ACREL News

President's Message

Summer has drawn to a close, and the arrangements for our annual Fall meeting in Washington, D.C. are in place. The meeting will be held from October 29, 2009 through October 31, 2009 at the JW Marriott in Washington, D.C. Complete information regarding the programs and tours is available on the College website. Meg Meister, Jill, and Henri have come up with a truly outstanding meeting. On the program side, we will have presentations on the status of the real estate markets, green leasing, workouts, and presentations by four of our substantive committees (Title Insurance, Insurance, Common Interest Ownership, and Capital Markets and Finance). We will also have the usual array of workshops. For the first time in several meetings we will also have a voluntary public service project on Saturday afternoon, working with the District of Columbia Public School System. Phil Horowitz has been working on setting that program up, and more details will be forthcoming.

On July 20, 2009, Kevin Shepherd, Linda Striefsky and I met with Jill and Henri at the ACREL offices in Rockville for our annual review of the affairs of the College and to plan for future events. As always, we had a very productive meeting and the College and its finances are in good shape, even in light of the status of the economy. The Executive Committee is working on revising the College's investment policy, which has not been revisited for a number of years, and we will be in a position to discuss the revisions with the Board at the Fall meeting.

One other project underway is the reprising of Bob Wright's presentation in Puerto Rico on wind leases for an ALI-ABA webcast. Through the efforts of Mark Mehlman, the College entered into an arrangement with ALI-ABA in April which provides for the College providing material and speakers to ALI-ABA, ALI-ABA providing distribution of the program, and the splitting of revenues after the recovery of the associated costs. This will be the first program done under the new arrangement, and we are looking forward to implementing more of these types of presentations in the future.

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President's Message

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There was a meeting of the Synergy Group on July 31, 2009 in Chicago in conjunction with the ABA meeting. Mark Mehlman and Kevin Shepherd attended on behalf of the College, and it was the first meeting where all members of the group were present either in person or by phone (The Synergy Group is comprised of representatives from the College, the American College of Mortgage Attorneys, The International Council of Shopping Centers Law Conference, the ABA Real Property, Trust and Estate Law Section, the ABA Section of Business Law, the American College of Commercial Finance Lawyers, and the Commercial Real Estate Women Network). The Synergy Group determined it would not generally look to identify individual projects to work on, but would focus on matters where the collective participation of all organizations would add additional weight, such as the efforts (led by Kevin Shepherd) in connection with the Financial Action Task Force on Money Laundering. The group plans to meet at least annually, with the next meeting to be in conjunction with the ABA Annual Meeting in San Francisco.

As a further example of the benefits of cooperation among groups, a joint conference call of the Title Insurance Committees of the College and The American College of Mortgage Attorneys was held on August 25, 2009 to discuss recent developments regarding fund payments relative to claims in respect of Old Republic Title Insurance Company, and recent litigation involving Lawyers Title Insurance Corporation, Ticor Title Insurance Company and Fidelity National Title Insurance Company wherein the insurers are seeking to defend claims on title insurance policies because of alleged deficiencies in the underwriting practices of the insured originating lenders. A more detailed report of the results of this call will be included in a future newsletter and posted to the College website, and the two Title Insurance Committees are considering forming a joint task force to study the issue further.

I hope each of you will be able to attend the Fall meeting in Washington. In addition to an outstanding program, it will be a great time to get together and visit with your Fellows from around the country and exchange information on the current economic situation. I look forward to seeing you there.

Best regards.

Phil

Philip D. Weller, President

STAFF BOX

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Report of the ACREL Nominating Committee

The ACREL 2009 Nominating Committee, as appointed by President Phil Weller, consists of Mark Mehlman (IL) Chair; Jay DeVaney (NC), Rebecca Fischer (CO), Mike Rubin (LA), Jonathan Shils (GA) and Jo Anne Stubblefield (GA).

Pursuant to Article VI, Section 2(b) of the Bylaws, Kevin Shepherd will automatically become the President on January 1, 2010.

Pursuant to Article VI, Section 2(a) of the Bylaws, the Nominating Committee nominates the following individuals for election to the offices indicated for terms commencing January 1, 2010:

Linda Striefsky	President-Elect
Ann Saegert	Vice-President
Earl Segal	Treasurer
Jonathan Shils	Secretary

Pursuant to Article V, Section 3 of the Bylaws, the Nominating Committee nominates the following individuals for election as Governors for three-year terms commencing January 1, 2010:

Angela Christy
Rod Clement
Ray Iwamoto
Jo Anne Stubblefield
Roger Winston

The Committee appreciates having had this opportunity to nominate future leaders of the College. ■

ACRELades

In July, **Robert Harms Bliss** was presented with the 2009 Distinguished Texas Real Estate Attorney Lifetime Achievement Award by the Real Estate, Probate and Trust Law Section of the State Bar of Texas. Past ACREL recipients include **Bernard O. Dow, James H. Wallenstein, William W. Gibson, Jr., J. Cary Barton, Wm. Terry Bray, John S. Hollyfield,** and **Sanford A. Weiner.**

In addition to those reported in past issues of the ACREL News, Best Lawyers in America has recognized these ACREL Fellows as Real Estate Lawyers of the Year for 2009: **Elwood Cahill**, **Neal J. Kling**, and **Leopold Z. Sher** in New Orleans, Louisiana, **Richard A. Rosner** in Cleveland, Ohio, **Harold Parkman** in Mobile, Alabama, **Thomas Ellison** in Salt Lake City, Utah, and **Thomas Page** in Portland, Oregon. Best Lawyers in America has recognized **David H. Fishman** as Baltimore's Real Estate Lawyer of the Year for 2010.

Roger D. Winston became chair of the ABA Section of Real Property, Trust and Estate Law on August 1, 2009, and **Susan G. Talley** has been re-elected Secretary of the Section. **Robert J. Krapf** was elected to the Council of the Section at the same meeting. ■

Property Tax Fundamentals

by Michael G. O'Flaherty, Stinson Morrison Hecker LLP, Kansas City, MO[1]

The property tax system represents an important component of the real estate world. However, it is an area where the fundamentals are not that well understood by practicing real estate lawyers. That was certainly true for me prior to my accepting appointment as Director of Assessment of Jackson County, Missouri.

Property taxation is very local in nature. In fact, there can be important variations from county to county in a given state. However, at the core are certain common, fundamental principles. The International Association of Assessing Officers has, since 1990, published surveys of the property tax systems in Canada and the United States, the most recent being in 1999[2]. Using the IAAO Survey, and drawing on some state-specific examples, our goal here will be to cover some of the more important of these basic principles.

