

Current Developments and Hot Tips

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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.

- I. FINCEN Expands Reporting Obligations to Purchases in Bexar County
- II. Definition of Waters of the United States and Its Impact on Real Estate Development.
 - A. The Environmental Protection Agency and Corps of Engineers Definition of “Waters of the United States” and Why It Matters – Expansion of Permitting and Enforcement Jurisdiction
 - B. USCOE v. Hawkes Co. Inc. – A Procedural Victory for Landowners in Wetland Cases
- III. You Need To Keep Up With Developments In Bankruptcy Law Even Though You Do Not Want To
 - A. Cram Downs in Multiple Debtor Cases – The Ability of the Debtor Expands
 - B. The “Golden Share” Technique Loses Its Luster
- IV. Lease Accounting Rules -- “I Told You So” -- but I got the Timing Way Wrong
- V. Convenience Fees Added to Rental Payments Taken Through On-Line Portals – Legal or Not? AG Opinion KP-0095.
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 - A. Endangered Species Compensatory Mitigation Policy
 - B. Flood Insurance Market Parity and Modernization Act

I. FINCEN EXPANDS REPORTING OBLIGATIONS TO PURCHASES IN BEXAR COUNTY

The Financial Crimes Enforcement Network (“FinCEN”), a division of the US Treasury Department, is expanding its requirement that U.S. title insurance companies investigate and report the identities of the real people behind companies buying residential real estate without bank financing to cover a total of six metropolitan areas, one of which is Bexar County, Texas. The orders, which aim to combat money laundering, apply to all-cash purchases of residential real estate for which payment is in excess of \$500,000.00 in Bexar County by any LLC or other corporate or partnership entity. The order is authorized, it is said, by the Patriot Act.

Similar orders have been in effect since January, 2016, for all-cash purchases of high-end residential property in New York City areas and Miami areas. The new orders extend the areas involved in the investigation and reporting obligations to Los Angeles County, San Diego County, San Francisco areas, as well as Bexar County. The order is in effect for six months from late August, but the older orders have been extended so the new order may well be extended also when it is set to expire in early 2017.

FinCEN reports that the results of the earlier orders for New York City areas and Miami areas have identified possible criminal activities. FinCEN has stated that the title companies are not suspected of wrongdoing, but the title companies are common participants in the kinds of transactions that FinCEN wants to investigate and that allows the Treasury Department to require them to investigate and to provide information.

The Texas Land Title Association and the American Land Title Association have sent bulletins giving more details to their members and set up arrangements for members to get answers to questions.

II. 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” – An Update

At this event last year, we told you that 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.

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.

The current status is that the litigation has been consolidated in the Sixth Circuit Court of Appeals under the case name Murray Energy Corp. vs. United States DOD, No.15-3751, and the rule has been stayed nationwide pending resolution of the case. Challenges to the rule are both procedural and substantive. We have not seen any projection for timing on resolution of the litigation. The stay by the Sixth Circuit means that the COE definition of “waters of the United States” issued in 1986, and subsequent guidance, is still in effect and its primary concern is the finding of a “significant nexus” between the area to be disturbed and streams of other bodies which are clearly “waters of the United States”.

B. Developments in Jurisdictional Determinations of “Waters of the United States”.

While the challenges to the new definitional rule go on, the US Supreme Court decided a procedural issue which will impact the practical application of that rule, once a definition is determined. The Court ruled that landowners no longer need to await enforcement action before challenging an Army Corps of Engineers determination that waters of the US exist on a property. The case is U. S. Corps of Engineers v. Hawkes Co, Inc., 136 S. Ct. 1807, decided May 31, 2016.

The Court decided that the COE determinations are immediately reviewable as final agency actions under the Administrative Procedures Act. Prior to the Hawkes case, if the COE issued a jurisdictional determination that an owner’s property contained waters of the United States, the property owner could not directly challenge that determination but could only go through the long and expensive permitting process or choose to proceed with its development without a permit and await an enforcement action from the Justice Department where a judicial review (and if wrong significant penalties including jail are possible) in that proceeding.

The hope of property owners and developers is that the availability of an immediate challenge to a decision by the COE will mean that the COE is less likely to make a jurisdictional determination. This administrative law principle will apply to the new definition if it is upheld.

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