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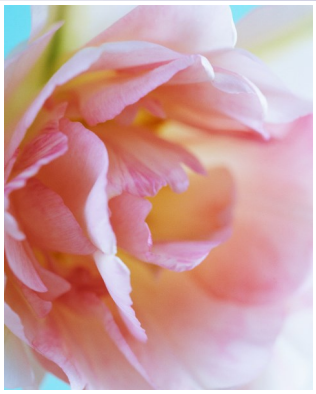
Monroe McDonough Goldschmidt & Molla
Attorneys at Law

SOUTHERN ARIZONA'S REAL ESTATE LAW FIRM

MONROE McDONOUGH GOLDSCHMIDT & MOLLA

Welcome to the MMGM Newsletter

"It is the month of June, The month of leaves and roses, When pleasant sights salute the eyes And pleasant scents the noses." ~ N P Willis



LOSS OF ACCESS DUE TO CONDEMNATION
By Karl MacOmber, Esq.

In May of this year, Division One of the Court of Appeals sided with a property owner against the City of Phoenix in *City of Phoenix v. Garretson*. In building its light rail system, the City had condemned property of Garretson which abutted Jefferson Street. As part of the condemnation proceedings, Garretson sought "severance" damages for his loss of access to Jefferson. The City persuaded the trial judge to deny that claim on the grounds that Garretson retained other, albeit circuitous, access to his property. The Court of Appeals disagreed. The Court of Appeals distinguished previous cases which had denied severance damages to property owners whose access to an abutting street had been modified but not totally cut off. Finally, the Court of Appeals noted that the damage claim of Garretson was not strictly "severance damages," and that it would be his burden of proving that he suffered damages and how much, in this new trial.

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Tucson Association of REALTORS®

National Association of REALTORS®

Tucson Women's Council of REALTORS®

Green Valley Association of REALTORS®

Southeast Arizona Association of REALTORS®

Santa Cruz County Board of REALTORS®

THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPACA or OBAMACARE) AND ITS IMPACT IN 2013 *By Heidi Rib Brent, Esq.*

This article is intended to just alert you to some of the new issues affecting individuals, businesses and trusts. For any more specifics regarding the taxes and W-2 reporting, contact your accountants.

No matter your political opinion about Obamacare, it has become a reality. With some 2700 pages of legislation and over 20,000 pages of regulation that have followed so far, it is complex to say the least. The impact in 2013 is taxes: a credit for small employer's health care insurance, two personal tax increases, additional W-2 reporting and a healthcare exchange notice that must be posted by all employers.

Small employers who provide health care insurance to their employees may be eligible for a tax credit up to 35% of the eligible employer paid health insurance premiums for tax years 2010 through 2013 and up to 50% for tax years beginning after 2013. Small employers are defined as those with (1) an average annual compensation level not exceeding $50,000 *and* (2) 25 or fewer full time equivalent employees (FTE), determined by all employees' hours of service divided by 2080 hours, rounded to down to the next whole number. (This is a *different* calculation of FTEs from that used in calculations for large employers regarding issues of providing insurance or paying penalties, which will be addressed in next month's newsletter.)

New tax increases for 2013 include a .9% additional Medicare tax on wages (earned income) in excess of $200,000.00 for a single person, $250,000 for married filing jointly and $125,000 for married filing separately (so this is quite a marriage penalty!). The employer must begin withholding the additional .9% in the pay period the wages exceed the $200,000, and the employee is responsible for paying the additional .9% if it accrues due to multiple employers or self-employment. This tax is not reduced by losses for self-employed individuals.

The other new tax in 2013 is 3.8% on net unearned or investment income for individuals, as well as for estates and trusts. The tax is imposed on individuals when adjusted gross income is over the threshold of $200,000 for a single person, $250,000 for married filing jointly and $125,000 for married filing separately (another marriage penalty) and is on the lesser of the net investment income or the modified adjusted gross income over the threshold. Trusts and estates also must pay the tax on the lesser of the undistributed net investment income or the excess of adjusted gross income over the highest tax bracket that begin for the tax year, which is $11,650 for 2012. This should encourage trusts to distribute net investment income annually and may also encourage either conversion of IRAs to Roth IRAs for the non-taxable distribution or charitable contribution of distributions from IRAs up to $100,000 to avoid taxes.

Additional W-2 reporting is required beginning with 2012. Large employers with 100 or more employees must report the aggregate cost of health insurance, both the employer's portion and the employees' portion, for the employees, their spouses and dependents, available through the group insurance plan. The penalty for not complying is up to $100 per W-2!

