims based on Salameh by deliberately withholding information about their rental programs from prospective unit purchasers during the sales process.

Salameh’s Limitations

Based on the court’s reasoning, one of the key elements of the Intrawest model—the ability of developers to disclose the existence and terms of a rental management program to prospective purchasers—appears to conflict with the contours of the Salameh safe harbor. Therefore, developers may face certain inherent practical limitations in trying to qualify for the safe harbor, as they may be required to adopt the “don’t ask, don’t tell” policy that Intrawest successfully argued against. Furthermore, condominium hotels are no longer novelties, and prospective purchasers may expect to enter into a rental management arrangement. Thus, an integral question concerning the purchase—what does the purchaser do with this resort property the other 50 weeks of the year?—could be excluded from the prospective purchaser’s investigation.

In light of Salameh, condominium hotel developers must continue to structure their marketing and sales processes in accordance with the release and re-evaluate their current sales and marketing programs to determine whether they satisfy the conditions of the Salameh safe harbor. Condominium hotel developers will have to reconcile the tension between the safe harbor’s protections and the practical reality of selling condominium hotel units and strike an appropriate balance.

4 See FC Beach Joint Venture (May 29, 1998); Princeville Corp. (Mar. 13, 1991); Diamond Cove Associates (Sept. 27, 1990).
6 Some developers have sought specific no-action letter comfort from the SEC directly. However, no-action letters are only binding on the SEC, and while they may be a very persuasive deterrent against third-party private plaintiffs, they are not binding on third parties.
7 Salameh v. Tarsadia Hotel, ___ F. 3d ___, 2013 WL 4055825 (9th Cir. 2013).
LAST JUNE, THE U.S. SUPREME COURT handed down a ruling that reined in government’s ability to exact fees from developers in exchange for the right to develop property. In a 5-4 decision, the Court in Koontz v. St. Johns River Water Management District\(^1\) held that an agency must meet the heightened constitutional scrutiny of the “essential nexus” and “rough proportionality” test before it can impose conditions on proposed development. The Court’s decision signals that officials cannot evade this constitutional standard by exacting fees instead of an interest in land. It also opens the door to challenges to fee programs and other efforts that impose financial burdens that appear disproportionate to the impact caused by a development—burdens that ought to be borne by the public, not an individual owner.

The Koontz opinion embodies the tension between a government’s legitimate interest in reducing impacts of a project and the constitutional imperative of protecting an owner from having to bear the cost of public improvements for which a project does not create a need. The recession has exacerbated this tension as state and local governments struggle to find financing for much needed infrastructure in the face of dwindling tax and other revenues. Agencies have increasingly responded by imposing development impact fees, dedications of property, and construction of off-site improvements as conditions to permit applications to provide public infrastructure. The temptation lies in going too far—requiring a developer to underwrite community benefits that have no relationship to the proposed project.

A claim that an agency has succumbed to this temptation lies at the heart of Nollan v. California Coastal Commission\(^2\) and Dolan v. City of Tigard.\(^3\) The Court, relying on the “unconstitutional conditions” doctrine, ruled that government cannot condition approval of a land use permit on an owner’s relinquishment of a property interest unless it shows an “essential nexus” and “rough proportionality” between the condition and the project’s effects.\(^4\) This doctrine has a “special application” in the land use context because it protects the Fifth Amendment right to just compensation for property government takes when an owner seeks an entitlement.\(^5\) The Supreme Court observed, “Land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than the property it would like to take.”\(^6\)

In Nollan the California Coastal Commission conditioned approval of a coastal development permit to build a home on providing a public easement across the owner’s beachfront property to protect the public’s “visual access” to the beach. The Court found it “quite impossible” how the easement would help those already on the beach see the beach, or how the easement would lower an asserted “psychological barrier” to using the beach for those driving by the property, or why building the home would increase public use of the beach or how the easement could ease that increase.\(^7\) Thus, discerning no relationship between the condition imposed and the impact of the proposed home, the Court invalidated this exaction.\(^8\)

In Dolan the Court refined the constitutional test employed in Nollan by requiring 1) an “essential nexus” between a “legitimate state interest” and the condition imposed and 2) a “rough proportionality” between the condition and the project’s impact.\(^9\) In satisfying the second prong, an agency must make an “individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”\(^10\) The city of Tigard conditioned the owner’s application to enlarge her retail store by requiring dedications of a “greenway” for public use and preservation of a nearby floodplain and a pedestrian-bicycle pathway easement to ease car traffic this project could generate. Although concluding that Tigard showed a “nexus” between these dedications and its legitimate interests in preserving a floodplain and reducing traffic, the Court determined that this city did not meet the rough proportionality prong because it failed to “quantify” or individualize how these conditions would mitigate project impacts on the floodplain or...
traffic. The majority found wanting why a public greenway, versus private open space, was needed to protect the floodplain and looked askance at the city's “conclusory statement,” without more, that the pathway “could offset...traffic demand.”11

Two key California Supreme Court decisions emerged in the wake of Nollan and Dolan that sought to apply the latter rulings to development impact fees. In Erhlich v. City of Culver City,12 the owner of a sports center sought to rezone his property and amend the city's general and specific plans to allow the development of a multiunit condominium project. The city conditioned these entitlements on the owner's payment of $280,000 to replace some of the recreational facilities that would be lost as a result of the proposed project. The owner sued, claiming the fees violated the Mitigation Act13 and constituted an unconstitutional taking of his property without just compensation. The California Supreme Court concluded that the heightened scrutiny test formulated by Nollan and Dolan applied to this fee “under the circumstances of this case.”14 It interpreted the Mitigation Act’s “reasonable relationship” standard to embody this test but limited this test's application to exactions imposed “on an individual, discretionary basis,”15 not to those imposed “generally” by “legislatively formulated development assessments.”16

In San Remo Hotel v. City and County of San Francisco,17 the California Supreme Court revisited impact fees in the context of Nollan and Dolan. There, the owners of a hotel challenged in lieu fees exacted by the city under an ordinance that required a developer desiring to convert residential hotel units to tourist use either to build or pay for, by an in lieu fee, housing to replace the lost units. The Court declined to apply the Nollan/Dolan test to the in lieu fees imposed because they emanated from a generally applicable development fee:

The “sine qua non” for application of Nollan/Dolan scrutiny is thus the “discretionary deployment of the police power” in “the imposition of land-use conditions” in individual cases. Only “individualized development fees warrant a type of review akin to the conditional conveyances at issue in Nollan and Dolan”...therefore, housing replacement fees under the [ordinance] are not subject to Nollan/Dolan/Ehrlich scrutiny.18

**Enter Koontz**

The Court in Koontz dealt with an owner who wanted to develop 3.7 acres of his 14.9-acre property that included installing a dry-bed pond for retaining and releasing stormwater runoff. To mitigate the environmental impact of this proposal, he offered to provide a conservation easement on the remaining 11 acres of this site. When he applied to the St. Johns River Water Management District for permits under the state's Water Resources Act and Warren S. Henderson Wetlands Protection Act, the district told petitioner that it would not approve construction unless he either: 1) developed only 1 acre, installing a costly subsurface water management system and deeding the rest of his 13.9 acres to the district as a conservation easement, or 2) developed on 3.7 acres, deeding the balance of the site to the district and paying for improvements on 50 acres of district-owned land several miles away. He declined each alternative and filed suit in state court, alleging an unconstitutional taking without just compensation.

The district postured that petitioner had no cognizable claim because, among other reasons: 1) no taking occurred since the district denied the permits, 2) it could have denied the permits outright without providing the option of granting the permit in exchange for fees to pay for the off-site improvements, and 3) a claim under Nollan and Dolan does not extend to a demand for money.

The Court rejected each contention in turn, opining that the principles of Nollan and Dolan regarding nexus and rough propor-
tionality do not change depending on whether the government approves a permit on a condition that an applicant will convey a property interest or denies a permit because the applicant declines to do so. Although no taking occurs in the latter event, an “extortionate” demand would “impermissibly burden the right not to have property taken without just compensation.” Nor does it den the right not to have property taken.

The majority dismissed the district’s concern: that making money demands subject to scrutiny under Nollan and Dolan would leave no principled way of distinguishing impermissible exactions from property taxes. First, the Court believed that this concern “exaggerates” the practical difficulty of drawing this distinction. Second, the district did not claim its demand for money was a tax, and it could not plausibly have done so because Florida law did not afford the district the power to tax petitioner’s property in the manner it sought.

