ROMERO MONTAGUE P.S.
ATTORNEYS AT LAW

Winter 2004 Newsletter

In The Trenches

Homeowners Have a Right to Build Their Dream Home Despite Association's Refusal

Have you or someone you've known ever had a dispute with a homeowner's association or an architectural control committee? Regrettably, this is happening with more and more frequency. Oftentimes the homeowner does not have the money, desire and/or time necessary to protect their rights. So, emboldened by the prospect of dictating to homeowners what they can and cannot build on their property, these associations can at times trample the rights of property owners.

We were privileged to assist one of our clients who decided to not only standup to their homeowner's association, but actually took them to court to not only get permission to build their house but to prove that the association's actions were unreasonable and made in bad faith. Our clients prevailed at trial, and even recovered most of their attorney's fees and costs in the dispute. Regrettably, the association members appealed the judgment entered in our clients' favor to the Washington State Court of Appeals. In October 2003, the Court of Appeals published their decision affirming the judgment our clients had secured at the trial court and giving them permission to build the house according to the plans submitted by them to the association. If you would like to read the entire published opinion, you can find it at 118 Wn. App. 746 (2003).

Community Property Agreement Upheld

Community Property Agreements in Washington control the disposition of property upon death of one's spouse. At times, however, a will may conflict with the terms of a prior community property agreement.

We were privileged to assist one of our clients who had her Community Property Agreement challenged by several individuals who claimed her deceased husband had executed a new will providing for distribution of his property contrary to that described in the Community Property Agreement. We are pleased to report that our client was successful in getting the Community Property Agreement not only validated, but the will effectively rendered void. Further, our client won her attorney's fees against one of the challengers to the Community Property Agreement.

Software Company Acquisition Closed

Buying controlling interest in the stock of an existing company can be a legally dangerous activity, since acquiring stock means you are buying both the "good and the bad" of the company. Unlike an asset sale, where you can pick and choose the assets and/or liabilities you want to buy, a stock sale means you are effectively acquiring all of the liabilities as well as the assets of the company. Regrettably, some if not most of these liabilities are not readily ascertainable, and at times are almost hidden from detection during the due diligence period.

We were privileged to assist one of our clients in the acquisition of effectively the controlling interest in a software company. Working with the client we were able to discover a number of potential liabilities or problems with the business prior to closing that were all able to be remedied to our client's satisfaction before closing. In fact, we were able to negotiate a new license agreement with a foreign company that effectively restored some of the inherent value in the company that arguably had been lost through the execution of a poorly drafted license agreement. A word to the wise: always turn over every stone, no matter how small you think it might be, before acquiring a company.

Copyright Infringement Case Goes Up On Appeal To 9th Circuit

One of our clients slugged it out in court on a copyright infringement case, wherein the plaintiff originally asserted a claim in the 9-figure range. While the jury verdict came in at the low six-figure range, both sides nonetheless have chosen to appeal the verdict to the 9th Circuit Court of Appeals.

We are pleased to be able to assist our client in this appeal to the 9th Circuit. We are hopeful that our upcoming trip to the 9th Circuit will be as successful as our last trip to the 9th Circuit on a copyright infringement case (See *Wade Cook v. Tony Robbins*, 232 F.3d 736 (9th Circuit reverses trial court and awards large six figure judgment to client).

ABOUT THIS NEWSLETTER: This is a publication for clients, prospective clients, and friends of attorneys and staff of Romero Montague P.S. If you have received this Newsletter, you fall into one or more of these categories. Our hope is that you will find this publication both informative and useful. The format is to update you on firm news as well as to provide you with information to help you and/or your business. Please let us know if we have served these purposes. We highly value your feedback. You can reach us at 425-450-5000, info@RomeroMontague.com, or www.RomeroMontague.com.

Client Profile: Summit Capital Advisors

Summit Capital Advisors (Summit) is a fee-based Washington State registered investment advisory firm located in Tacoma, WA (Old Town). Summit provides Wealth Advisory Services, including Financial Planning and Investment Management to nearly affluent and wealthy individuals and their families, as well as business entities with initial investment assets of $250,000 and above.

Summit's typical client is near or in retirement and is seeking a firm that specializes in portfolio management, retirement distribution, and taxation. They seek unbiased advice with individually tailored recommendations, improved after-tax results, assistance with wealth protection and transfer to heirs, and reduction of time spent dealing with advisors.

Summit differs from their competitors in several ways. First, they act as a "fiduciary" when advising you. This means, by law, Summit puts your interest first. They are paid by fees for services, unlike many of their competitors who are paid in commissions from the products they recommend. Many times there are hidden charges and fees. Those advisors, by law, put their firm's best interest first, not yours. At Summit, all clients are firm clients, not clients of the advisor. As such, each client receives the same high level of quality service from advisors that specialize in different areas and work together on your behalf. If an advisor in an area outside of Summit's expertise is needed (for example an attorney), a pre-screened professional is recommended.