Finally, by October 1, 2013, all employers must post Health Care Exchange Notices for their employees. There are two versions of the notice, which can be printed from the Department of Labor website: one for employers who offer a health plan for employees http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf and another version for employers who do not offer a health plan for employees http://www.dol.gov/ebsa/pdf/FLSAwithoutplans.pdf.

DID YOU PAY ATTENTION IN ENGLISH CLASS?

By Michael J. Monroe, Esq.

A Massachusetts appellate court just made a decision and parsed out some English grammar in a manner that got a brokerage firm in some hot water. The facts of the case and the decision of the court are interesting.

In 2004 Sellers listed their home for sale with a real estate broker. One of the sellers advised the broker that the property was zoned as allowing residential business. There were no other businesses on the block. Buyer came along and saw the Broker's advertisements indicating the property permitted small business to operate at that property. Buyer was interested in opening a hair salon. Buyer made an offer which was accepted by Seller.

The purchase agreement contained the following statement: "The BUYER acknowledges that the BUYER has not been influenced to enter into this transaction nor has he relied upon any warranties or representations not set forth or incorporated in this agreement or previously made in writing.

Except for the following additional warranties and representations, if any, made by either the SELLER or the Broker(s): **NONE**." [See AAR Residential Resale Real Estate Purchase Contract Section 5c at lines 170 -184 for somewhat similar language.]

Of course, in short order, after closing escrow, Buyer learned his dream of opening a hair salon at the subject property was shattered. Naturally, Buyer sued the Broker and Brokerage Firm claiming misrepresentation. Based on the above language the lower court found in favor of the Broker and the Brokerage Firm. The Massachusetts Supreme Judicial Court affirmed the appellate court (lots of time and money!!). The Broker argued that she had no duty to confirm the status of the property's zoning and the above quoted language protected the Broker and the Brokerage Firm from liability. The court found that real estate professionals can be liable for negligent misrepresentation if they fail to exercise reasonable care in making representations to clients. The court pointed out that normally a real estate agent can rely on a representation of a client but such protections does not insulate the real estate professional from claims. The court indicated that the question is whether the real estate professional exercised reasonable care in making the statement(s) in question. Thus, if it is unreasonable for the broker to rely upon the information provided by the seller, then the broker has a duty to further investigate the information. So there is a question of whether it was reasonable under the circumstances for the Broker to make the representation made in this case about the zoning despite having received the information from the Seller given that there were no other businesses on the block.

The court took up the issue of whether the above quoted language from the contract attempting to protect the Broker was effective. The court noted that the Broker interpreted the language as indicating that the Buyer did not rely on any warranties or representations when entering into the purchase agreement since none was spelled out and the word "NONE" was inserted. However, the Buyer claimed he read the clause to mean that he could only rely on representations contained in the agreement itself, those made in writing, or those expressly provided at the end of the agreement thus allowing him to rely upon the advertisements prepared by the Broker. [Just when you think you have all your bases covered there is another argument!!] The court agreed with the interpretation of the Buyer saying it was the most plausible. NOW GET THIS. The court indicated that "not" applies to both of the phrases following it because the phrases are linked by the conjunction "or". Based on that construction, the Buyer could have relied upon the written representations made by the Broker in the advertisements for the property.

So, the Supreme Court sent the case back to the lower court for further proceedings. Meanwhile it is 2013. Remember, this started in 2004. The wheels of justice grind slowly.

See - DeWolfe v Hinghma, Ctr., 985 N.E.2d 1187 (Mass. 2013).

Thanks to National Association of REALTORS® for information about this case.

HOA OPERATIONS DURING SUMMER MONTHS

By Carolyn B. Goldschmidt, Esq.

The mass exodus from Tucson's summer heat is in full swing. As a result, this is the time of year when homeowner's association (HOA) boards have issues with absentee owners and absentee board members.

The Arizona Non-Profit Corporations Act requires boards of directors to meet at least once each year. Most HOA Bylaws require periodic board meetings and the reality is that vacation time does not mean that the operations of the association also go on hiatus.

Suspending Meetings. Some boards decide to forego having any meetings during the summer. If an association does not have a community manager, the Association President or Treasurer might be authorized to approve unbudgeted expenses within a specified spending limit. In larger associations, an executive committee of the officers is authorized to act on behalf of the board during the hiatus. If an expenditure arises that exceeds the authorized limit of these interim decision makers, a special meeting needs to be called or an action without a meeting needs to be organized.

