

Current Developments and Hot Tips

Mortgage Lending Institute of
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This paper is a collection of developments or events which we think are relevant to lawyers who practice in the area of commercial real estate finance, transactions and development. Some are reports of new developments and some are reminders of law and practice that we think might be useful to you. We are certain that we have overlooked many developments that you would like to see covered, but we have picked those things to report which we think would be helpful to most of you and maybe even entertaining in some ways. Much of the legal development in real estate finance has occurred in the area of consumer residential finance, which is beyond our topic and our skills. We have tried not to step on the toes of Mr. Weatherbie who so skillfully informs us of developments in Texas cases, but where we see a trend that he might not have fully dealt with, we do include some Texas cases.

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- IV. The Interstate Land Sales Act is still the law and there is a new sheriff in town.
 - A. Application of ILSA to Condos
 - B. The CFPB may be after your client
- V. Takings Cases of Interest to Prof. Rider and Maybe No One Else
 - A. Harris County Flood Control District and Harris County v. Kerr

B. Raisins in the Courtroom

VI. Use the Correct Form and Fill it in Correctly.

A. Whoa USA v. Regan Properties

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Conclusion

I. DEFINITION OF WATERS OF THE UNITED STATES AND ITS IMPACT ON REAL ESTATE DEVELOPMENT.

A. The Environmental Protection Agency and Corps of Engineers New Definition of “Waters of the United States”

In May of 2015, the EPA and Corps of Engineers jointly promulgated a final rule defining the term “waters of the United States” as that term is used in the Clean Water Act and other federal statutes and regulations. While the announcement from the EPA and COE stated that it did not extend federal jurisdiction but only better defined which tributaries to which water bodies were “waters of the United States”, critics think that the regulation expanded federal jurisdiction for permitting and enforcement actions. More than one million critical comments were filed in connection with the rulemaking, and the inevitable litigation has commenced. One Federal District Court has enjoined the enforcement of the rule in the states within the Circuit over which it has jurisdiction. The EPA and COE took the position that the rule was in effect in the rest of the nation. On October 9, 2015, the Sixth Circuit (where several suits in various Circuit Courts were consolidated) issued an injunction against the implementation of the new definition pending resolution of procedural matters.

There is no doubt that a definition of “waters of the United States” has been needed. The problem seems to be that a bright line definition is not possible or that the definition offered is influenced by politics – pick your bias. It is clear that we have new terms to deal with. There is in the rule a new class of “adjacent waters” that is broader than the previously used term “adjacent wetlands”. We have “ephemeral tributaries” covered while “ephemeral ditches” are not, and the difference is not defined. Covered by rule are all wetlands and water bodies within the 100 year floodplain and those waterbodies within 1,500 feet of the ordinary high water mark of a river or stream having a high water mark and further away on a case-by-case basis. Areas within 4,000 feet of a high tide line are covered if having a “significant nexus” with the tidal water body. The term “significant nexus” is defined broadly. We do have new exemptions for decorative ponds and the like, but for us in Texas there is a specific inclusion of “Texas coastal prairie wetlands”.

A copy of what we think are key parts of the definition is attached.

B. Why It Matters – Expansion of Permitting and Enforcement Jurisdiction

The rule will have implications for any organization which develops or alters land – including state and local governments, utilities, roadbuilders, pipelines, and others. Some projects that would not have previously required a COE permit will now be subject to regulation and some which could have benefited from expedited permitting procedures will no longer qualify.

The definition is not limited to land development permitting under the Section 404 program, but will also apply in stormwater runoff regulation, municipal stormwater system development and operation, and oil field spill prevention and response.

The class of beneficiaries of the new rule will certainly include engineers and hydrologists who will be fully employed in determining the classification of almost any land area other than the tops of hills and mountains!

II. YOU NEED TO KEEP UP WITH DEVELOPMENTS IN BANKRUPTCY LAW EVEN THOUGH YOU DO NOT WANT TO

Remember that the bankruptcy power is a specifically named power of the federal government in the US Constitution. Its benefits cannot for the most part be waived by a debtor. Even in economic “good times” lawyers for both borrowers and lenders need to be aware of changes in bankruptcy law so they can use the possible application of bankruptcy law in planning and documenting their transactions.

A. The American Bankruptcy Institute Report – Chapter 11 Improvements.

The American Bankruptcy Institute is a professional and academic commission which studies the function of Bankruptcy and related laws. It established several years ago a Commission to Study the Reform of Chapter 11. The Report of the work of that Commission was released in early 2015. It contains a wonderful history of bankruptcy law in the United States, recommendations for improvement of many aspects of Chapter 11 and suggestions for statutory changes needed to implement the recommendations.

The recommendations proposed by the ABI study are not likely to be adopted by Congress any time soon. The politicians in Washington DC seem to have numerous other issues on their plates and concerns with an election in 2016 on their minds.

But, it is reported to me by practitioners in Bankruptcy Courts across the country that this report is having an impact in that it is being used as a guide by the Bankruptcy Judges where the issues it addresses and the recommendations it makes are applicable to the cases in front of them and their discretion allows them to use the recommendations.

The Report is not concerned only with real estate finance matters. Real estate issues are not a major focus at all. But the Report does address numerous issues which regularly arise in real estate bankruptcy cases. Those issues include adequate protection issues on commencement and financing of the case, approval of Section 363 sales, recognition of the “new value corollary” for the retention of an interest in the property by the debtor, cram down interest rates, handling of executory contracts and leases, transactions free and clear of interests, credit bidding at sales or foreclosure sales, and the like. Any or all of these issues can be major concerns of

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