Finally, the Court rejected respondent’s contention that an obligation to pay money cannot form the basis of a takings claim because such an obligation does not operate on or alter a specific property interest. The Court reasoned that, quite the contrary, “the demand for money at issue here did ‘operate upon…an identified property interest’ by directing the owner of a particular piece of property to make a monetary payment.”

Indeed, this “direct link…implicates the central concern of Nollan/Dolan.”

After Koontz

Unlike the California Supreme Court in Ehrlich and San Remo, the Court in Koontz made no attempt to limit the reach of its holding by, for example, requiring heightened scrutiny only of money exactions imposed on an ad hoc basis. The majority in Koontz saw as the “fulcrum” of this case the “direct link” between a demand for money and a specific parcel. A fair reading of its opinion suggests that so long as a “demand for money operates upon an identified property interest,” the demand might be subject to heightened scrutiny under Nollan and Dolan, regardless of whether that demand emanates from an ad hoc exaction, a legislative fee program replete with fee schedules, standards and the like, or other sources.

In her dissent, Justice Elena Kagan recognized this potentially sweeping breadth of the majority’s ruling, and expressed grave concern:

---

NORIEGA CHIROPRACTIC CLINICS, INC.
JESS T. NORIEGA, D.C.

Is proud to announce the opening of our Lynwood location

SERVICING: SOUTHGATE • BELLFLOWER • CUDAHY • NORTH LONG BEACH • WATTS

LYNWOOD HEALTH CENTER
11123 LONG BEACH BLVD.
LYNWOOD, CA 90262
(310) 604-6940

ONTARIO HEALTH SERVICES
602B N. Euclid Ave.
Ontario, CA 91764
(909) 395-5598

HIGHLAND PARK HEALTH CENTER
5421 N. Figueroa St.
Highland Park, CA 90042
(323) 478-9771

1•800•NORIEGA Personal Injury cases accepted on lien basis. 1•800•667•4342
By applying Nollan and Dolan to permit conditions requiring monetary payments—with no express limits except as to taxes—the majority extends the Takings Clause...into the very heart of local land use regulation and service delivery. Cities and towns across the nation impose many kinds of permitting fees every day. Some enable a government to mitigate a new development’s impact on the community, like increased traffic or pollution—or destruction of wetlands.... All now must meet Nollan and Dolan’s nexus and proportionality tests.

Justice Kagan expressed hope that the Court would in the future attempt to constrain the broad reach of its decision: Perhaps the Court means in the future to curb the intrusion into local affairs that its holding will accomplish.... The majority might, for example, approve the rule, adopted in several States, that Nollan and Dolan apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable.

As both the majority and dissenting opinions in Koontz manifest, however, the Court’s decision draws no such distinction, and places no such limits. The absence of any apparent constraints on this ruling could leave a broad range of impact fee programs and other fees vulnerable to a legal challenge if they do not reflect a nexus and rough proportionality between conditions imposed and a project’s impacts. State and local agencies may be well advised that in adopting impact fee programs, they should attempt to fashion standards and appear to be a thinly veiled revenue source for a city.

Koontz could affect other forms of exactions in ways that may not be obvious. For instance, California courts have consistently held that the Nollan/Dolan test does not apply to conditions imposed as a part of a development agreement between a city and a developer that vests the right to develop property in accordance with local regulations in effect when the agreement is approved. This exception to heightened scrutiny rests on the principle that such an agreement is freely negotiated between a local agency and an owner. But what if a city, believing it could extract fees and other concessions that the Fifth Amendment would otherwise prohibit, told a developer that it had to enter into a development agreement if it wants the city to approve the project? Such a message would seem to fit within the paradigm of an “extortionate” demand from a vulnerable owner that Koontz found would give rise to a takings claim.

Of course, the full effect of Koontz on the viability of fee programs and other exactions has yet to be realized. At this nascent stage, however, it seems safe to say that the decision has placed government on notice to proceed with caution when crafting and imposing impact fees.

---


4 Id. at 391; Nollan, 483 U.S. at 836.


6 Koontz, 133 S. Ct. at 2594.

7 Nollan, 483 U.S. at 838.

8 Id. at 839.


10 Id. at 391.

11 Id.


13 Gov. Code §§66000 et seq.

14 Ehrlich, 12 Cal. 4th at 860 (emphasis in original).

15 Id.

16 Id. at 876.

17 San Remo Hotel v. City and County of San Francisco, 27 Cal. 4th 643 (2002).

18 Id. at 670 (citations omitted).


20 Id. at 2596.

21 Id.

22 Id. at 2603.

23 Id. at 2600.

24 Id. at 2599.

25 Id. at 2596.

26 Id. at 2601-02.

27 Id. at 2599.

28 Id. at 2600.

29 Id. at 2607.

30 Id. at 2609, (citing Ehrlich v. Culver City, 12 Cal. 4th 854, 911 (1996)).

The National Academy of Distinguished Neutrals, is an association of over 800 mediators and arbitrators who have substantial experience in the resolution of commercial and civil disputes. All members have been recognized for their accomplishments through the Academy’s peer nomination system and extensive attorney-client review process. Membership is by invitation only and is limited to individuals who devote substantially all of their professional efforts to ADR practice.

To access our FREE National Directory of over 800 trusted mediators & arbitrators, please visit www.NADN.org/directory

At www.CaliforniaNeutrals.org you can search by subject matter expertise, location and preferred ADR service in just seconds. You can also determine availability by viewing many members’ ONLINE CALENDARS, finding the ideal neutral for your case in a way that saves both time and money.
The National Academy of Distinguished Neutrals, is an association of over 800 mediators and arbitrators who have substantial experience in the resolution of commercial and civil disputes.

All members have been recognized for their accomplishments through the Academy's peer nomination system and extensive attorney-client review process.

Membership is by invitation only and is limited to individuals who devote substantially all of their professional efforts to ADR practice.

To access our FREE National Directory of over 800 trusted mediators & arbitrators, please visit www.NADN.org/directory

Daniel Ben-Zvi
(310) 201-0010
Lee Jay Berman
(310) 203-0700
Kenneth Byrum
(661) 861-6191
Michael Diliberto
(310) 201-0010
Max Factor III
(310) 456-3500
William Fitzgerald
(310) 440-9090

Kenneth C. Gibbs
(310) 309-6205
Michael J. Bayard
(213) 383-9399
Greg De r in
(310) 552-1062
Steve  Meh ta
(661) 284-1818
Deborah Rothman
(800) 616-1202

Leonard Levy
(310) 201-0010
Viggo Boserup
(310) 309-6205
Jeffrey  Palmer
(626) 795-7916

Selecting A T op-Tier Neutral H as Never B een Eas ier

To find the best neutral for your case, visit our California members at www.CaliforniaNeutrals.org

Need a top-rated mediator /arbitrator outside of California? Visit www.NADN.org
NEW REGULATIONS adopted by the California Energy Commission (CEC) designed to promote environmentally conscious practices in commercial real estate transactions may have a significant effect on contract and lease terms and create potential new sources of civil liability. These “green” regulations are the result of a process that can be traced back to 2007, when the California Legislature enacted AB 1103,1 which reflected EPA policy that improving energy efficiency in buildings is the “fastest, cheapest, and largest untapped solution for saving energy, saving money, and preventing greenhouse gas emissions.”2 The new regulations require nonresidential building owners to benchmark and disclose the energy usage of their buildings before entering into major financial transactions that involve those buildings.3 “Energy usage” encompasses a building’s consumption of all different types of energy, including electricity, natural gas, fuel oil, and district steam.4

The new regulations establish a benchmarking system that makes energy consumption information for all nonresidential buildings in the state readily accessible.5 This new system allows “building owners and operators to compare their building’s performance to that of similar buildings and to manage their building’s energy cost.”6 The comparisons are expected to “motivate building operators to take actions to improve” a building’s energy use and help justify the cost of those improvements.7 The CEC’s most recent alternative regulations were adopted in October 2013 as the Nonresidential Building Energy Use Disclosure Program.8 The regulations are now being phased into effect.9 Nonresidential building owners will be required to disclose a building’s energy use over the past 12 months to prospective buyers, lessees, and lenders.10 The regulations also require owners to benchmark that data by providing a comparison of the building’s energy use to that of similar buildings.11

The legislature has directed the CEC to establish a specific compliance schedule for the new disclosure mandate.12 The schedule requires each nonresidential building to comply with the new regulations at staggered dates based on the square footage of the building. Beginning January 1, 2014, commercial buildings with a total gross floor area measuring more than 10,000 square feet must comply with the new regulations.13 On July 1, 2014, the regulations will become

Richard H. Lee is a partner, and Jay M. Lichter is an associate, with Salisian Lee LLP. They practice in the area of business litigation and commercial real estate disputes.
applicable to buildings with a total gross floor area measuring between 5,000 and 10,000 square feet.\textsuperscript{14}

The regulations address the problem that many nonresidential building owners lack information regarding their building’s energy usage.\textsuperscript{15} The EPA estimates that an average of 30 percent of the energy consumed in commercial buildings is wasted. Wasted energy increases costs for owners, interferes with accurate valuation of their buildings, and results in harmful and needless greenhouse gas emissions.\textsuperscript{16} Specifically, energy use in commercial buildings and manufacturing plants accounts for nearly half of all energy consumption in the United States at a cost of over $200 billion per year.\textsuperscript{17} Accordingly, the regulations through their energy disclosure requirements focus on curbing the misuse of energy and promoting environmental efficiency and responsibility.

