LEGAL MATTERS

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ATTORNEYS AT LAW

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Take Note of New Notary Laws

New notary laws went into effect in New Hampshire on January 1, 2006. The state has adopted the Uniform Law on Notarial Acts' guidelines for identifying signers. The three ways to identify signers are by (1) Personal Knowledge - you must know the individual well enough to eliminate any reasonable doubt as to their identity; (2) Identification Documents - acceptable documents include drivers licenses, passports and military identification which include a picture; and (3) Credible Identifying Witness - a credible identifying witness must be personally known by the signer and Notary. The witness must present an acceptable identifying document, take an oath that they know the signer personally and can not have any personal interest in the transaction.

New laws are in place for misconduct concerning notarial acts and can result in civil and criminal penalties. Several authorized notarial acts are widely used. These acts include (1) Acknowledgments - certifies the notary has positively identified a signer who personally appeared and admits having signed the document; (2) Oaths and Affirmations - an oath is a spoken, solemn promise to a Supreme Being made before a Notary, whereas an affirmation is a spoken, solemn promise on one's personal honor, with no reference to a Supreme Being; (3) Jurat - a Notary certifies having witnessed the signing by a signer who swears that the document is truthful; (4) Copy Certification - certifies that a photocopy is a complete and true reproduction; and (5) Witnessing a Signature - certifies that the signer personally appeared, was identified and the signing was witnessed on the date of the notarization.

There are other things to keep in mind. A Notary with a direct financial or beneficial interest in a transaction should not notarize a document for such transaction. The Notary may not notarize a document when he is a party to the transaction, either individually or as a representative of a corporation. A Notary may never notarize his own signature. Our law allows a Notary to notarize relatives, however, it is not recommended.

ANNOUNCEMENT

In January, Attorney Larry Salzman, of the Pacific Legal Foundation, provided insight to our guests into land use cases in the national spotlight. Attorney Salzman provided the audience with background about the organization and its mission. We extend our gratitude to the organization for their dedication and commitment to the preservation of private property rights. An insert is included with this newsletter providing information about the organization and membership opportunities.

CASE NOTE

On January 27, 2006, the New Hampshire Supreme Court set the record straight for one of our clients. We represented a developer who believed that he had purchased 172.9 acres of real estate in Windham adjacent to an existing condominium. After the purchase, and as plans for the development of the property were advanced, the condominium association asserted that our client actually purchased nothing and the acreage involved was part of the common area of the condominium.

The Rockingham County Superior Court agreed with the association and concluded that our client owned nothing and thus had no development rights. On appeal to the Supreme Court, we asserted that the property in question had been identified as "expandable land," which, under certain circumstances set forth in the condominium declaration, could have later been added to the condominium. Since the land was never added to the condominium, it was not part of the common area.

The Supreme Court agreed with us. The Court concluded that the condominium documents were clear and that the 172 acres had not been added to the condominium through the process set forth in the condominium declaration. Although there may have been an issue regarding an unauthorized subdivision of the property, the failure to obtain subdivision approval could not result in a transfer of title of the property to the condominium. The condominium association's request that the Supreme Court reconsider its decision was denied.

Condominium Property Tax Abatements

Unlike other states that have large fiscal contributions from a sales tax or income tax, our state's budget is dependent on property tax revenue. The following is offered to allow condominium owners and managers to understand the assessment process and to determine if a tax abatement is warranted.

The property tax is assessed and collected at the municipal level. The municipal assessors determine the assessed value of all properties in a community. In a base year, referred to as a general revaluation year, the assessments are determined by a mass appraisal process during which every property in the community is inspected and the critical, property specific, information is documented on a tax card. The assessors then survey sales of properties throughout the community and attempt to develop a system to arrive at market values for each property. The goal of the assessors during the revaluation process is to establish the fair market value of each property in the community. Once the total value of all property in the community subject to assessment is determined and the budget for the community is finalized, the tax rate is set. Our state has a universal tax rate that is applied to every class of property regardless of its status as residential, commercial or industrial.

Revaluations don't occur every year as general revaluations are expensive. Most communities undertake a general revaluation only once every five years. In intervening years, communities employ an equalization ratio, developed by a sample of sales, to adjust assessments to fair market value. For example, if the market value of a property is established at $100,000 during revaluation and the property tax assessment in that year is also $100,000, the ratio of assessed value to market value is 100%. However, property values are dynamic and they tend to fluctuate over time. Using the example above, if in a year following the general revaluation, the property initially valued and assessed at $100,000 appreciates and is now worth $115,000, the ratio is 87%. If the appreciation is consistent throughout the town, the ratio of assessed value to market value, the equalization ratio, is deemed to be 87%. The equalization ratio is determined annually for each community by the Department of Revenue Administration. Why is the ratio important? The answer is because it is the first step in any analysis to determine whether a property tax abatement is warranted.

The first step to determine if a property tax abatement is warranted is to review the final tax bill which includes the total annual assessment. Thereafter, obtain a copy of the property record card for your unit from the assessor's office. Study the tax card to confirm the property specific information such as square footage, number of bedrooms, etc. is correct. If an error is discovered, most assessors will make an immediate correction once the correct information is verified. Next, determine the equalization ratio for the community. A call to the local assessor should provide you with the proper ratio. Or, go to www.nh.gov/revenue/property_tax/equalization and find the ratio for your community.