1. What is the Subject of Property Taxation?

The constitution and statutes of the particular jurisdiction will dictate what types of property can be taxed. Real property is generally taxable. However, there are variations among the states as to personal property, with a large number taxing machinery and equipment and tangible personal property, but a much smaller number taxing such items as inventories and intangible personal property.[3] From the standpoint of the local assessor, it can be very difficult to deal with personal property, which in many cases is dependent on self-declaration. The IAAO Survey reported a trend to remove various classes of personal property from the tax base.

2. The Valuation Process.

A. Who Assesses?

For the most part, property is valued for assessment purposes at the local level. However, it is common for certain property, such as that of railroads, utilities, telecommunication companies and the like, to be centrally assessed at the state level.

B. Valuation Date and Standard.

The usual approach is to estimate the fair market value of the property based on its highest and best use as of a certain date. However, there are exceptions to this standard, such as (i) assessing on the basis of value at the time of acquisition as opposed to a more current date, or (ii) requiring that valuation be based on current use even if such is not the highest and best use.[4]

Reliable, current sales information is essential to the appraisal process, particularly

1 Michael O'Flaherty is Of Counsel in the Kansas City office of Stinson Morrison Hecker LLP and chairs its Property Tax Issues and Valuation Appeals Practice Group. Previously, Mr. O'Flaherty served as Director of Assessment of Jackson County, Missouri, from May of 2003, to August of 2007.

2 Int'l Ass'n of Assessing Officers, Property Tax Policies and Administrative Practices in Canada and the United States (2000). This will be referred to herein as the "IAAO Survey".

3 At the time of the IAAO Survey, only eleven (11) states provided for the taxing of intangible personal property.

4 The Missouri State Tax Commission has held, for example, that as long as property is being actively used for an agricultural purpose, it is to be classified as agricultural which will result in a lower assessed value and ultimate tax bill. Park 370 Development v. Muehlheausler*,* App. No. 02-10275-02-10286 (Mo. STC, Dec 19, 2003).

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with regard to single family residential property. Accordingly, many jurisdictions require sales price disclosure. At the time of the IAAO Survey, this number stood at 35.

C. Frequency of Valuation.

The question here is if reassessment or revaluation occurs annually or at different intervals.[5] Nationwide, there are many different approaches, with the trend being towards reducing the interval between reassessment. In periods of increasing values there can be a form of sticker shock, and the complaint often is with the cycle-over-cycle increase as opposed to the value itself that is placed on the property. While values generally remain in place over the entire assessment cycle, there is often a proration process for new construction.

D. Classification.

If there is no classification in a property tax system, all property would be valued at its fair market value and taxed uniformly. As the data compiled in the IAAO Survey shows, that is rarely the case, and properties used for different purposes often bear a materially different percentage of the ultimate tax burden. In one form of classification, the actual tax is a function of applying the tax rate to an assessed value, with the assessed value being a percent of market depending on the use classification. Another approach is to have differing tax rates for different classes of property.

E. Property Tax Relief.

The increase that occurred in past years in property values, particularly in single family residential, gave rise in the political world to calls for property tax relief. These have included tax credits for seniors and handicapped, limitations on increases in assessments and limits on tax rates or revenue growth for the taxing jurisdictions.[6]

3. The Appeal Process.

The right to an appeal is a necessary part of the process. Though there are many differences among the states, the common element noted by the IAAO Survey includes a number of hierarchical steps, often starting with an informal meeting or hearing and working all the way up to a potential court action.

The process normally starts with some form of notice as to valuation. The requirement may be that the notice be given to all owners or only to those experiencing an increase. The first step may be in the form of a meeting with the assessor's office, while, in others, the first step may be an actual hearing before a local board with the possibility of an informal meeting in advance. The next step is often to a state body and ultimately to the judicial system. All along the way, there will be deadlines that must be respected. Often, the administrative processes must be exhausted, meaning that each base must be touched in proper order. There may be requirements, such as the submission of income and expense information for rental

5 Missouri requires that real estate be reassessed every other year on the odd year, while neighboring Kansas requires an annual reassessment.

6 In a recent twist, several school districts in Jackson County, Missouri (metro Kansas City), brought suit against the local assessor because of a drop in some values. *See* Blue Springs Reorganized Sch. Dist. No. 4 v. Jackson County, No. 0916-CV24152 (M0. 16th Cir. Filed Aug. 6, 2009). As of this time, the efforts of the districts have not been successful.

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property. A critically important question that must be addressed is whether taxes must be paid on a current basis in order to keep the right to appeal alive.[7]

4. Exemptions.

State law, often the constitution, will dictate what property is exempt from property tax. The constitution may be self-executing and exempt certain types of property, while other cases require legislative action. The range of exempt properties can include cemeteries, historical properties and the property of charitable organizations, educational institutions, governmental entities, hospitals and other health care institutions and churches and other property of religious organizations. An important question in cases of charitable, religious and similar exemptions is whether both the ownership and use must be on a non-profit basis. Under this approach, a church used as a church is exempt, but the commercial office building owned by the church is taxable, and while the typical non-profit hospital is exempt, for-profit ownership may make the property taxable.

Related to exemptions but materially different are the various development incentives that deal in one way or the other with property taxes. Some of these provide for forms of abatement, while in other cases, such as tax increment financing projects, a portion of the taxes are separated from the general fund and used to pay for project expenses.

Any discussion of taxes, property or other, runs the risk of being deemed incomplete without that famous line: "In this world, nothing can be said to be certain, except death and taxes."[8] Margaret Mitchell put it differently in *Gone with the Wind, 1939,* "Death, taxes and childbirth! There's never any convenient time for any of them." Take your pick. ■

7 Kansas and Missouri offer contrasting examples in this area. In Missouri, it is necessary to pay under protest taxes that are being appealed. Mo. Rev. Stat. §139.031.2 (2008). Kansas, on the other hand, has two appeal processes, and under one of these, the equalization process, a payment under protest is not required as a condition to the equalization process, although failure to pay taxes can result in various penalties including, ultimately, foreclosure. Kan. Stat. Ann. § 179-2005(c) (2008).

8 This proverb is attributed to no less than Benjamin Franklin in a letter in 1789 to one Jean-Baptiste Leroy, reprinted in *The Works of Benjamin Franklin,* 1817.

The Endangered Future of Affordable Housing Exactions

by Roger Bernhardt, Professor of Law, Golden Gate University, San Francicso, CA &
David Callies, Kudo Professor of Law, William S. Richardson School of Law, Honolulu, HI

Roger Bernhardt begins: If the enforceability of local exactions imposed by communities on developers to promote affordable housing in their environs interests you, then do read the decision in *Building Industry Association v City of Patterson*, 171 Cal App 4th 886, given its entertaining facts, its complicated logic, and its ominous implications for this cause. The decision was rendered by a Court of Appeal in March, and in June, the California Supreme Court denied review and refused to de-publish it.