The CEC regulations seek to remedy these problems by: 1) establishing a compliance schedule, 2) specifying what building characteristics and energy usage information must be provided to prospective buyers, lessees, and lenders, 3) identifying what disclosure documents must be supplied, 4) setting a deadline for utility releases of data to building owners while also requiring that utilities protect the confidentiality of customer data, and 5) enabling the CEC to access the energy use data.\textsuperscript{18}

\textbf{The Energy Star System}

The centerpiece of the CEC’s new benchmarking and disclosure program is the EPA’s Energy Star portfolio manager system. The portfolio manager is an interactive energy management tool that allows building managers to track and assess the energy consumption of one or more buildings in a secure, online environment.\textsuperscript{19} The portfolio manager is designed to help a building owner set investment priorities, identify underperforming buildings, and verify efficiency improvements.\textsuperscript{20} Consumers may recognize the blue-and-white Energy Star logo that appears on energy-efficient homes and appliances. The certification logo indicates that a product meets the energy efficiency requirements of a given Energy Star product.\textsuperscript{21}

For commercial real estate, the Energy Star system employs two specific metrics to describe overall building energy use: 1) the Energy Star energy performance score, and 2) energy use intensity.\textsuperscript{22} The Energy Star energy performance score compares a building to a statistically representative sample of similar buildings. For example, a score of 50 indicates that a building’s energy consumption falls below the consumption of 50 percent of the same type of buildings throughout the country.\textsuperscript{23} The Energy Use Intensity metric describes a building’s energy use, representing the energy consumed by a building relative to its size.\textsuperscript{24} Currently, a building or manufacturing plant is awarded Energy Star certification if it performs better than at least 75 percent of comparable buildings.\textsuperscript{25}

Compliance with the regulations requires knowledge of specific Energy Star document maintenance and data uploading procedures. A nonresidential building owner may be hesitant to navigate through these online programs because they present unknown or uncertain technical and legal requirements. While regulatory compliance does not necessarily require legal assistance, lawyers with building owner clients should consider learning how to assist them in compliance.

Under Title 20 of the California Code of Regulations, a building owner is required to open or update an existing account on the EPA’s Energy Star program Portfolio Manager Web site at least 30 days prior to when disclosure is required.\textsuperscript{26} In addition to providing the basics—such as a building owner’s contact information—the owner must also identify the year in which the building was constructed, list all sources of energy use data for the entire building for the past 12 months, describe each use of space located throughout the building, and request all utility and energy providers\textsuperscript{27} serving the building to release energy use data for the entire building for the past 12 months.\textsuperscript{28} Once a utility or energy provider receives a request, it must upload all applicable energy use data to the building owner’s portfolio manager account for the most recent 12 months.\textsuperscript{29}

The building owner must then generate the building’s data verification checklist from portfolio manager and electronically submit the checklist to the CEC.\textsuperscript{30} Once this task is complete, the owner must submit the data verification checklist for the building to 1) a prospective buyer of the building no later than 24 hours before executing a sales contract, 2) a potential lessee of the entire building no later than 24 hours prior to signing a lease, or 3) a lender financing the entire building no later than submittal of a loan application.\textsuperscript{31}

Assisting in the technical requirements of the document upload and data log procedures, maintaining critical information concerning the building, and explaining the need to provide certain information all may become duties for attorneys. The strict procedural requirements of the new regulations will also have a significant effect on commercial real estate transactions. Attorneys will need to consider whether to include provisions referencing the nonresidential building energy use disclosure program in a contract. At a minimum, provisions should be incorporated acknowledging that the owner has disclosed the building’s energy use over the previous 12 months to the prospective buyer, lessee, or lender and has downloaded that information to portfolio manager. A more comprehensive provision would reference the specific building information disclosed in the disclosure summary sheet, a statement of energy
performance, and a data checklist. The facility summary could include these documents as exhibits to a contract.

Tenant Consent

The new regulations dictate that only building owners comply with the new upload and disclosure requirements, but in so doing they affect the landlord-tenant relationship. The CEC rejected a requirement that landlords obtain consent for release of energy usage data from tenants because it would be “so burdensome that it would endanger compliance.”33 Notwithstanding that decision, landlords could benefit from having energy usage data from tenants, especially when tenants are on separate utility meters. Counsel for landlords may advise for obtaining tenant consent to disclose energy use information for purposes of regulatory compliance.

This may give rise to disputes relating to the program’s incentive to reduce energy usage levels. For example, landlords may want to incorporate language in leases allowing them to limit if not outright control the energy usage of their tenants. These provisions may allow for such measures as automatic power shutoff after regular business hours, limits on the use of temperature controls, and restrictions on the use of equipment that consumes large amounts of energy. These lease provisions may create conflict with tenants who consume large amounts of energy. On the other hand, these provisions may also provide tenants with an incentive to operate their businesses with greater energy efficiency.

Since these regulations are relatively new, they also present questions concerning enforcement and the potential for litigation. Significantly, the statutes implementing these regulations do not provide the CEC with the authority to impose monetary or other penalties for noncompliance. The absence of any specific enforcement mechanism, however, by no means suggests the lack of other legal means of achieving the policy objectives for which the regulations were enacted.

The threat of litigation for nondisclosure or inaccurate disclosure could expose an owner to financial liability. In California, if “the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer.”34 A building’s energy usage is an important element in determining the value of a property and thus constitutes material information. On a positive note, higher value could be placed on buildings for which regulatory compliance in general and Energy Star certification in particular can be demonstrated.

Likewise, failure to disclose knowledge of the building’s energy usage could constitute a cause of action. As a result, a court could rule against the owner and award damages or even rescind the sale, lease, or finance agreement. While the latter remedy is drastic, it is expressly available for various causes of action, such as fraud, that might arise from real estate transactions.35 The new regulations may also support a cause of action under California’s Unfair Competition Law (UCL).36 The UCL is California’s consumer protection statute and applies broadly to consumers, investors, business customers, and competitors. Because the UCL prohibits “unlawful, unfair or fraudulent” business acts or practices,37 and because the new regulations affirmatively require disclosure of energy data, an owner’s failure to submit the required information could be deemed unlawful. In turn, this failure to comply could constitute an unlawful act under the UCL. A court that finds that an owner has violated the disclosure rules could issue an order directing the owner to disclose the energy usage of the building or order payment of restitution, including a return of all money paid to the owner.38 Owners could also find themselves exposed to claims for negligent misrepresentation and fraud, depending on such factors as an owner’s intent and a buyer’s reliance on specific representations. Energy use data constitutes material information relative to the purchase, lease, and finance of commercial real estate. The suppression or misrepresentation of this information could establish the basic elements required to present causes of action for fraud39 or negligent misrepresentation.40 A cause of action for fraud further exposes an owner to liability for punitive damages, which could potentially reach millions of dollars in liability, depending on the nature and extent of the wrongdoing and the financial condition of the wrongdoer.

The legal and technical burdens imposed by California’s new energy disclosure laws are significant. Attorneys with clients who own commercial real estate should learn about these new regulations in order to offer proper advice on compliance. California’s continuing advancement toward a greener future gives attorneys an opportunity to help reduce energy waste.

Confidence At The Courthouse.