With the ratio in hand, determine the market value of your unit as of April 1st of the tax year. Most unit owners have a sense of the value of their units. If not, an appraisal can be commissioned or comparable sales information can be obtained from the assessor's office. When the market value and equalization ratio are known, you can compare the figures to determine whether you are fairly assessed. For example, if the market value of your unit is $125,000 and the equalization ratio is 80%, a proper assessment is $100,000. In this scenario, an assessment above $100,000 is excessive and an abatement is warranted.

Since many condominiums have similar types of units, an assessment error is often compounded in assessments throughout the community. Due to this unique circumstance, it often makes economical sense to pursue abatements as a group or as a class action for all members of the community.

Seminar Announcement

We are proud to announce that Attorney John Cronin will be presenting at a National Business Institute continuing legal education seminar titled *Legal Aspects of Condominium Development and Homeowners' Associations* on May 15, 2006 at the Radisson Hotel in Manchester, New Hampshire.

The program will address issues that effect condominium development projects and association government. The information includes:

- essential basics and updates
- formation of common interest communities
- effective document preparation
- operation and management of homeowners' associations
- ethical considerations
- conflict resolution and claims against developers

Contact us for information on how to register!

Residential Contractors Take "Notice"

As of January 1, 2006, there is a new law in New Hampshire entitled "Residential Construction Defects, Dispute Resolution." This legislation, modeled after laws in 24 other states, was advanced by the Homebuilders and Remodelers Association of New Hampshire. The stated purpose of the law is "to encourage the out-of-court resolution of disputes between homeowners and contractors relative to residential construction defects" and applies to the relationship between homeowners and residential contractors.

Under the new law, the contractor must notify owners of the contractor's rights under the Act at the time of contracting for service when the scope of proposed work is expected to exceed $5,000. The contractor must provide written notice of the contractor's rights to address construction defects before the homeowner can file legal action if a dispute arises. The Act provides specific language that should appear in the notice. If the relationship includes third party warranties, the contractor must provide the warranty documents and claim procedures to the homeowner.

If a dispute arises over the work performed, the homeowner must provide a minimum of 60 days written notice of any "construction defect." A construction defect is "a matter concerning the design, construction, modification, or repair of a residence about which a person has a complaint against a contractor. The term may include any physical damage to the residence, or construction alteration, addition, or repair of an appurtenance to a new or existing residence." Within 30 days of the receipt of the notice, the contractor must provide a written response in which he proposes to address the matter by monetary payment, additional work or some combination. Alternatively, the contractor may request the right to inspect the asserted defect or reject the claim entirely. Although encouraged to allow inspection, the homeowner is not required to do so.

If the homeowner accepts an offer to resolve the matter and the contractor fails to follow through with the proposal, the homeowner can file the settlement documents with the court or an arbitrator and seek to compel settlement. The burden will then be on the contractor to explain why the settlement agreement should not be binding. Alternatively, the homeowner may file suit on the original claim without regard to the proposed settlement. If the homeowner files suit and later receives less than the settlement offer, the homeowner may be held responsible for the costs of the action against the contractor.

The statute also provides a list of items for which the contractor may not be held liable, including (1) normal shrinkage or settlement; (2) reliance on information from governmental agencies; (3) reliance on building codes; (4) normal wear and tear; (5) homeowner negligence in failing to perform normal and reasonable maintenance; and (6) homeowner alteration of the contractor's work. The language is general and somewhat vague, suggesting that there likely will be litigation to determine the scope of the various exclusions and the rights of owners and contractors under the Act.

The Impact of Impact Fees

Under established New Hampshire law, a Planning Board is statutorily empowered to set impact fees, as long as the municipality has adopted ordinances with "sufficient standards" to guide it in assessing these fees. Planning Boards have broad authority to set specific municipality impact fees for projects as long as the municipality has adopted an ordinance delegating the authority to the Planning Board and describing with some specificity the methodology the Planning Board must apply. Recently, the Supreme Court approved an ordinance where it set forth two factors that a Planning Board must consider in setting impact fees: anticipated expenditures for improvements to public capital facilities and the projected increase of dwellings and excess bedrooms. Another ordinance was upheld that required the Planning Board to use the "Mayberry" methodology based on eight variables developed by a planning consultant, Bruce C. Mayberry. In both towns, some of the variables considered in setting impact fees are arguably subjective, creating uncertainty for developers and broad discretion for the Planning Boards.

The Supreme Court also affirmed the constitutionality of this procedure despite plaintiffs' concerns about "taxation without representation." The Court pointed out that the residents themselves voted these ordinances into effect. (Apparently without regard to whether the developer was able to vote as a resident of the town.) Still, developers who are dissatisfied with the impact fee assessed by a Planning Board can always appeal the decision, or attack the assessment in court. They should be aware, however, that if the impact fee is based on some "proper standard" the Planning Board's decision will likely be upheld in Court.