As for the facts, in 2003 a developer and a city signed a development agreement for the construction of 214 residential housing units. The agreement called for the developer to pay an affordable housing in lieu fee of $734 per unit - or more as determined by a "revised fee schedule, including indexing as provided by ordinance at the time of the adoption of the fee, providing the same is reasonably justified".

The affordable housing fee had originally been set at $319 per unit in 1995, but had been increased to $734 in 2001, based upon a "leverage" study that assumed that the city would only need to itself cover 9% of the cost of subsidizing affordability. But then, a second study, in 2005, went off the rails: it concluded that, based upon a "needs assessment" of all of Stanislaus County, the City of Patterson needed to develop 642 units of affordable housing - which would cost a total of $73.5 million! Since there were only 3500 "unentitled" residential lots yet available in the city, the price of subsidizing each affordable unit would require imposing a charge of $20,946 on each of those undeveloped lots, not $743, as originally thought. So the fee was increased from $743 to $20,946 on each of the developers 214 lots.

A trial court found that the City's "methodology" was reasonable, and upheld it, but the Court of Appeal reversed that decision, and invalidated the new fee. Its opinion went out of its way to avoid taking any easy way out. The court declined to hold that the developer had any vested rights to the earlier, lower fee, given the specific language of the development agreement. It also held that under the development agreement, the City was free to charge any new fee that was "reasonably justified", and was not required to abide by the earlier leverage formula it had used in originally calculating that fee. Nor could the developer get itself protected by a heightened constitutional scrutiny theory a la *Nollan/Dolan*; based on the California Supreme Court decision of *San Remo Hotel v San Francisco*, 27 Cal 4th 643, 2002, the City of Patterson was only required to show "a reasonable relationship between the amount of the fee, as increased, and the 'deleterious public impact of the development.'"

Using that kind of test, the court "located nothing that demonstrates or implies the increased fee was reasonably related to the need for affordable housing associated with the project."….No connection is shown . . . between this 642 figure and the need for affordable housing associated with new market rate development." Since the city failed to demonstrate any reasonable relationship between the new fee and any deleterious impact connected to the project, it was invalid

Technically, one can read this decision as holding merely that the city's interpretation of a development agreement that it executed with a developer was incorrect, but I took it to say that a town's entire affordable housing impact fee—whether imposed by way of a develop-

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ment agreement or by an across-the-board ordinance—might not pass constitutional muster.

To get an outside perspective on this case, I turned to David L. Callies, the Kudo Professor of Law at the University of Hawaii's William S. Richardson School of Law. Given his credentials, it made more sense for me to ask the questions and have him give the answers. So, David, what is your reading of Patterson?

David Callies: The latter. Moreover, it seems to me the reasoning of the case applies not only to housing set-asides/fees/exactions, but all land development conditions/in lieu/mitigation fees. Although *Nollan/Dolan* intermediate scrutiny may not apply, the court is clearly requiring some demonstrable connection between a problem caused by the development/developer and the fee/set-aside.

RB: But isn't there the notion that across-the-board, wide-ranging impositions, especially those legislatively enacted, should survive judicial scrutiny more successfully than individualized, adjudicative decisions that come out of appointees in agencies? If that applies here, might Patterson be better able to do by ordinance what it could not get away with in a development agreement?

DC: True, if legislatively enacted according to the California Supreme Court in *Ehrlich v Culver City* (1996) 12 C4th 854, 50 CR2d 242, though I admit to the same puzzlement as Justice Thomas in his dissent from the U.S. Supreme Court's denial of certiorari in *Parking Ass'n of Georgia v City of Atlanta* (1995) 515 US 1116, 1117, 132 L Ed 2d 273, 274, 115 S Ct 2268: Certainly, legislative bodies can impose conditions that are just as unconstitutional as those imposed by administrative agencies. The rest of the California Supreme Court's *Ehrlich* decision is a stark example of what results from the mindless application of legislative deference: upholding the levying of a public art fee on the developer of a small condominium complex, without any attempt to link that development with a presumably public desire for public art. How does any private development even remotely drive a need for art?

RB: Getting to the merits of the fee formula itself, the opinion's requirement that the city demonstrate a "reasonable relationship between the amount of the fee, as increased," and the "deleterious public impact of the development" looks like it might be a possibly insurmountable hurdle. What do you think of the idea of calculating the housing fee by 1) starting with an estimate of the countywide need for affordable housing, 2) allocating 642 affordable housing units to this town, 3) estimating each unit to require a subsidy of $55,000-$165,000 (for moderate or low income householders), for a total of $73.5 million; and then 4) spreading out that total subsidy cost among the 3500 remaining unbuilt lots in the town, in order 5) to get to a fee of $21,000 on each new building permit? Do you think that will ever be upheld as a legitimate way to start?

DC: We don't get to proportionality if there is no nexus. However, even if one gets past nexus, the suggested calculation above places the entire burden for affordable housing on new development—which, I suspect, will not pass even a watered-down version of a proportionality test. Thus, for example, why should all unbuilt units pay an identical impact fee? Why shouldn't the city pay a substantial portion of the cost of affordable housing, once the fee has been separated from the need for lack of nexus? Note that the Ninth Circuit Court of Appeals was impressed by the City of Sacramento's willingness to pay half the cost of the affordable housing need generated by the proposed hotel (according to the city's studies) in *Commercial Builders of N. Cal. v City of Sacramento* (9th Cir 1991) 941 F2d 872.

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RB: So are you saying that you think a court (or this court) is saying that there is no nexus, or the nexus logic in this case didn't work?

DC: The latter. The court found no demonstrable relationship between the housing fee and the public impact of the contemplated/proposed residential development. Therefore, considering proportionality—the size of the fee—in this circumstance is moot.

RB. Let's look at some of the particular components of the fee formula themselves. How does a proactive community justifiably estimate its local need for affordable housing? Can it just accept the number given to it by its county or regional government agency? If there is no such higher authority to give it a number, is there a way for it calculate its own number? Would it have to make a census of its residents and then derive the shortfall mathematically by comparing the median income of its residents with the median cost of its housing? Given the emphasis on regional housing needs, wouldn't the city also have to look at the economic situation of the outsiders who might like to move into town but cannot afford to do so?