Business litigation is increasingly complex. That is why we believe valuation issues must be addressed with the same meticulous care as legal issues. Analysis must be clear. Opinions must be defensible. Expert testimony must be thorough and articulate. HML has extensive trial experience and can provide legal counsel with a powerful resource for expert testimony and litigation support.

For More Information Call 213-617-7775
Or visit us on the web at www.hmlinc.com

BUSINESS VALUATION • LOSS OF GOODWILL • ECONOMIC DAMAGES • LOST PROFITS

1 See AB 1103 (2007), codified at PUB. RES. CODE §25402.10; http://www.energy.ca.gov/ab1103.
3 In the matter of: AB 1103 Commercial Building Energy Use Disclosure Program Rulemaking, California Code of Regulations, Title 20, Sections 1680-1684, Order No. 12-1212-1h: Order Adopting Regulations
28th Annual
LAND USE LAW AND PLANNING CONFERENCE
Jan 31, 2014 • Millennium Biltmore Hotel Los Angeles

This unique conference offers a big-picture view of land use law and planning practice. Speakers provide updates on core state and federal case law, legislation, and land use practices.

Also featured is a keynote address by 3 generations of San Diego’s planning directors, as well as panels on Planning, Zoning, and Development Law; CEQA; land use law and planning practice. Speakers provide updates on core state and federal case law, legislation, and land use practices.

Enroll today & save with early pricing! $455 by Dec 31; $495 after Use Reg# Z3119W
For more details and to enroll visit uclalexension.edu/landuseLAW or call (310) 267-4264.
MCLE and AICP (CM) Credit Programs

AMERICAN LANGUAGE SERVICES
TRANSLATING & INTERPRETING ALL LANGUAGES CERTIFIED PROFESSIONALS
LEGAL CORPORATE TRANSCRIPTIONS EXPERT WITNESS TESTIMONY NATIONWIDE OFFICES WORLDWIDE COVERAGE
ESTABLISHED 1985 - EXCELLENT RATES
DINA SPEVACK 310.829.0741 x303 800.951.5020 alsglobal.net

EMPLOYMENT LAW REFERRALS
Paying Highest Referral Fees (Per State Bar Rules)
Representing executive, technical, and administrative employees statewide with integrity, passion and expertise!
Honored to receive regular employment referrals from over 100 of California’s finest attorneys
Super Lawyers 2012
Stephen Danz, Senior Partner
877.789.9707
11661 San Vicente Boulevard, Suite 500, Los Angeles, CA 90049

Let Us Help You Overcome the Hurdles in Your Estate Disputes
Estate Mediation
Probates, Trusts & Estates
Woodard Mediation
CALL (626) 584-8000 or visit us online www.woodardmediation.com

5 See Portfolio Manager, supra note 2.
7 See id.
8 Id.
9 Id.
10 Id.
11 Id.
14 Id.
15 See Final Statement of Reasons, supra note 5, at 5.
16 Id.
18 See Final Statement of Reasons, supra note 5, at 1-2.
20 Id.
23 Id.
24 Id.
26 See CAL. CODE REGS. tit. 20, §§1683, 1684(a).
27 A “utility” is defined as “an entity providing electricity or natural gas to a nonresidential building owner or tenant.” CAL. CODE REGS. tit. 20, §1681(k).
28 An “Energy Provider” is defined as “an entity providing sources of energy other than electricity or natural gas that are recognized by Portfolio Manager.” CAL. CODE REGS. tit. 20, §1681(c).
29 CAL. CODE REGS. tit. 20, §1684(a).
30 CAL. CODE REGS. tit. 20, §1684(b).
31 CAL. CODE REGS. tit. 20, §1684(c).
32 CAL. CODE REGS. tit. 20, §1683(a).
36 BUS. & PROF. CODE §§17200 et seq.
37 BUS. & PROF. CODE §17200.
39 People v. Superior Court, 9 Cal. 3d 283, 286 (1973).
WITH THE START of the new year, the California Revised Uniform Limited Liability Company Act\(^1\) (RULLCA) has replaced the Beverly-Killea Limited Liability Company Act (Beverly-Killea).\(^2\) Because limited liability companies are often the entity of choice for closely held businesses, including many real estate-related enterprises, the recasting of California’s limited liability company laws has widespread and significant consequences for businesses in California.

RULLCA is modeled upon the Revised Uniform Limited Liability Company Act (Model Act) published by the National Conference of Commissioners on Uniform State Laws in 2006. The California Legislature, in enacting RULLCA, cited the benefit of consistency with the limited liability company laws of other states.\(^3\) While California’s enactment of RULLCA brings its limited liability company laws more in line with the seven other states that have adopted the Model Act\(^4\) and others that incorporate select provisions, it reaffirms the gap between California’s law and the Delaware Limited Liability Company Act\(^5\) (Delaware Act), which is the preference of many operators, lenders, and institutional investors. An examination of various provisions of RULLCA, as compared to the Delaware Act, highlights reasons why sponsors organizing limited liability companies in California may opt to form their entities in Delaware and be governed by the Delaware Act rather than RULLCA.

Delaware has long been a state of choice for entity formation because of its overriding commitment to uphold freedom of contract, as embodied in the Delaware Act,\(^6\) in addition to Delaware’s generally business-friendly body of law. In accordance with the Model Act, RULLCA pays homage to freedom of contract: “It is the policy of this title and this state to give maximum effect to the principles of freedom of contract and to the enforceability of operating agreements.”\(^7\)

Nonetheless, RULLCA enumerates more than...
20 restrictions on what members of a limited liability company can agree upon. Further, RULLCA provides new default standards (i.e., provisions that apply in the absence of the parties’ providing otherwise in the operating agreement) that may complicate company operations, creating a potential trap in the event that members 1) fail to address such matters in their operating agreements, or 2) in the case of existing companies, had relied either on prior default rules that are now supplanted by RULLCA or on the limited liability company’s articles of incorporation. Nevertheless, many operating agreements, including operating agreements of real estate-related companies, authorize the members and managers to participate in activities that may be competitive with the company, without incurring any obligation to offer any interest in these activities to the company or to the other members. This provision could be read as negating the duty of a member to refrain from competing with the company, making it “manifestly unreasonable.”

Further, how do managers completely avoid situations in which they would be acting on behalf of parties having an interest adverse to the company when, for example, when proceeding under RULLCA, sponsors should precisely craft limitations on fiduciary duties tailored to the specific business plan and scope of the enterprise accounting for RULLCA’s limitations and should further consult California case law for guidance in interpreting what actions constitute a breach of fiduciary duty.

When proceeding under RULLCA, sponsors should precisely craft limitations on fiduciary duties tailored to the specific business plan and scope of the enterprise accounting for RULLCA’s limitations and should further consult California case law for guidance in interpreting what actions constitute a breach of fiduciary duty.

absence of the extensive array of default rules that appears in RULLCA.

Limits on Contractual Variation

Among other things, RULLCA prohibits an operating agreement from varying any provision relating to mergers and conversions provided for in Articles 10 and 12 of RULLCA. The restrictions also limit the ability to vary applicable law and the power of the court in certain contexts. However, the restrictions on contractual flexibility set forth in RULLCA particularly emphasize limitations on the ability of the operating agreement to modify fiduciary duties and related obligations, with no less than nine subsections of RULLCA Section 17701.09 pertaining to these issues.

Addressing a previously existing ambiguity under California law, RULLCA states that an operating agreement is prohibited from eliminating the duty of loyalty, the duty of care, or any other fiduciary duty. Nor may an operating agreement eliminate the contractual obligation of good faith and fair dealing consistent with which a member is required to perform its duties and exercise its rights with respect to the limited liability company.

Ambiguity remains, however, with respect to the extent to which fiduciary duties may be modified. For example, RULLCA lists what the duties of loyalty that a member in a member-managed limited liability company (or of a manager in a manager-managed limited liability company) are:

1. To account to a limited liability company and hold as trustee for it any property, profit, or benefit derived by the member in the conduct and winding up of the activities of a limited liability company or derived from a use by the member of a limited liability company property, including the appropriation of a limited liability company opportunity.
2. To refrain from dealing with a limited liability company in the conduct or winding up of the activities of a limited liability company as or on behalf of a party having an interest adverse to a limited liability company.
3. To refrain from competing with a limited liability company in the conduct or winding up of the activities of the limited liability company.

