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Affordable Housing Incentive Programs under HB 2984: Bonus or Burden?

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I. Introduction

With the housing market boom of the past decade, communities across the country have seen drastic increases in the costs of land and housing. In response to the growing need for affordable housing, state and local governments have begun to take steps to encourage or require the construction of affordable housing units when new developments are approved.

This article examines legal issues surrounding the use of incentive zoning and inclusionary housing to address affordable housing needs in Washington State. As used in this article, the term "incentive zoning" means a regulatory program that provides for optional incentives or "bonuses" (such as increased density, adjustments to height restrictions, or modifications to other zoning requirements) in exchange for the developer's provision of affordable housing.[1] The majority of Washington jurisdictions adopting affordable housing programs have chosen to provide optional, as opposed to mandatory, incentives to developers. For example, the City of Seattle offers incentive zoning options for commercial and residential development in certain downtown zones,[2] and the City Council is currently considering amendments that would add such options in other zones throughout the City.[3]

By contrast, "inclusionary housing" refers to regulations that impose mandatory affordable housing requirements. At least one Washington jurisdiction, the City of Redmond, has adopted a mandatory program that requires developers to allocate at least ten percent of the total number of housing units in certain developments as affordable housing, regardless of whether or not the developer makes use of the density bonus provided under the program.[4]

Recent state legislation has provided some clarity regarding the use of voluntary programs in Washington. This article focuses on the remaining ambiguity regarding mandatory programs and uses the Redmond program as an example to evaluate the legality of such programs.

II. Background

A. Legal Framework for Zoning and Affordable Housing Regulation

Because affordable housing incentive programs are adopted as zoning regulations, it is important to first examine the basic legal framework for zoning by cities and counties. The power of local governments to adopt zoning regulations is both granted and limited by the state and federal constitutions and by state zoning enabling acts. In Washington, the Growth Management Act further clarifies the duties and powers of local governments with respect to affordable housing.

Article XI, section 11 of the Washington Constitution provides that "[a]ny local county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Zoning enabling acts in Washington include the Planning Commissions Act (RCW Chapter 35.63), which authorizes cities and counties to plan with few restraints; RCW Chapter 35A.63 of the Optional Municipal Code, which includes more stringent standards for cities that elect to incorporate as noncharter code

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cities; and the Planning Enabling Act (RCW Chapter 36.70), which include similarly prescriptive standards for counties that choose to establish a planning agency under the act. If a local government chooses to zone under one of these three enabling acts, it is bound by the provisions of the enabling act and cannot also zone under the "police powers" granted by the article XI, section 11 or more general statutes regarding local government powers.[5] If local government fails to zone under a specific enabling act, however, it is possible that a court would uphold its authority to zone directly under general police powers.[6]

Washington's Growth Management Act ("GMA," Chapter 36.70A RCW) imposes additional requirements on certain cities and counties, including requirements related to affordable housing. One of the GMA's planning goals is to "[e]ncourage the availability of affordable housing to all economic segments of the population of this state."[7] To further this goal, governments planning under the GMA are required to include in their comprehensive plans a housing element that "identifies sufficient land for housing, including … housing for low-income families … [and] makes adequate provisions for existing and projected needs of all economic segments of the community."[8] The GMA also requires cities and counties to accommodate the need for housing based on 20-year population forecasts within each county.[9] Despite these requirements, many have argued that the GMA lacks an effective mechanism for ensuring compliance with affordable housing requirements, leaving the housing goal as a mere aspiration.[10]

B. Optional or Mandatory?

The decision whether to encourage the construction of affordable housing units (through optional programs) or to require affordable housing (through mandatory programs) raises important legal issues, particularly in Washington. Mandatory programs have been used in a number of other states, including California, Colorado, Florida, Illinois, and Massachusetts. In Washington, however, governments have been reluctant to adopt affordable housing programs because the legality of such programs is unclear under state law, and early efforts to impose housing-related requirements on developers have faced aggressive and often successful legal challenges.[11]