DC: The issue is not the community's need, but the legality/constitutionality of the mechanism that it chooses to use to attempt to meet that need. Extracting (some would say extorting) the housing necessary to satisfy that need from a housing provider of more expensive housing is a tax, pure and simple: It is a means of raising revenue or its equivalent. Impact fees, exactions, and dedications, on the other hand, represent exercises of the police power, not the power to tax and raise revenues. The city is entitled to meet those "needs" through land development fees and exactions only if those "needs" are generated by the proposed development. If the development is commercial, then depending on the nature of that commercial use, the Ninth Circuit's *City of Sacramento* decision methodology would be apt: Do a study that determines the number of low-income employment opportunities generated by the development and the shortage of available affordable housing to meet that development-generated need, and then assess the commercial development a share of the cost incurred to meet that need.

RB: Assuming that it comes up with a formula that works, how does a community that does create some affordable housing allocate it? Since it clearly can't reduce housing costs across the board for everybody, how does it decide who the winners are, i.e. those who get to move in to the new units? Auctions probably would be self-defeating, so should it to go lotteries or waiting lists? And who should be in the pool of eligible winners; can only existing residents get on the list?

DC: The mechanism simply needs to be fair; going beyond residents, however, abandons any pretense of justification based on community need. Since community need is the only basis for levying such a fee in the first place, only residents should be counted in determining that need. Lotteries are pretty random methods for determining who is entitled to a limited amount of affordable housing. Better to use waiting lists with each resident's position on it based upon a combination of factors like current income and family size.

RB: The biggest issue for me is: How can a city ever show a "deleterious public impact" from a housing development that creates a need for affordable housing? I can see the linkage between industrial or commercial developments and affordable housing, but where is there any nexus when the new development is residential instead? Do the new middle-class homeowners moving in need to have their maids and gardeners not have to commute from too far away? (And in that case, a better solution might

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be larger houses with servants' quarters rather than lower priced housing somewhere else.)

DC: That's the point: The city can't show a deleterious impact on affordable housing resulting from a residential development.-There isn't any. I think these mechanisms won't hold up in court anywhere, and following the *Patterson* decision and the Supreme Court's decision in *Lingle v Chevron U.S.A. Inc.* (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074, I don't think they're constitutional in California either.

RB: Might these issues be any easier with a different formula? Might an inclusionary zoning ordinance that just requires developers to set aside of some percentage of units for low or moderate income housing more safely survive the Patterson standard?

DC: Inclusionary zoning in the context you suggest is both illusory and misplaced.-The concept was originally used against recalcitrant local governments (as in the New Jersey *Mt. Laurel* litigation (*South Burlington County NAACP v Mount Laurel* (NJ 1975) 336 A2d 713)) that failed to provide for a fair share of affordable housing by, among other things, zoning only for middle to high-end housing. To turn it on its head and apply it to a landowner developer is flawed from the beginning.

RB: Could affordability be brought about by a tax instead, say, an excise tax on the privilege of developing land? That would be harder in California, because of Proposition 13, but since the town's residents (those who vote) already live in completed houses that would not be subject to the tax, its financial burden would fall only on the owners of undeveloped land, who probably don't vote.

DC: Sure, a tax would solve all the legal problems.-It recognizes such housing exactions for what they are: revenue-raising measures (as opposed to police power exercises) with no connection to the residential project to which they are applied.

In sum, the *Patterson* case requires some reasonable connection between a land development fee or exaction of any kind and a need that the "charged" developer causes by reason of its development. Gone are the days when a California local government could require the payment of such fees and exactions simply because local government had a need and the developer needed a development permit. Certainly, this is a fair result. No one is quarrelling with the public need. The issue is—and always has been—who pays, and on what basis.

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RB. Before we finished polishing the comments above, another decision came down that we thought ought to be tied in to them. On July 22, a different court of appeal rendered its decision in *Palmer/Sixth Street v City of Los Angeles*, 175 Cal.App.4th 1396. What had happened there was that in 1991 the city of Los Angeles had adopted a specific plan for the preservation of the low income characteristics of one of its neighborhoods, requiring that the demolition of any low income housing there had to be offset by construction of new affordable housing either subject to rent control or else by payment of an in lieu fee of \$80000-\$100000 for each unit so lost. This 60 unit building had been torn down in 1990, but the City's specific plan reached back to 1988, leading it to include in the conditional use permit it issued for the developer's new 350 unit project that it create 60 replacement low income rental units or pay an in lieu fee oh \$5.8 million.

Both the trial court and appellate court held that the city's demand violated the vacancy

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decontrol requirement of the California Costa Hawkins Act, which declares that residential landlords may "establish the initial and all subsequent rental rates" for their dwelling units. The City's requirement that 60 of the new units be let at affordable rates was therefore in violation of and preempted by the statute. The in lieu fee alternative, although not mentioned in the Costa Hawkins act, was so intertwined as to be also preempted. That meant, of course, that the city of Los Angeles would be no more successful at mandating affordability through rent control measures that the city of Patterson had been in achieving affordable pricing.

This is technically a rent control decision rather than a land-use exaction one, and will not be too informative to residents of other jurisdictions that lack local rent control ordinances or statewide preemption of it. But the court's holding that a city's demand on a developer to replace 60 units of low income housing that had been demolished in a particular neighborhood ran afoul of a statutory vacancy decontrol mandate seemed to me to demonstrate a kind of willingness to stretch out to prohibit a local government from overreaching. After all, this was not a classic citywide rent control ordinance but rather a conditional use permit applicable only in special circumstances. Do you agree David?

DC: Well, sort of. The circumstances are sufficiently odd that it is difficult for me to draw any generally-applicable conclusions.

RB: When this holding is combined with *Patterson*, the future of affordable mandates seen even bleaker. *Patterson* prohibited a city from mandating affordable sale prices, and now this case prohibits it from mandating affordable rental prices. Is there anything left?

DC: Sure: mandatory set-asides on commercial and industrial development that really does generate a need for nearby affordable/workforce housing, just like the 9th Circuit held in the City of Sacramento case way back in 1991. It's still all about nexus and proportionality.

RB: Well, this case does illustrate a situation where the nexus that was missing in *Patterson* might be found. You and I feared that a local government might never be able to satisfy a court of the need to charge a developer for affordable housing that it wanted to see built, but perhaps it could make such a demand when that developer began the project by demolishing some affordable housing that was already there?

DC: Your fear, Roger, not mine. I never did buy the city's notion as accepted by the California Court of Appeals in the Culver City case that a socially useful or desirable private facility like a sports club (or, for that matter, an inexpensive dwelling) becomes affected with or coupled to a governmental/public interest to which government can attach replacement conditions to a demolition or change-of-use permit. If government wants, or the public needs (not necessarily the same thing…) low income, affordable, workforce housing then it can either (1) build it (2) subsidize it or (3) provide incentives to the private development sector, such as the obviously popular density bonus which California authorizes by statute, and which, according to a recent study by a housing nonprofit, is successfully used by 90% of the local government respondents, according to its 2004-2005 surveys.