While Section 17701.10(c)(14) of RULLCA prohibits elimination of these duties, it specifically allows an operating agreement to qualify them by 1) identifying specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable, or 2) specifying the number or percentage of members that may authorize or ratify, after full disclosure to all members of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty. This statute raises some questions.

First, does the inclusion of these specifically authorized modifications preclude any other type of modification of the duty of loyalty? Second, could typical provisions included in operating agreements potentially be found by courts to be “manifestly unreasonable”? For example, many operating agreements, including operating agreements of real estate-related companies, authorize the members very often the manager’s affiliate is the property manager of the company’s property, the guarantor of the company’s debt, or a stakeholder in a community where the company owns property? Inevitable divergences of interest are difficult to identify in advance without describing them in a manner so overly broad it becomes “manifestly unreasonable.”

Given these challenges, the right under Delaware law to contractually eliminate fiduciary duties appeals to sponsors as a way to mitigate unexpected liability not contracted for by the sponsor. The Delaware Act cautions that, while fiduciary duties may be contracted away, the operating agreement “may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.” The requirement of good faith and fair dealing, also inviolable under RULLCA, arguably sufficiently protects passive investors from true bad acts of managers, as merited by public policy.

When proceeding under RULLCA, sponsors should precisely craft limitations on fiduciary duties tailored to the specific business plan and scope of the enterprise accounting for RULLCA’s limitations and should further consult California case law for guidance in interpreting what actions constitute a breach of fiduciary duty.
The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. The limited liability company law of which state has a policy of giving maximum effect to the principles of freedom of contract and enforceability of operating agreements?
   A. California.
   B. Delaware.
   C. Both.
   D. Neither.

2. The California Revised Uniform Limited Liability Company Act (RULLCA) permits elimination of the fiduciary duties of the manager.
   True.
   False.

3. The Delaware Limited Liability Company Act (Delaware Act) permits elimination of the fiduciary duties of the manager.
   True.
   False.

4. RULLCA allows an operating agreement to eliminate the contractual duty of good faith and fair dealing of the members.
   True.
   False.

5. The Delaware Act allows an operating agreement to eliminate the contractual duty of good faith and fair dealing of the members.
   True.
   False.

6. Under RULLCA, one element of the duty of care that a manager in a manager-managed LLC has is to refrain from competing with the LLC in the conduct or winding up of the activities of the LLC.
   True.
   False.

7. Under RULLCA, one element of the duty of loyalty that a manager in a manager-managed LLC has is to refrain from acting on behalf of a party having an interest adverse to that LLC.
   True.
   False.

8. RULLCA allows an operating agreement to qualify the duty of loyalty by identifying specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable.
   True.
   False.

9. Under RULLCA, a member is bound by a provision in the operating agreement modifying the fiduciary duties of the manager even if the member has not signed the operating agreement.
   True.
   False.

10. Unanimous consent of the members of a manager-managed, California LLC is required for the sale of all or substantially all of the property owned by the company:
    A. Under all circumstances.
    B. Even if the operating agreement allows for the sale upon majority approval.
    C. If the operating agreement does not specify what vote is required.
    D. Under all circumstances.

11. Pursuant to RULLCA, unless otherwise specified in the operating agreement, taking of any action outside the ordinary course of the LLC’s activities by the manager requires unanimous consent of the members.
    True.
    False.

12. RULLCA defines activities in the “ordinary course” as the day-to-day activities of the company.
    True.
    False.

13. The default rule for the percentage vote required to amend the operating agreement under RULLCA is the same as it was under Beverly-Killea.
    True.
    False.

14. In a manager-managed LLC, the members can remove the manager without cause upon a majority vote.
    True.
    False.

15. A charging order is available as a remedy for judgment creditors of members of an LLC in:
    A. California.
    B. Delaware.
    C. Both.
    D. Neither.

16. California law permits foreclosure on membership interests in a multimember LLC as a remedy against a judgment debtor.
    True.
    False.

17. California law permits foreclosure on membership interests in a single-member LLC as a remedy against a judgment debtor.
    True.
    False.

18. Delaware law permits foreclosure of membership interests in a multimember LLC as a remedy against a judgment debtor.
    True.
    False.

19. Delaware law permits foreclosure of membership interests in a single-member LLC as a remedy against a judgment debtor.
    True.
    False.

20. Under RULLCA, a merger must be approved by unanimous consent of the members of each constituent LLC involved in the merger.
    True.
    False.
breach of fiduciary duty. RULLCA also provides that the fiduciary duties of a manager of a limited liability company may only be modified in a written operating agreement with the informed consent of the members. Accordingly, care should be taken that the original members, as well as any transferees, whether by operation of law or otherwise, provide their written informed consent to these provisions. In addition, the operating agreement perhaps should include recitals regarding the informed consent of the members. When proceeding under the Delaware Act, it is also necessary to explicitly specify if the parties have agreed to eliminate fiduciary duties rather than attempt to contract them away by omission. The Delaware Supreme Court pointed out in 2012 that whether the Delaware Act imposes default fiduciary duties was unsettled, and in response the Delaware Act was amended to specify that the rules of law and equity relating to fiduciary duties apply by default.

**Default Voting Specifications**

ULLCA necessitates that an operating agreement also address the percentage vote of members, if any, required for a company to take particular actions. A lack of specification regarding whether a vote of members is required in a manager-managed limited liability company, without affirmative language that a manager can act without a vote of members on any unspecified matters, likely results in application of ULLCA’s new default rule requiring approval by a vote of members. This default rule, set forth in Section 17704.07(c)(4), requires unanimous consent of all members of the limited liability company to do any of the following:

(A) Sell, lease, exchange, or otherwise dispose of all, or substantially all, of the limited liability company’s property, with or without the goodwill, outside the ordinary course of the limited liability company’s activities.
(B) Approve a merger or conversion.
(C) Undertake any other act outside the ordinary course of the limited liability company activities.
(D) Amend the operating agreement.

The prior default rule under Beverly-Killicia imposed a lower hurdle for decisions not otherwise addressed in the operating agreement, requiring the vote of a majority in interest of the members for “matters in which a vote is required,” except in the case of amendment of the operating agreement or articles of organization, which specified unanimous consent as the default rule. In the absence of a contrary provision in the limited liability company agreement, the Delaware Act default rule similarly calls for unanimous consent for amendments, unless otherwise provided by law, such as in the context of a merger wherein only a majority in interest is required for an amendment.

However, the Delaware Act does not impose a hurdle of unanimous consent or any particular voting requirement for actions by the limited liability company that fall outside of an undefined “ordinary course,” including sale, lease, exchange, or other disposition of the company’s property, as does ULLCA. Under RULLCA, it is not clear what constitutes the “ordinary course,” including whether financings or other transactions are within the ordinary course. Providing for unanimous consent of the members to authorize actions of the manager confers upon minority members a disproportionate power over the destiny of the company.

Further, ULLCA includes a default provision that a majority of the members can choose a manager or, with or without notice or cause, remove a manager at any time. The Delaware Act has no similar provision. In the absence of express requirements regarding appointment and removal of managers, very different results would arise with respect to removal of the manager of a California limited liability company versus a Delaware one. In California, a manager can easily be ousted from control unless alternative arrangements appear in the operating agreement.

Accordingly, an operating agreement should set forth with specificity that certain enumerated actions require a specific threshold of consent (less than that set forth in ULLCA) and that the manager can act without the vote of any other member except as explicitly constrained by the operating agreement. The operating agreement should also specify appropriate requirements for appointment and removal of managers, which may include removal of the manager only with cause. Note that the adoption of ULLCA also behooves lenders to require unanimous written consents of members up the chain of ownership if the relevant limited liability company agreements are not completely clear that the manager of the company has authority to bind the company in a loan transaction without such consent.

**Rights of Judgment Creditors**

Also of concern to sponsors, lenders, and investors in limited liability companies are the rights of judgment creditors against membership interests in the limited liability company. In closely held companies, it would be problematic if a judgment creditor could interfere in the operations of a limited liability company or in any way supplant the intended members of the company. In addition, owners of membership interests are loath to forfeit the entire value of an interest in a limited liability company due to foreclosure of a judgment lien against the interest (which may be for a judgment of a much lesser value) because liquid funds to pay the creditor are scarce.

ULLCA provides that a court can issue a charging order as a lien on the transferrable interest of the judgment debtor in a limited liability company and require that any distributions that would otherwise be paid to the member be paid instead to the judgment creditor. ULLCA further allows for the foreclosure of the lien on the membership interest upon a showing that distributions under the charging order will not pay the judgment debt within a reasonable time. In Delaware, on the other hand, the ability to foreclose in this context has been squarely rejected.