Action Without a Meeting. The Non-Profit Corporations Act (and most bylaws) authorizes a board to take any action that could be taken at a board meeting to be taken without a meeting. All of the directors need to give their written consent, and the consents need to be included in the minutes filed in the corporate records reflecting the action(s) taken [A.R.S. §10-3821]. A board member's consent to the action can be submitted via email, fax, or U.S. Mail.

Including Absentee Board Members in Meetings. Condominium and planned community board meetings can include absentee directors via speaker phone or videophone attendance. A quorum of the board of directors of an association is permitted to meet by conference call if a speakerphone is available in the meeting room that allows board members and owners to hear all parties who are speaking during the meeting [Open Meeting Law: A.R.S.§§ 33-1248(D)(3) and 33-1804(D)(3)]. If an association is neither a planned community nor a condominium, then it would be best if the bylaws authorize a director's attendance via speaker phone.

Proxies. One board member can give his/her voting proxy to another board member if authorized in the Association's articles of incorporation or bylaws [A.R.S. §10-3824(G)]. A board member needs to realize, however, that voting via a proxy at a meeting brings the same responsibility for a decision of the board as when the director is present at the meeting.

Open Meeting Law. Generally, Arizona's open meeting law for condominiums and planned communities requires at least 48 hours prior notice to members of a board meeting. However, notice to members is not required if emergency circumstances require action by the board before notice can be given. This law authorizes an emergency meeting of the board to discuss business or take action that cannot be delayed until the next regularly-scheduled board meeting. The minutes of the emergency meeting must state the reason necessitating the emergency meeting and must be read and approved at the next regularly-scheduled meeting of the board of directors.

Enforcement against Absentee Owners. All too often a winter-only resident leaves someone in charge of maintaining his/her lot, and the maintenance is not done frequently enough or well enough, or is not done at all. Most CC&Rs have a "self-help" provision that allows an association's board to hire a contractor to do any needed clean-up on a lot after proper notice to the owner. Summer brings many weeds to our desert dwellings, and self-help to clean up an untended lot is usually the most economical and expedient enforcement option. Generally, the provision states that any money expended by the association becomes part of the assessment lien and can be collected like an assessment.

Maintenance issues are common on lots that have been abandoned by their owners in anticipation of foreclosure, but the lender is delaying the trustee's sale. In this case, an association still can exercise self-help, but may have to absorb the costs because collection would have to seek from the abandoning owner.

If you have any questions about this article or have a suggestion for a future article, please email me at cgoldschmidt@mmgm-law.com.

CLOUD ON TITLE AND STATUTE OF LIMITATIONS

By Karl MacOmber, Esq.

The Town of Lakeside-Pinetop gave Mr. Cook quiet title to a property by abandoning it to him.

Years after the abandonment, a neighbor, Mr. Huffel, requested the Town rescind its abandonment because the effect was to land lock his property. Mr. Cook filed suit and the Superior Court dismissed his lawsuit on statute of limitations grounds under the one year statute for bringing actions against a governmental entity.

Division One of the Arizona Court of Appeals reversed that ruling, holding that no statute of limitations applied to someone in possession of land who brings an action to remove a cloud on the title.

The Court of Appeals reasoned that as long as the cloud remains, the statute of limitations does not begin to run against someone in physical possession of the land.

MARK YOUR CALENDAR

Tucson June Events

8—SPLASH! At La Encantada

8,15,22,29—Bat Bridge Discovery

14-15—Guitars & Growlers Event

15—Beer Tastings Dinner at Club Congress

15—Father's Day Golf Classic

15—Brew at the Zoo

18—Martina McBride Concert

19-21—Sabino Canyon Evening Rides

20—Tucson World RefugeeFEST

20—Twilight Third Thursdays

8,15,22,29—Music on the Mountain

20-23—Ringling Bros Circus

21-23—Salute to the Buffalo Soldiers

22-23—Legends of the Night Sky

22—Night Wings Pima Air & Space

23—SUN-Day on the Solstice

26—Primavera Cooks Summer Dining Event

28—FC Tucson

28—Air Supply Concert

July — October — Center for Creative Photography

ARIZONA FASCINATING FACTS

The Center for Creative Photography at the University of Arizona holds more archives and individual works by 20th Century North American photographers than any other museum in the nation. Its archives contain an estimated 3.8 million items.