RB. Oh, well. If that's all it requires… ■

Letter to the Editor

by Steven M. Alden, Debevoise & Plimpton LLP, New York, NY

Dear Editor:

In recent issues of the ACREL News, Harris Ominsky and Larry Preble reported on different approaches used to resolve disputes and effect partition of real estate among partners. We recently faced the division of a very large and valuable (even in the current market) portfolio, including residential apartment buildings, office buildings, retail properties and projects in various stages of development, owned by three partners.

Here are the steps in the division process which worked well for us:

1. The three partners met to select a "pile creator." The pile creator's task was to divide the portfolio into three relatively equal piles, using cash and notes as necessary to achieve equality. Since the pile creator would be the last "chooser," the pile creator was to be paid something for accepting this position. Thus, the three partners held an auction starting with an opening bid and bidding down in amount to reach the lowest dollar amount which one of the three would accept to be the pile creator. The low bidder became the pile creator and the amount bid was paid 75% by the first chooser and 25% by the second chooser; the pile creator was the third or last chooser.

2. The pile creator had 60 days to create the three piles which the pile creator presented to the other two partners as Pile A, Pile B and Pile C.

3. The other two partners had 30 days to consider and evaluate the three piles. They then met and drew lots to determine which of them would be the "caller" in a coin toss. A coin was then tossed by a neutral party and the caller called heads or tails. If the caller won the coin toss, the caller became the "first chooser." If the caller lost the coin toss, the other partner became the first chooser and the caller became the second chooser.

4. The first chooser had 14 days to select Pile A, Pile B or Pile C. After the first chooser made his or her choice, the second chooser had 24 hours to make his or her choice. The pile creator received the remaining pile.

5. The partners had 14 days in which they could trade properties within their respective piles. Closing documents – deeds, assignments and the like – were prepared and closing occurred 30 days thereafter. ■

The JEB Report

by R. Wilson Freyermuth, University of Missouri School of Law, Columbia, MO, and Executive Director, Joint Editorial Board for Uniform Real Property Acts

One of ACREL's significant contributions to law reform in the real estate area is its continuing support of the Joint Editorial Board for Uniform Real Property Acts (JEB). The JEB is comprised of members from the ABA Real Property, Trust and Estate Section, ACREL, and the Uniform Law Commission (ULC, also known as NCCUSL), with liaisons from the American College of Mortgage Attorneys and the Community Associations Institute.

For those who are not familiar with the JEB, it functions as an advisory board to the ULC, with three primary functions. First, the JEB provides assistance to the ULC in obtaining introduction and enactment of uniform acts relating to real estate. Second, the JEB provides advice to the ULC regarding the need for amendments to existing uniform acts relating to real estate. Third, and perhaps most significantly, the JEB makes recommendations to the ULC regarding potential subject areas for new uniform real estate acts. For example, when the ULC receives proposals for new uniform acts relating to real estate, the ULC typically refers these acts to the JEB for its input and evaluation. During the past 10 years, input from the JEB has produced or substantially influenced a number of new uniform law drafting projects, including the Uniform Environmental Covenants Act, the Uniform Real Property Electronic Recording Act, the Uniform Assignment of Rents Act, the Uniform Residential Mortgage Satisfaction Act, and comprehensive amendments to the Uniform Common Interest Ownership Act.

To promote greater awareness among ACREL members about the JEB's activities, this column will hopefully become a recurring feature of future ACREL newsletters, and will highlight one or more projects of potential interest from the JEB's recent or upcoming agenda. This column will highlight two projects — one just completed, and another that remains in the drafting stages.

The New Uniform Real Property Transfer on Death Act. At its July 2009 Annual Meeting, the ULC voted to approve the new Uniform Real Property Transfer on Death Act. One of the most significant innovations in property law has been the development of asset-specific will substitutes for the transfer of property at death, such as the proceeds of life insurance policies and pension plans, securities registered in transfer on death (TOD) form, and funds held in pay on death (POD) bank accounts. Today, such nonprobate transfers are widely accepted with respect to personal property. However, in most states, statutes have not authorized transfer on death for real estate (outside the context of a will).

By contrast, a small number of jurisdictions (now up to 12) have enacted statutes providing a mechanism for the nonprobate transfer of land through the execution, delivery, and recording of a transfer on death (TOD) deed (referred to in some states as a "beneficiary deed"). By this deed, the grantor identifies the beneficiary or beneficiaries who will succeed to the property at the owner's death. During the owner's lifetime, the beneficiaries have no interest in the property, and the owner retains full power to transfer or encumber the property or to revoke the TOD deed.

Based upon a joint recommendation of the JEB and its corresponding advisory board, the Joint Editorial Board for Uniform Trust and Estate Acts, the ULC appointed a drafting committee in late 2006 to prepare a Uniform

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Real Property Transfer on Death Act. With the guidance of the Reporter, Prof. Thomas Gallanis, the drafting committee completed its work in December 2008. The ULC has now approved the Act for introduction in the states, and it is hoped that this Act will gain widespread introduction and enactment. For those interested in more detail on this Act, a copy of the Act is available online at:

http://www.law.upenn.edu/bll/archives/ulc/tod/2009am_approved.pdf

The Drafting Committee for the Uniform Partition of Inherited Property Act. For many years, commentators and scholars have argued that existing partition laws in most states have exacerbated the problem of "family land" loss, particularly within minority communities. In the classic example, a parcel that has served as a family homestead or farm for generations may have come to be owned by dozens (or even hundreds) of relatives due to intestate succession and lack of estate planning. A developer then acquires a fractional interest from one of the family members (typically one not in possession of the land) and then uses the state's partition law to force a sale of the parcel. All too often, this process may result in the sale of the property to the developer and the displacement of one or more family members from their ancestral lands. For more background on this problem, see Phyliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting,* 78 Wash. U.L.Q. 737 (2000); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 Nw. U.L. Rev. 505 (2001).