In fact, the Delaware legislature amended the Delaware Act in August 2013 to firmly establish that a charging order is the exclusive remedy that a judgment creditor can pursue with respect to the judgment debtor’s interest in a limited liability company. The amendment states explicitly that attachment, garnishment, foreclosure, or other legal remedies are not available to the judgment creditor. Further, the amendments also codified that the result will be no different if the judgment debtor is a single member or a multi-member limited liability company. This declaration is significant, given that some courts have viewed foreclosure by a judgment creditor against the interests in a single member limited liability company as more equitable. In contrast, ULLCA provides that foreclosure is available upon a showing that distributions will not pay the judgment debt in a reasonable time, which is particularly suited to allow for a foreclosure in the context of a single-member limited liability company.

**Delaware Law in California**

A question remains as to whether a California court would enforce the choice of Delaware law to govern the remedies available to the judgment creditor. According to the Delaware statute, “a limited liability company agreement that provides for the application of Delaware law shall be governed by and construed under the laws of the State of Delaware in accordance with its terms.” However, ULLCA states that the law of the jurisdiction of formation governs 1) the organization of the company, its internal affairs, and the authority of its members and managers, 2) the liability of a member as member and a manager as manager for the debts, obligations, or other liabilities of the company, and 3) the authority of the members and agents of a limited liability company. It is unclear whether these categories are exclusive of all
other matters addressed by RULLCA, and Section 17713.04 exacerbates this ambiguity, declaring that RULLCA applies to all foreign limited liability companies registered in California. Perhaps the scope of application is meant to be limited to the provisions of RULLCA that specifically address foreign limited liability companies (such as registration, merger, and conversion), or perhaps instead the section makes a far-reaching attempt to override the choice of any other state law except for very limited purposes. While a California court may attempt to assert its domestic law regarding the rights of judgment creditors in the case of a Delaware limited liability company operating in California, especially considering Section 17713.04, it is certain that forming a California limited liability company will result in the availability of foreclosure for judgment creditors.

The Issue of Practicality

In light of the changes in the California limited liability company statute, some have counseled that limited liability companies amend their operating agreements to ensure that there are no unintended consequences of omissions from existing operating agreements. However, given that such amendments would likely be unpopular with those whose fiduciary duties or approval rights are sought to be altered, as well as that lender consent in most cases would be required to amend the operating agreement if a lender is involved, amendment of existing agreements seems impractical. California limited liability companies may want to consider conversion to Delaware limited liability companies, which generally requires only a majority in interest approval, although in many instances conversion will also require lender consent, if applicable.

The emphasis of RULLCA on fiduciary duties and rights of nonmanaging investors as well as its grant of foreclosure rights to judgment creditors when a charging order seems insufficient is reflective of California’s public policy. Those who prefer the public policy of Delaware, which proclaims itself the corporate capital of the world, may alternatively opt for organization of their limited liability companies in Delaware.

OPINEXPERTS
ALL MATTERS REAL ESTATE

We Collect Attorney Fee Judgments

ZERO COSTS and ZERO RISK and We only get paid if we collect!

Buffer yourself from State Bar Complaints and free up your time to do what you do best.

Call us at 213-986-6020 or visit our website at www.tjjudgments.com to learn more.

BUSINESS OPPORTUNITY

Want to purchase minerals and other oil/gas interests?

Send details to:
P.O. Box 13557
Denver, CO 80201

2014 Southern California Directory of Experts & Consultants

Containing more than 2,000 listings in over 500 categories, this is the definitive resource for finding expert witnesses, legal consultants, litigation service providers, arbitrators, and mediators.

LACBA
Just one of the many benefits of LACBA membership!

Other news of interest:

- The Delaware Act allows for a charging order to be issued at any time without requiring a showing that distributions under a charging order will not pay the judgment debt within a reasonable time. Corr. Code §17302.
- See In re Albright, 291 B.R. 538, 539 (Bankr. D. Colo. 2003); Olmstead v. FTC, 44 So. 3d 76 (Fla. 2010). The Florida legislature subsequently amended its statute to provide for a charging order as the sole and exclusive remedy for a judgment creditor, except that if the interest charged is an interest in a single member limited liability company and the judgment creditor makes a showing that distributions under a charging order will not satisfy the judgment within a reasonable time, the creditor has the option to foreclose and become the sole member of the company. Fla. Stat. §608.433.
- Del. Code Ann. tit. 6, §18-1101(i).
Wireless communication has become one of the most important sectors of the national economy. Many U.S. households have given up their landline telephone entirely in favor of reliance on wireless services. Businesses have also greatly increased their demand for wireless services as retailers use mobile devices to scan purchases and documents and to complete sales transactions. The connected car of the future is anticipated to allow drivers to manage e-mail, access the Internet, and program television recordings by voice command. Healthcare is going wireless as well, as doctors and hospitals are increasingly able to monitor patients remotely. This augmented demand has resulted in a need for the wireless industry to expand, modify, and replace its wireless network infrastructure. Consequently, service providers are constantly required to obtain local governmental approvals for new wireless facility construction as well as modifications to existing wireless infrastructure.

Each wireless facility (commonly referred to as a cell site) can only provide service within a given area (the facility’s coverage) and to a certain number of users (capacity). Therefore, wireless carriers are continually monitoring their capacity to identify areas where new facilities may be needed. Customer complaints of dropped calls and failed calls are part of this process. The geographic area in which a new facility will be considered, known as a search ring, is literally represented by a circle, or ring, on a map. The carriers then select potential locations (candidates) within the search ring for consideration. For each candidate, computer modeling tests forecasting the coverage for the proposed site are prepared in order to help the carrier assess how the proposed candidate will benefit the overall network. This is often followed by radio frequency (RF) testing in the field that helps confirm the actual signal strength predicted by the computer modeling. These tests are submitted to the municipality.

Infrastructure Selection

There are various types of wireless facilities. The most commonly recognized facility is the tower, which typically comes in three designs: the monopole, the self-supporting lattice tower, and the guyed lattice tower. In urban areas, monopoles are quite common. This type has a single pylon or pole to which...
various antennae are mounted. Monopoles are often camouflaged as trees, such as a palm (monopalm), pine (monopine), or eucalyptus (monoeuc). Monopole facilities typically range from 30 to 200 feet in height. The lattice tower can be much taller and is customarily installed in rural areas where coverage must be much broader. Generally, the taller the tower, the broader the coverage area.

In addition to tower facilities, cell sites can also be mounted to various existing structures, including light poles, water tanks, building exteriors, and rooftops. The placement of a cell site on an existing structure is known as a collocation. Collocations may be camouflaged by faux building facades or even an extension of the building, such as a faux cupola or clock tower. A camouflaged site is referred to as a stealth facility, and the creation of a camouflaged cell site design is called stealthing. The creativity of stealth facades is endless and may range from faux boulders to faux cacti, even a faux bison. While community members and local property owners may prefer stealthed sites, they come with their own set of complications. At times, community opposition to a cell site may force a carrier to consider unique stealth design solutions that may be economically and logistically impractical for the carrier. For example, one local community’s efforts to require a cell site design of a faux angel proved unsuccessful due to space limitations. This design would actually have negatively impacted existing property use. Moreover, communities that seek to limit the visual effects of a cell site by requiring stealthing should be aware that stealthed sites may provide reduced coverage levels and limit collocation opportunities, which eventually may result in the need for additional cell sites in the community.

Collocation may also refer to the practice of subleasing space at an existing cell site, usually a tower. Collocations involve the negotiation of RF interference concerns among the carriers, minimum space separation requirements of the various kinds of equipment, and structural considerations arising from the installation of multiple pieces of hardware on a single-tower structure, which may require reinforcement of the tower. While an existing tower may be a potential candidate for collocation, there may be technological, legal, and business barriers. The available space at the tower may be at the wrong height, the sublease terms may be too risky, or the rent may be too high. While a municipality may not be able to force a carrier to collocate, a carrier may nevertheless have an incentive to consider collocation for various reasons, including a good working relationship with the tower owner or the potential for an expedited land use process made available under a new federal law.