Summit offers expertise in all areas of Wealth Advisory Services including Tax Planning and Preparation, Investment Management, Estate Planning, Asset Protection, Insurance, Expense Management and Reporting, Philanthropy, and Business Advisory Services. Summit has incorporated and improved the "best practices" of numerous advisory firms from across the nation into their unique Wealth Advisory Services package. This expertise allows Summit's financial advisors to deliver the best possible personalized advice without conflicts of interest.

Lastly, in a time of rampant client complaints and litigation, Summit is proud of its unblemished regulatory and legal record. To learn more about Summit, contact Jim Suits, CFP®, AAMS®, founder and President, at 253-589-1401 or email: jsuits@summitcapitaladvisors.net.

The Pitfalls of Administrative Law

By: Michael E. Wiggins

Sometime ago, a client, who I will call Bruce for purposes of this article, came to me after having just been through an administrative hearing with the King County Department of Development and Environmental Services. When I first met with Bruce, an *Administrative Law Judge* (ALJ) had just upheld a Notice and Order issued by the county against my client for various zoning violations related to his business and property.

It was apparent from the moment Bruce began telling me about his circumstances that he was in a fix. You see he, not agreeing with the ALJ's findings of fact and conclusions of law, had tried to appeal that judge's ruling. Not knowing the proper timeframe or place for service of his appeal, however, he missed the deadline for filing the appeal and, upon the county's motion, his appeal was dismissed. He no longer had the ability to dispute the merits of his case.

After Bruce's appeal was dismissed, the county sued Bruce in King County Superior Court to enforce the ALJ's ruling and, thus, the county's Notice and Order. Although Bruce wanted to argue the merits of his defense to the Notice and Order, he could not. Because his appeal had been dismissed on procedural grounds, he was prevented from doing so and, instead, could only argue the more limited issue of the county's ability to enforce the ALJ's ruling. Fortunately for Bruce, Romero Montague was able to settle his case under terms that were mutually beneficial to both him and the county.

Although Bruce had retained an attorney to assist him during the preliminary phases of the administrative process, ultimately he represented himself before the ALJ. *Pro se representation* (representing one's self) in an administrative law setting is dangerous. Why? Because the administrative process in Washington State is a labyrinth of statutes, codes, case law and regulations, through which even the most experienced attorney can have a difficult time navigating. Unaware of the procedural complexity of the administrative process, Bruce dove into that process on his own, not knowing that decisions he made at the very outset would preclude his ability to mount a defense later on in a court of law.

As much as an opportunity to vindicate rights, the administrative process must be seen as the only opportunity to develop the record for a later appeal. Litigants will usually be prevented from entering new evidence at a later stage in the appeal process, so having legal counsel to assist in making the record is imperative.

ALJ's have an enormous amount of discretion when it comes to adjudicating administrative disputes, and unfortunately, they are only quasi-judicial officials, often attached to the very agencies before which people find themselves defending their rights. Because the state's trial courts review an ALJ's decision under what is known as an "abuse of discretion" standard, it is critical that a litigant focus on ensuring that the administrative process runs as it should (according to the numerous federal, state and local statutes, regulations and ordinances) as he presents evidence and argues the merits of his case. When it comes to an appeal, the trial court is just as likely to reverse an ALJ on procedural grounds as it is on substantive grounds.

Like Bruce, most non-lawyers do not have enough knowledge or experience to be able to safely navigate, on their own, the maze that is administrative litigation. Over the years, Romero Montague P.S. has handled countless administrative matters for its business and individual clients. If you or your business finds itself on the receiving end of an agency action, call us early in the process, and, thereby, give yourself the tools you need to protect your rights both in the short and long term.

Michael E. Wiggins

Condos and Sex Offender Awareness

By: Justin Park

Sex offender registration statutes, or "Megan's Laws," are named after seven-year old Megan Kanka, murdered by a released sex offender in New Jersey. However, New Jersey was not the first state to pass a statute like Megan's Law. Five years before Megan's gruesome death, Earl Shriner, a previously convicted sex offender, abducted, raped and mutilated a seven-year old boy playing in a neighborhood park in Washington. Outrage over the fact that Shriner was released from prison without any notice to the public prompted passage of the Washington Community Protection Act. This Act contained the first sex offender notification provision in the United States. The federal government soon followed suit by enacting its own "Megan's Law" that required states to enact procedures for notifying the public of the presence of dangerous sex-offenders in the community.

The State and Federal Courts have upheld the constitutionality of the Washington notification statute. However, the courts and lawmakers have been careful to include on the actual forms used to notify the public a caveat that "threats, intimidation, or harassment of the offender will not be tolerated."

"May we suggest that an association take steps to protect it's members, while controlling the disbursement of information."