As public awareness of this problem increased, the ABA Real Property, Trust and Estate Section established a task group, called the Property Preservation Task Force (PPTF), to study the problem with a view toward identifying ways to ameliorate the problem of family land loss. The PPTF's report ultimately led the ULC to appoint a drafting committee to prepare a new uniform act addressing partition and the role of partition in the family land loss problem. The drafting committee has been at work since early 2008; it is hoped that this act, entitled the Uniform Partition of Inherited Property Act (UPIPA), will be completed in 2010. In its current form, UPIPA would attempt to address the problem of land loss by strengthening a preference for partition in kind and, where partition in kind is impossible or impracticable, by creating a pre-emptive right for family members to acquire the property and thus retain it within the family group. The most recent draft of UPIPA is available online at:

http://www.law.upenn.edu/bll/archives/ulc/utcpa/2009_amdraft.pdf

The JEB is actively working with the drafting committee to ensure that UPIPA remains appropriately narrow in scope and does not attempt to displace state partition law generally. For example, the current UPIPA draft would apply only to tenancy-in-common property in which one or more of the current owners acquired their interest via a testamentary transfer. Further, it would not apply to any tenancy-in-common property for which the existing cotenants have a written agreement governing their rights and responsibilities respecting the land. Any cotenancies covered by such a written agreement will continue to be governed by the terms of such agreements, as supplemented by a state's already-existing partition law.

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The JEB Report

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The next meeting of the UPIPA drafting committee will be held November 20-21, 2009 in Chicago, IL. Any ACREL members who have comments or concerns on the current draft of UPIPA are welcome to forward them to any of the following ACREL Fellows:

- Ira Waldman (iwaldman@coxcastle.com) (ACREL Representative to the JEB)
- Ann Burkhart (burkh002@umn.edu) (ACREL Representative to the JEB)
- Carl Lisman (clisman@lisman.com) (Member of UPIPA Drafting Committee)
- Steve Eagle (seagle@gmu.edu) (ABA Adviser to UPIPA Drafting Committee)
- Greg Stein (gstein@utk.edu) (ACREL Adviser to UPIPA Drafting Committee)
- Wilson Freyermuth (freyermuthr@missouri.edu) (JEB Executive Director) ■

Interested in writing for the ACREL News?

1. Articles should be between 500-2000 words in length. This is approximately 2-6 double-spaced pages.
2. Use Times New Roman font, Size 12, 1" margins. Use Microsoft Word – no exceptions.
3. Remember: shorter, well-written, and relevant articles are much more beneficial to the audience.
4. We are seeking pertinent features, how-to articles, tips and hints, etc. If you wish to address a topic that is similar to a recent article, try to approach it from a new angle that will be interesting to readers.
5. Avoid using lots of formatting in your text. We will change your headings, subheadings, etc. to create a cohesive format for the newsletter.
6. Use subheadings and paragraphs generously. Audiences are more likely to stay engaged in an article if it does not look too daunting on the page!
7. Be careful not to over-footnote your articles. Space is limited, and this makes the pages cramped and confusing.
8. Please provide complete bibliographic information for all references.
9. Review and proofread.
10. Repeat Step 9.
11. Email completed articles to Jill Pace, jhpace@acrel.org. ■

Mortgage Prepayment Premium of One-Third Held Not Excessive

by Harris Ominsky

(Harris Ominsky, a retired partner of Blank Rome LLP, is a past President of the Pennsylvania Bar Institute, and has authored four books and more that 1,000 articles.)

"Heads I win,
tails you lose,"
is a spin
we cannot choose.

A recent Kansas Appellate Court revisited an issue that has plagued mortgage lenders for many years. The question is, when do mortgage prepayment premiums become unenforceable penalties?

That Court held that a disputed premium of $1.6 million on the prepayment of a loan balance of $4.8 million was not excessive. *Santa Rosa KM Associates, Ltd., P.C. v. Principal Life Ins. Co.,*206 P.3d 40 (Kan. Ct. App. 2009). In a loan environment where many lenders worry about getting paid at all, it may seem incongruous that lenders still worry about, and battle over, attempts by borrowers to prepay their loans.

That's because lenders want to protect their income flows generated when market interest rates decline. To discourage borrowers from prepaying their loans and refinancing at lower rates, lenders use devices such as lock-in provisions, prohibitions of prepayment, and steep prepayment premiums.

"HEADS I WIN…."

On the other hand, in a period of rising interest rates it is in the borrower's interest (and to the lender's disadvantage) to continue to make payments at the favorable interest rate on the existing loan. As the Court pointed out, prepayment premiums are designed to avoid a "heads I win, tails you lose" outcome when the election to prepay is entirely in the borrower's hands.

These premiums can be structured in various ways. They may be specified as a percentage of the amount prepaid, and sometimes, that percentage is reduced as the mortgage term approaches maturity. Some prepayment formulas relate the amount of premium to the level of market interest rates at the time of prepayment. Mortgage lenders like the defendant, Principal Life Insurance Company, use prepayment premiums to protect legitimate economic interests. For example, insurance companies often commit to maintain returns to their policyholders at certain levels based on anticipation of long-term cash flow from mortgage investments. If high-yielding mortgages are prepaid because mortgage interest rates have fallen, these companies will not be able to maintain commitments made to their policyholders.

That was the position that Principal Life Insurance Co. found itself in when they tried to collect a prepayment fee of $1.6 million. That amount turned out to be 1/3 of the whole mortgage balance!

Background

Principal Life's 1991 shopping- center mortgage ran to 2017 at an annual interest rate of 10.25%. It included a "make whole premium" for prepayment that was tied to the yield on the 2017 U.S. Treasury issue as of the date of prepayment.

Seven years after the loan, the shopping center was purchased and a new owner

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assumed the note and mortgage. After another seven years, the purchaser decided to prepay the balance and was informed that under the mortgage, it would have to pay a premium of $1.6 million. When the plaintiff challenged that premium, the lower court entered a summary judgment in favor of the insurance company, ruling that the provision was valid.

The Make-Whole Premium

The borrower contended that genuine issues of fact existed about whether the premium was unconscionable, thereby making the summary judgment premature. The Appellate Court upheld the summary judgment and said that generally, competent adults may make contracts on their own terms, provided they are not illegal, contrary to public policy or the result of fraud, mistake or duress. In this case, the borrower's president was an experienced lawyer and real estate investor, and the transaction was at arm's length untainted by fraud, duress, mistake or overreaching. The other argument against enforcing the premium was that it was against public policy, and the Court rejected that theory.

The borrower argued that the "make-whole premium" is unreasonable for two reasons. First, it measured the loss of the mortgage interest by the Treasury-bill interest rate at the time of prepayment in calculating the present value of the future income stream from the loan, even though the lender will reinvest the loan proceeds at a rate of higher return than the current Treasury rate. The Court rejected this argument using precedent by the Federal courts for Iowa and Missouri, as well as a New York Bankruptcy Court. These cases found that interest rates on Treasury instruments were easily verifiable and predictable, and, therefore, commonly used in prepayment provisions.

Also, the Court found that Treasury instruments provide a reasonable substitute for trying to find a loan transaction that precisely replaces the investment opportunity lost with the borrower's prepayment. It refused to speculate about the extent of the difference between the Treasury rate "and some unidentified future investment."