The Approval Process

Although wireless communication siting, much like the zoning for any real estate development, is handled at the municipal level, federal and state laws play some part in the approval process. Almost two decades ago, Congress recognized the benefits to American businesses and consumers resulting from streamlined wireless siting. The Telecommunications Act of 1996 confirms that state and local governments maintain authority over the placement, construction, and modification of wireless facilities, but it also provides certain protections to service providers. For example, municipalities cannot unreasonably discriminate among carriers providing similar services or deny an application because another carrier serves the area. Additionally, municipalities cannot act in a manner that prohibits or has the effect of prohibiting wireless services.

Municipalities reviewing zoning applications for wireless facilities also must act within a reasonable time after the request is submitted. Under what are referred to as the shot clock requirements, reasonable response times have been defined as 90 days for site modifications and collocations and 150 days for a new cell site, unless otherwise agreed between the parties. Municipalities may not deny or regulate wireless facilities due to environmental concerns arising from RF emissions so long as the equipment complies with FCC regulations. Finally, any land use denial must be in writing and supported by substantial evidence within the written record.

Municipal regulations governing the land use approval process for wireless facilities differ widely. Whereas some regulations allow wireless communication facilities in certain districts as a matter of right, others require variances, and still others impose height restrictions and setback requirements or visual screening of some type, including landscaping, or may treat wireless facilities as a special use or require site plan approval. Regardless of the applicable process, the carrier should confer with the jurisdiction early in the application process to discuss the proposed project and confirm the requirements. Many jurisdictions will agree to a preapplication meeting at which both the applicant (or its representative) and a planning official meet and confer regarding the design and location of the proposed facility. This meeting allows the applicant to get important feedback from the municipality and to make any requested changes prior to submitting the application.

The carrier should expect to provide the jurisdiction with information regarding the site selection process, such as maps identifying the search ring, the location of the proposed candidate, and the proposed coverage area. The carrier also should provide information on the types of services and the proposed facility equipment and design, including identification of the applicant and property owner, as well as their respective representatives; a description of the property, including geographic features and vegetation; site plan drawings showing the dimensions of facility components; the type of infrastructure proposed (monopole versus collocation), including any foundation or other support structure; the number, type, and dimensions of antennae; tower lighting as may be required by federal law, and the dimensions and construction materials of the equipment shelter that will house the carrier’s non-tower equipment. To this end, standard submission requirements include construction drawings signed and sealed by a state-licensed engineer showing in detail the ground layout, the tower, equipment dimensions, and electrical details, along with an engineer’s structural analysis attesting to the ability of the proposed facility to handle the equipment load.

As part of the approvals process, the carrier may also be required to establish, among other things, that the height of the facility is the lowest technically feasible to accomplish the carrier goals and that collocation on another tower, building, or other structure is not a viable option. In addition, the carrier may have to show that the site will have emergency backup power sources in the event of a power outage at the property; that the site design minimizes visual and other impacts of the site, including by stealth design or landscaping; and a detailed analysis of why an alternative candidate was not selected. A carrier may also have to demonstrate a viable plan for the removal of the facility and restoration of the site upon discontinuance of use.

Because each jurisdiction may have its own unique process, it is difficult to list the possible additional steps that may be required of the carrier in order to complete the land use approval process, but, as one example, the carrier may need to subdivide the land so that the communication facility is located on a separate parcel. As another example, some municipalities require carriers to regularly submit construction plans so that the municipality can have some general understanding of potential future site applications. Many municipalities make the building permit process an integral part of the zoning approval process with the building permit approval contingent upon the zoning.
The public hearing is a sensitive component of the land use approval process in jurisdictions where it is required. These hearings may attract community interest as concerned citizens sometimes express a preference that the facility be located “not in my back yard.” Carriers must develop a good rapport with the community in order to address their concerns. The local zoning department staff can therefore provide valuable insight into local community responses to previous siting applications, which helps the prospective carrier identify issues that may arise in the public hearing process.

Other Considerations
As part of the land use process, the local jurisdiction must conduct a California Environmental Quality Act (CEQA) review in accordance with CEQA guidelines. An environmental impact report must be prepared, adverse environmental impacts of the proposed facility must be disclosed to the public, and feasible environmental mitigation measures must be determined and adopted. Additionally, a Phase I Environmental Site Assessment report must be prepared disclosing any preconstruction recognized environmental concerns at the site and a plan for addressing these concerns. Implementation of that plan and any subsequent remediation efforts are also disclosed to the municipality.

Similarly, a National Environmental Policy Act review must be conducted to determine whether the site is located in a wilderness area, wildlife preserve, floodplain, wetland, or area with high intensity lights; whether there are threatened or endangered species; whether the site is located within view of historic properties or within designated historic districts; whether the site is located on a Native American religious site; and whether the site will be compliant with certain RF emission-related requirements.

All wireless facilities must be evaluated to determine whether the site will be located within an area that is registered, or may be registered, for listing in the National Register of Historic Places. Placement of wireless facilities within these environmentally sensitive areas will require FCC approval.

For facilities located on the California coast, the applicant must determine whether a local coastal plan applies in order to ensure that the facility will meet the plan requirements. For other coastal areas, the applicant must work with the California Coastal Commission to ensure that the facility is consistent with Coastal Commission requirements.

Notwithstanding the ubiquitous nature of wireless facilities and the federal imposition of timely review requirements under the shot clock, carriers have reported persistent delays in the land use approval process. Based upon information collected by CTIA, wireless service facility siting applications have waited for approval anywhere from one to three years, even with respect to collocations on existing towers and the simple replacement of existing equipment. Processing time for applications in several California communities has been reported to range from 28 to 36 months. The California Wireless Association has taken an active role in working with local jurisdictions throughout the state to reduce the length of time that applications are in process.

As part of the Middle Class Tax Relief and Job Act of 2012, recognition of the vital importance of a streamlined approval process resulted in the passage of important wireless facility deployment legislation. With respect to the placement of new equipment on an existing facility, or the sublease of space at an existing facility by a new carrier to the site (i.e., collocation), the federal act provides that local governments must approve such land use applications so long as the changes will not substantially change the physical dimensions of the tower facility. This effectively pre-empts zoning review processes and conditional approvals. The FCC has confirmed that these site modifications may be handled through an application for administrative approval. The authority of the FCC to promulgate and enforce these regulations was recently upheld by the U.S. Supreme Court in Arlington v. FCC. Accordingly, it would seem that many local wireless ordinances may require rewriting to incorporate these new streamlined processes. In September 2013, Los Angeles instituted a new zoning process to implement the act’s procedures by allowing certain wireless facility modifications to be handled by administrative sign-off and administrative plan approval. The states of Michigan, Missouri, and New Jersey have enacted similar provisions.

As wireless technology and demand continue to advance, the land use approval process has adapted as well. From the jurisdictional standpoint, local authorities have begun to accept land use applications via e-mail. These submissions are easily tracked, saved, catalogued, and reviewed. Additionally, electronic materials are more easily forwarded and more cost-effective approach.

From a technology standpoint, wireless networks are adapting as well. The traditional wireless network model built on large, outdoor wireless facilities (macrosites) has evolved to include smaller wireless facilities known as microcells, small cells, and Distributed Antenna Systems. The advantage of these smaller cell sites is that they provide continuous coverage to a select group of users located in close proximity to the site. Because these small cells are often located on private property or outdoors, but within the public right-of-way, they often require no zoning approvals. Small cells thus provide a benefit to both the community and the carrier by being visually unobtrusive and eas-
The potential benefits from wireless devices and services are limitless. Therefore, expedient wireless facility siting will continue to be an essential part of the conveniences we have come to expect in everyday life.

1 Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local of Section 332(c)(7)(B) to Ensure Timely Siting Review -0

https://hraunfoss.gov/edocs_public/attachmatch/FCC_DISEASE_CONTROL_AND_PROTECTION, W IRELESS SUB-

2 STEPHEN J. BLUMBERG & JULIAN V. LUKE, CENTERS FOR DISEASE CONTROL AND PROTECTION, WIRELESS SUB-


5 The Middle Class Tax Relief and Job Creation Act of 2012 (Tax Act) provides that local governments must approve modifications of existing wireless facilities that would not result in a substantial change in the physical dimension of the site. See Pub. L. 112-96, §6409, 126 Stat. 156 (2012). For example, the addition of a limited number of antennas on an existing monopole by a new carrier subleasing space at the site may potentially qualify. See also Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, FCC Public Notice (Jan. 25, 2013).


8 47 U.S.C. §332(c)(7).