This mandate creates a quandary for landowners: to what extent does a landowner have a duty to disclose the presence of a sex offender? The question turns on whether a particular landowner has a duty to protect third-parties against criminal acts occurring on their land. Only when a "special relationship" exists between the landowner and the injured party will Washington courts find a duty to protect. Generally, private persons have no special relationship, and therefore no duty. However, business owners, hosts, and especially landlords could have such a special relationship that would require them to take steps to protect against criminal acts that would harm their customers, guests, or tenants. In Griffin v. West, the State court of Appeals found that such a relationship did exist between landlords and tenants. However, as that case was subsequently overturned by our State Supreme Court (on a different point), the law in Washington is still unsettled.

Even more difficult to understand is the question of whether the "special relationship" extends to a condominium homeowners association. A condo association combines some elements of the private person (private ownership and occupancy, lack of a business purpose) with some elements of the landlord (control of the common areas). Other states that have dealt with this issue have come out on opposite sides of the question. Hawaii, for instance, found no "special relationship" for a condo association, while California has found that such a relationship exists.

In light of the lack of clear authority on this issue, how should a condo association act when it becomes aware of a sex offender living within its association?

What is undisputed is that if a duty exists, the duty would be one of taking steps to prevent third-parties from "reasonably foreseeable" injury from a criminal act. This duty would then be balanced against the standard in the sex offender statute that requires that the information not be used to threaten, intimidate or harass.

Until the Washington Courts rule on this issue, may we suggest that an association take the following steps to protect its members, while controlling the dissemination of information that could be easily used for a harassing purpose:

1. Form "Block Watch" organizations. Properly organized Block Watch organizations have been shown to be effective in reducing crime. Most local police forces offer assistance in forming Block Watch groups. Block Watch captains, elected by their neighbors, receive specific information on sex offenders in their neighborhood. This option offers increased protection against all forms of criminal act as an additional benefit.

2. Include the sex offender database on a list of safety resources for unit owners. If your association has a newsletter, it can regularly publish a list of safety resources, including contact information for local police, fire and hospitals. In that list include a link to the public sex offender database. In King County, that database is found at http://www.metrokc.gov/sheriff/sosch.htm.

3. Inform security. If your association has a security force, the security personnel should be informed about the offender. They must be instructed not to harass or confront a law-abiding offender, nor may they disclose to other unit owners the offender's location. However, such preparation can have the same effect as a Block Watch, that of raising awareness.

These suggestions are in no way meant to be the final answer, as the Washington courts have yet to weigh in on this issue. However, these steps would allow a condo association to show that it is taking reasonable steps to protect its members. Until such a time as the law in this area is clarified, that may be all that we can do.

Even as I draft this article, I certainly hope that the courts never have to rule on this issue. That would mean that no one would ever have to suffer like little Megan Kanka and her family in New Jersey.

Justin Park

Special thanks to Tony Grover, our law clerk in the summer of 2003, and currently a third-year law student at Brigham Young University for taking the laboring oar in researching this issue.

[1] Lori A. Polonchak, *Surprise! You Just Moved Next to a Sexual Predator: The Duty of Residential Sellers and Real Estate Brokers to Disclose the Presence of Sexual Predators to Prospective Purchasers*, 102 Dick. L. Rev. 169, 173 (1997).
[2] RCW 9A.44.130-145
[3] *Russell v. Gregoire*, 124 F.3d 1079, 1083 (9th Cir. 1997).
[4] *Kim v. Budget Rent A Car* 143 Wn.2d 190, 195, 15 P.3d 1283 (2001).
[5] 97 Wn. App. 557, 984 P.2d 1070 (1999).
[6] See *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997).
[7] *Russell, supra*, 124 F.3d at 1082.

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Your Firm for Emerging Business

Michael Wiggins Selected for Board of Directors BYU/ Marriott School of Business Management Society

Romero Montague is pleased to announce that one of its associates, Michael Wiggins, has been selected to sit on the 2004-2005 Board of the Puget Sound Chapter of the BYU/ Marriott School of Business Management Society, which is a not-for-profit organization comprised of local, regional and national business leaders, entrepreneurs and professionals focusing on networking, business and career development, and fundraising for student scholarships. Mr. Wiggins has been with Romero Montague for almost 3 years and focuses his practice on general business, intellectual property and transaction law. If you would like more information on the BYU/Marriott School of Business Management Society, please visit the chapter's website at www.byuwa.org. If you would like to contact Mr. Wiggins, you can reach him by phone at 425-450-5000, or by e-mail at mwiggins@romeromontague.com.

Romero Montague Assists with Mock Trial Competition

For the 5th straight year, Romero Montague will be assisting the teenagers in Tom Rayback's class at Tiger Mountain Community High School prepare for this year's Mock Trial Competition. Put on this year by Judge William Downing of the King County Superior Court, the competition allows teenagers from high schools all over King County to get a feel for what it is like to litigate contemporary and often times complex legal issues in a real-life courtroom setting, complete with a real judge and a jury. "The practice of law has been good to me, and I want to be able to show teenagers that the law is still a noble, worthwhile profession," said Michael Wiggins, an associate at Romero Montague who has worked with the students at Tiger Mountain for the last three years. With the mock trial date rapidly approaching, Romero Montague wishes all the student participants the best of luck!