The borrower also argued a more subtle issue. It stated that the "make-whole premium" does not take into account that the lender is not only receiving the outstanding principal balance on the loan, but also the "make-whole premium," that can be reinvested. Therefore, that formula for loss by the lender creates a windfall for the lender.

While the Court acknowledged that this argument has some validity, it brushed off that point by finding that, "It was not considered so erroneous in 1998 as to cause Santa Rosa not to ratify it." Therefore, the formula is not so unreasonable to make it unenforceable. The Court said that inclusion of the premium in the make-whole formula would create "a rather awkward feedback loop" in which the amount of the premium must be determined in order to calculate the amount of that same premium. However, the Court presumed that such a formula "could be fashioned" with calculus, if one were so inclined.

PENALTY ARGUMENT

The borrower also argued that the premium was so excessive as to make it a "penalty." The Court responded by saying that a considerable amount of the premium is a function of the unpaid loan balance and the disparity in prevailing interest rates between the time the loan originated and the time of prepayment. It held, "the time for prepayment was in Santa Rosa's exclusive control." Finally, nothing in

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the facts of the case suggests unequal bargaining power, exploitation or questionable circumstances surrounding the negotiation.

Based on the Court's reasoning, it seems that with a slightly different set of facts, the Court might have gone the other way and found the prepayment premium to be an unenforceable penalty. For example, if the facts indicated that the transaction was tainted by fraud, duress, mistake or overreaching or that the parties had unequal bargaining power, that might have made a difference. For example, an inconspicuous and unnecessarily complex prepayment clause in a residential mortgage might have posed a different issue.

Also, if the formula had used the Treasury security interest rate as a measure of the premium without discounting the projected loan payments to the present value of the future income stream from the loan, that also may have made a difference.

In addition, lenders occasionally apply so-called prepayment premiums, not when the loan is prepaid voluntarily, but when the borrower has defaulted on a payment and the lender elects to accelerate the principal of the mortgage and to charge the full prepayment premium on that accelerated amount. In some cases, courts have found that the application of a prepayment premium to this type of "involuntary" prepayment should be deemed punitive in character. That's because it may be viewed as an attempt to coerce timely payment by forfeiture, which is not reasonably calculated to merely compensate the insured lender for anticipated losses. If the right to collect a prepayment premium upon acceleration of the loan is not stated in the loan documents, courts generally will not permit the lender to collect it. But courts generally have upheld the enforceability of a prepayment provision where the clause clearly states that it applies if the loan is accelerated as the result of the mortgagor's default under any of the terms and conditions of the loan documents. *See* Harris Ominsky, REAL ESTATE LORE, MODERN TECHNIQUES AND EVERYDAY TIPS FOR THE PRACTITIONER, Pages 84 to 89 (American Bar Association, 2006); *Loans; Prepayment Fee Upheld*, 39-JUN REAL EST. L. REP. 3 (JUNE 2009). ■

Meetings Calendar

2009 Annual Meeting
October 29-November 1, 2009
JW Marriott
Washington, DC

2010 Mid-Year Meeting
March 11-14, 2010
Terranea Resort
Palos Verdes, CA

2010 Annual Meeting
October 7-10, 2010
Four Seasons
Toronto, Canada

Enforceability of Prepayment Premiums – Language Does Matter!

by John C. Murray, First American Title Insurance Company, Chicago, IL © 2009

Introduction

The Circuit Court of Cook County, Illinois recently entered an interesting ruling on the enforceability of a commercial-loan prepayment provision. *See Cornerstone Leased Drugstores LLC v. Wells Fargo Bank Northwest, NA,* Circuit Court of Cook County, Illinois, No. 07 CH 04352 (June 19, 2009). The case was decided solely on the basis of the meaning of the contractual language regarding prepayment contained in the (identical) mortgage notes executed by Cornerstone Leased Drug Stores LLC ("Cornerstone") in connection with forty-two 25-year mortgages on properties located in 16 states. The Court agreed with the defendant, Wells Fargo Bank Northwest ("Wells Fargo," which served as trustee for the five institutional lenders who actually loaned the money and were designated as trust-beneficiaries) with respect to its calculation, under each of the notes, of the Reinvestment Yield under the prepayment provision and the conversion to a monthly yield as provided by the provision. This article will summarize and analyze the court's decision and discuss its relevance for commercial mortgage lenders.

Analysis of Decision

> The court summarized the issues as follows:
>
> There are two portions of [the prepayment provision] that are critical to the resolution of the dispute between the parties. The first is part (i) of the definition of "Reinvestment Yield," and in particular the parenthetical statement: "(or such other display as may replace such displays on the Bloomberg service or any other generally available service)." The second is contained within the definition of "Prepayment Consideration" providing the method of calculating the total amount of the remaining payments due under the note: "such sum to be determined by discounting (monthly on the basis of a 360-day year composed of twelve 30-day months).

Id. at p.3.

The prepayment premium was to be calculated (pursuant to the applicable provision) by reference to the "Reinvestment Yield," which, as stated in the provision,

> means the yield to maturity of either (i) the yield reported as of 11:00 A.M. (New York City time) on the date of calculation on the display designated USD on the Bloomberg Financial Markets Screen (or such other display as may replace such displays on the Bloomberg service or any other generally available service) for actively traded U.S. Treasury securities having a constant maturity equal to the remaining average life of the Note, or (ii) if such yields shall not be reported as of such time or the yields reported as of such time shall not be ascertainable (including by way of interpolation), the Treasury Constant Maturity Series yields reported for the latest day for which such yields shall have been so reported as of the Business Day next preceding the Determination Date

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> in Federal Reserve Statistical Release H-15 (519) (or any comparable successor publication) for U.S. Treasury securities having a constant maturity equal to the remaining average life of the Note as of the Determination Date: provided however, if no maturity exactly corresponding to the remaining average life of the Note shall appear therein, yields for the two most closely corresponding reported maturities (with one being shorter and the other longer) shall be calculated pursuant to the foregoing sentence and the Reinvestment Yield shall be interpolated from such yields on a straight-line basis (rounding in each of such relevant periods, to the nearest month). All such prepayments must occur on a Business Day.