10 Petition, supra note 1, at ¶56.

11 47 U.S.C. §332(c)(7)(B)(i)(II); §253(a).


13 Petition, supra note 1, at ¶46.

14 Id. at ¶48.

15 Id. at ¶50.


17 See 47 C.F.R. §1.1310.


20 Towers of a certain height or located within a certain proximity to airports must be reviewed by the FAA. Upon a determination by the FAA that the tower does not pose a danger to air traffic, the site must be registered with the FCC. The FCC, based on recommendations issued by the FAA, may require tower lights, paint, or other markings to ensure the tower is visible to aircraft.


22 See, e.g., BERKELEY, CAL., CODE SUB-TITLE 23B.

23 PUB. RES. CODE §21000 et seq.

24 CAL. CODE REGS. tit. 14, §§33500 etc.


26 42 U.S.C. §§4321 et seq.

27 36 C.F.R. §800, Subpart B.

28 PUB. RES. CODE §30251.

29 The CTIA is an international nonprofit organization representing the wireless communications industry whose members include wireless carriers and their suppliers, as well as providers and manufacturers of wireless data services and products. See http://www.ctia.org/aboutCTIA.

30 Petition, supra note 1, at ¶33.

31 Id.


35 Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) Policy and Review Procedures, Office of Zoning Administration, City of Los Angeles, Memorandum (Sept. 3, 2013).

JUST RELEASED!

A CLE-in-a-Box designed to meet all your mandatory CLE requirements with content specific to real property law.

The 27-hour audio CLE program includes self-study and participatory credit and covers substance abuse, elimination of bias, and ethics.

The 2014 compliance deadline is February 3 for attorneys whose last name begins with N-Z.

Available as a CD set or On-Demand ¥ Free Ground Shipping within California
To order, go to www.lacba.org/clebox or call Member Services at 800.456.0416

LACBA Member Price: $224 • Nonmember Price: $274

REAL PROPERTY EDITION CLE-IN-A-BOX INCLUDING CROCKER SYMPOSIUM

- **Specialty Credits**
  - Sex, Bias and Substance Abuse—Those Hard-to-Get MCLE Credits
  - Everything You Always Wanted to Know about Client Trust Accounting but Were Afraid to Ask
  - How to Be a Zealous Advocate for Your Client’s Project without Violating the Brown Act
  - Ethics—All You Need to Know (2012)

- **General CLE**
  - Hot Topics in California Real Estate Law: Top 10 Real Estate and Title Cases of 2011-12
  - Negotiating and Drafting Real Estate Joint Venture Agreements
  - Drafting and Interpreting Easements
  - Structuring & Enforcement of Multi-State Transactions
  - Mixed-Use Projects: Things You Need to Tell Your Developer Client
  - Hot Topics in California Real Estate & Title Law: The Top Ten Cases of 2012
  - 2013 Annual Construction Law Update and Flaig Award
  - Top Cases of 2012 Affecting Leasing and Purchase and Sale Transactions
  - The Nuts and Bolts of Retail Leases in Today’s Market
  - Recent Developments in the Law of Real Estate Finance
  - Drafting Financeable Leases

- **Crocker Symposium 2012**
  - The Evolution of CEQA: Changing the Game or Staying the Same?
  - Negotiating Lender’s Recourse to Borrowers and Guarantors in Real Estate Loans
  - Pitfalls and Practical Advice for Small Projects
  - Speed (Up)dating 2012—Cutting-Edge Gems in Real Estate Deals

- **Crocker Symposium 2013**
  - Quick Hits 2013: Shifting Gears in the Fast Lane
  - Infrastructure: Update on Major California Infrastructure Projects
Los Angeles Gets a New Mural Ordinance

LAST OCTOBER, PURSUANT TO THE NEW CITY MURAL ORDINANCE,1 the Department of Cultural Affairs (DCA) of Los Angeles processed its first applications for new public art murals, ending a decade in which they were in legal limbo. Older murals had been haphazardly painted out or left in disrepair, and uncertain landowners commissioned no new murals.

In 2008, Judge Collins of the Central District held that exemptions to the ban on off-site advertising and supergraphics vested too much discretion in the city. However, in 2010, the Ninth Circuit overruled that holding, finding that the city’s regulation of supergraphics and off-site advertising was constitutional. In 2011, the city council commissioned a Mural Working Group that approved a general plan for time/place/manner permits, and after dozens of meetings held around the city, including with graffiti artists, a near-final version of the law made its way to the city’s Planning and Land Use Management Committee last summer.

The new ordinance distinguishes between advertisements and murals, defining an “original art mural” as a “one-of-a-kind, hand-painted, hand-tiled, or digitally printed image on the exterior wall of a building that does not contain any commercial message” that “advertises a business conducted, services rendered, or goods produced or sold.”2 Older murals are grandfathered in.3

Most significantly, the ordinance allows permitted and registered murals on private property. The DCA’s rules include “neighborhood involvement requirements,” meaning that an applicant for mural approval must send a notice to the appropriate neighborhood council 45 days before the DCA registers the mural. The DCA retains sole authority to approve the application under a content-neutral determination. When the mural is registered, the building owner must record a covenant with the county and DCA.4

By definition, a mural must remain unaltered for two years. The ordinance contains additional miscellaneous exclusions of murals over building openings, certain lighted murals, and murals extending beyond structures upon which they are placed or 100 feet above grade.

Currently, murals cannot be painted on single-family residences. This provision was controversial, as one version with the single-family residence restriction and one without were considered by the city council. The more limited version passed, but council members Gilbert Cedillo and José Huizar moved that their districts be allowed to establish a pilot program permitting murals to be created on homes, and other neighborhoods (in Venice and South Central Los Angeles) are joining. A certain public reluctance regarding permitting murals on single-family residences is understandable in view of concerns over property values, but the proposed opt-in procedure for Districts 1 and 14 will be a testing ground for these fears. Indeed, the ordinance as written could also exclude traditional tiled entries or art removed from the common concept of a mural.

The ordinance exists alongside other laws regulating art, including the federal Visual Artists Rights Act (VARA) and the California Artist Protection Act (CAPA),5 the Copyright Act,6 and common law rules concerning ownership of property.7 CAPA was the nation’s first moral rights law. VARA, more complex and limited than CAPA, was passed a decade later and preempts CAPA, although not completely.8 Under VARA and CAPA, the landowner can destroy art after giving the artist 90 days’ notice. I have worked on a few VARA disputes, and whether the artist can be found is always an issue.

It remains to be seen how VARA and CAPA will interface with the new ordinance. For instance, the statute provides that a building owner can remove a mural within two years upon request. DCA regulations call for the 90-day waiting period of VARA and CAPA, but a building owner may believe he or she can remove a mural once the city approves removal. Also, one can assume that constitutional challenges will arise from the billboard industry. Meanwhile, murals are already being painted, and unless enjoined, the law should result in a flowering in public art in Los Angeles.

Overall, the new mural ordinance is a boon for the city. Artists are now challenged to create great works of public art. Building owners and art dealers can commission these works without fear of destruction by the city. Artists and building owners—under common responsibility of their rights, including moral rights, copyrights, and the law of ownership of the physical work of art—should bargain and come to agreement in writing. Most importantly, public art may someday be as much a part of property law as easements or fixtures.

Murals are already being painted, and unless enjoined, the law should result in a flowering in public art in Los Angeles.

Eric Bjorgum is a shareholder at Karish & Bjorgum, PC, an intellectual property firm in Pasadena.
THE CORRECT WAY TO ACCEPT PAYMENTS!

Trust your credit card transactions to the only merchant account provider recommended by 32 state and 48 local bar associations!

- Separate earned and unearned fees
- 100% protection of your Trust or IOLTA account
- Complies with ABA & State Bar Guidelines
- Safe, simple, and secure!

Reduce processing fees and avoid commingling funds through LawPay.

Process all major card brands through LawPay

866.376.0950
LawPay.com/lacba

NOW AVAILABLE EXCLUSIVELY THROUGH
THE LOS ANGELES COUNTY BAR ASSOCIATION
YOUR BEST REFERRALS COME FROM OTHER LAWYERS.

We host business development meetings exclusively for attorneys.

With TEN, you can develop 50, 75, 100 or more of your peers as effective referral sources.

30 MONTHLY MEETINGS IN GREATER LOS ANGELES

www.tenesquire.com
www.fb.com/tenesquire@esquirenwotk