Cornerstone subsequently refinanced the loan and exercised its right to prepay in the summer of 2006. However, on the stipulated date for calculation of the prepayment premium (August 16, 2006), a "matched" Treasury security that would mature on the maturity date of the loan (March 3, 2019) did not appear on the Bloomberg USD screen. The parties then agreed, as per the language in the prepayment provision, to interpolate the prepayment consideration using the two most closely corresponding reported U.S. securities, one shorter than March 3, 2019 and one longer. But the parties disagreed on whether they could only look to the Bloomberg USD screen to ascertain such interpolation based on the U.S. Treasury securities most closely corresponding to March 2019 (as argued by Wells Fargo), or whether the parties could look to different screens for such purpose (as argued by Cornerstone). The court ruled in favor of Wells Fargo, noting that "Paragraph 6 [the prepayment provision] of the Notes, while admittedly complex, is not ambiguous." *Id*. at p. 5. The court further noted that: "The plain language of the note anticipates the possibility that changes might occur over the course of those 25 years, but does not provide the parties with an alternate financial markets screen from which to obtain information on the interest rate borne by U.S. Treasury securities." *Id*. at p. 7.

Cornerstone also argued that the Reinvestment Yield should have been calculated on a semi-annual, rather than a monthly basis. But after carefully reviewing the language in the prepayment provision, the court agreed with Wells Fargo that in order to be consistent with the terms of the Notes the Reinvestment Yield had to be calculated on a monthly basis. According to the court:

> Since the discount factor is comprised of the "Reinvestment Yield plus 50 basis points," the Notes direct the parties to apply the Reinvestment Yield as if it accrued monthly, and then to add 50 basis points to that number. The word monthly in this section of the note provides the clear and unambiguous direction for that calculation. As such, there is no issue of material fact . . . and Wells Fargo's Motion for Summary Judgment is granted.

Id. at p. 7.

The basic purpose of a yield-maintenance prepayment provision in a commercial real-estate loan document is to provide a fee to the lender that will compensate it for the difference between the original interest on the loan and the yield available from U. S. Treasury instruments at the time of prepayment. The prepayment clause in the *Cornerstone* case provided that "the Notes direct the parties to apply the Reinvestment Yield as if it accrued monthly,

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and then to add 50 basis points to that number." This adding of basis points, which is not all that common any more in connection with prepayment premium provisions in commercial mortgage-loan documents, was probably done by the lender to blunt any argument that prepayment based on U.S. Treasury instruments without the addition of such basis points would constitute a "windfall" for the lender. But this specific language (certainly not a bad idea) had no bearing on the court's ruling, which was based strictly on contractual interpretation. This was not a true "yield maintenance" case where the validity or enforceability of such a clause in general was questioned. For years, institutional lenders such as insurance companies have used "yield maintenance" clauses to calculate prepayment premiums, and such clauses are considered the industry norm.

See Richard F. Casher, *Prepayment Premiums: Hidden Lake is a Gem*, 19-9 ABI J. 1 (Nov. 1, 2000):

> A yield-maintenance clause typically assumes that the prepayment premium and the prepaid principal will be invested in U.S. Treasury securities (Treasuries) that will mature at the same time as the prepaid loan and that the dollars so invested will return the same yield that the insurance company would have realized had its loan not been prepaid. Treasuries are used as the reinvestment norm because there exists no standard commercial mortgage loan rate, given the uniqueness of each commercial loan and the inherent difficulty (if not impossibility) of identifying an identical or similar loan; in contrast, the market for treasuries is deep and highly liquid.

See also Restatement (Third) of Property: Mortgages § 6.2 comment a (1997):

> The primary purpose of [prepayment] clauses is to protect the mortgagee against the loss of a favorable interest yield . . . . Prepayment may also result in further losses, such as the administrative and legal costs of making a new loan . . . and in some cases additional tax liability.

Conclusion

The *Cornerstone* case (at least at the trial level) once again clearly illustrates the importance of clarity in the drafting of a mortgage prepayment provision, and in this case it would appear the lenders (and their counsel) did it right. The borrower had contended that it was overcharged by $2,260,000 based on the defendant's calculation (the total prepayment amount paid to Cornerstone, pursuant to Wells Fargo's calculation, was $20,621,812). The court noted in its ruling that there was no ambiguity and therefore no need to examine parol evidence. (*See also Friedman v. LaSalle Nat'l Bank*, 2004 Ohio 2205 (Ohio App. 2004), at P21 ("[t]he prepayment provision is clear on its face and unambiguous. Therefore we will not consider the parol evidence [the borrower] advances")). The court's ruling in *Cornerstone* highlights the fact that a mortgage prepayment provision should be carefully, clearly, and comprehensively drafted so that its meaning is clear and there is no ambiguity that may open the door to a challenge by a clever borrower. The general rule is that any ambiguity will be construed by a court in the borrower's favor when the lender has drafted the loan documents. *See, e.g., Littlejohn v. Parrish*, 163 Ohio App. 3d 456, PP 27-28 (2005) (holding that mortgage, which provided that there was no prepayment penalty but that any prepayment was subject to the mortgagee's approval, imposed duty of good faith and fair dealing "when one party has discretionary authority to determine certain terms of the contract"; court refused summary judgment for mortgagee and remanded case for further proceedings). The moral of the *Cornerstone* case: Language does matter! ■

Mid-Atlantic Golf Outing

by Earl Segal, Newmark Knight Frank, Washington, DC

While most people only think of Poolesville, Maryland as the childhood home of ACREL's Kevin Shepherd, on Friday, July 24 the area took on an additional significance.

Continuing in the tradition established last year, ACREL Fellows from the Mid-Atlantic region again met for a golf outing and lunch. Not only did the day provide an opportunity for ACREL fellows to enjoy the collegiality benefits of membership but the event also helped support the ACREL Foundation. Through the gracious efforts of Robert Gottlieb all of those in attendance had a very enjoyable day.

The course at Four Streams proved to be as challenging as anticipated and while looking for his golf ball in the woods one ACREL Fellow was heard to remark that Four Streams "is not where you come to find your game". Notwithstanding the challenging play Fellows Robert Gottlieb, Roger Winston and Barry Rosenthal took home the honors with the lowest net score. It is worthy to note that last year the winning group also included Roger Winston, who has become the person to beat in 2010.

ACREL Attorneys Opinions Committee

The Attorneys Opinions Committee is currently engaged in the preparation of an annotated real estate secured transactions opinion report. Bob Thompson, Ken Jacobson, David Miller and Pete Ezell are leading this effort. We hope to have the report completed, at least in draft form, by the end of the year and then submit the draft to a broader group for review and comment. Then the Committee plans to lead a break-out session or workshop at the Spring Meeting to discuss the report and solicit comments.

The Committee presented a workshop at the 2008 Annual Meeting in San Francisco titled "The Opinion Wars". Cathy Goldberg, Ken Jacobson, Scott Willis, David Miller and Bob Thompson discussed their work with other groups on a variety of opinion projects, including the Customary Practice Statement, which has since been endorsed by ACREL.

The Chair of the Attorneys Opinions Committee is Pete Ezell. Please contact him if you would like to become involved in the work of the Committee.

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