The City of Seattle has defended the most notable challenges to mandatory housing requirements to date. In 1985, the City enacted a Housing Preservation Ordinance ("HPO") to address the conversion of low-income residential housing units to nonresidential uses. Under the HPO, landowners planning to demolish low-income units were required to (i) provide current tenants with special relocation notice and assistance, and (ii) either replace a specified percentage of the low-income housing with other suitable housing or provide a payment in lieu.[12] The Washington Supreme Court struck down the HPO as an unauthorized tax in violation of RCW 82.02.020, reasoning that the ordinance was nothing more than an attempt to achieve a desired public benefit by taxing a limited segment of the population.[13] The Court also reviewed the constitutionality of the HPO within the context of section 1983 civil rights claims and concluded that the ordinance violated substantive due process rights because it was unduly oppressive to the landowner.[14] These HPO cases suggest that a municipality cannot exercise its police powers to shift public responsibility for low-income housing to a few individual property owners.[15]

III. HB 2984: State Legislation Authorizing Local Affordable Housing Incentive Programs

To address the need for tools to meet the GMA's housing goal, and in light of successful challenges to affordable housing efforts like the HPO, advocates for low-income housing pushed for state legislation that would clarify local government authority to adopt affordable housing programs.[16]

A. HB 2984: Affordable Housing Incentive Programs

In 2006, the Washington Legislature passed HB 2984, a bill aimed at encouraging local governments to enact or expand affordable housing incentive programs. HB 2984 is divided into four sections:

- Section 1 includes findings that housing affordability is a "serious, statewide problem" with "adverse socioeconomic effects."
- Section 2 adds a new section to the Growth Management Act ("GMA"), RCW Chapter 36.70A, authorizing "affordable housing incentive programs," and is discussed in further detail below.
- Section 3 amends RCW 82.02.020, which prohibits local governments from imposing taxes, fees, or charges on certain construction, development, and land division activities. This section of HB 2984 clarifies that nothing in RCW 82.02.020 limits the authority of local governments to adopt affordable housing programs (or to enforce agreements made pursuant to such programs) consistent with the provisions of HB 2984.
- Section 4 provides that "[t]he powers granted in this act are supplemental and additional to the powers otherwise held by local governments" and authorizes local governments that adopted affordable housing incentive programs before the effective date of HB 2984 to bring those programs into compliance with HB 2984 by ordinance or resolution.

Section 2 of HB 2984 is now codified at RCW 36.70A.540, which authorizes cities and counties planning under the GMA to "enact or expand affordable housing incentive programs providing for the development of low-income housing units through development regulations."[17] Affordable housing incentive

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programs may include density, height, or bulk bonuses, fee waivers or exemptions, parking reductions, expedited permitting, mixed use projects, or other incentives.[18] If a developer chooses not to participate in an "*optional* affordable housing incentive program," the local government may not penalize the developer by conditioning, denying, or delaying permits or other approvals. *See* RCW 36.70A.540(1)(c) (emphasis added).

RCW 36.70A.540(3) details how programs enacted under HB 2984 "may be applied within the jurisdiction to address the need for increased residential development, consistent with local growth management and housing policies." First, the jurisdiction must identify designations within a geographic area "where increased residential development will assist in achieving local growth management and housing policies."[19] Second, the jurisdiction must "provide increased residential development capacity through zoning changes, bonus densities, height and bulk increases, parking reductions, or other regulatory changes or other incentives."[20] Third, the jurisdiction must make a determination that the adopted incentives can actually be achieved within the identified area.[21] If all three criteria are satisfied, then the jurisdiction "may establish a minimum amount of affordable housing that must be provided by all residential developments being built under the revised regulations."[22]

B. Mandatory and Voluntary Readings of HB 2984

While HB 2984 plainly allows local government to adopt optional "incentive zoning" programs, it is unclear whether the bill also authorizes mandatory "inclusionary housing." The scope of HB 2984 hinges on the meaning of RCW 36.70A.540(3), which is subject to two different interpretations.

The first interpretation of RCW 36.70A.540(3) is that this subsection authorizes mandatory programs when the criteria in RCW 36.70A.540(3)(a)-(c) have been met. Under this reading, cities and counties may adopt a program under which the developer *must* provide affordable housing, but in exchange receives "increased residential development capacity" in the form of an upzone (which increases the number of units allowed on each lot) or other regulatory change or incentive. According to Michael Luis, an affordable housing advocate who testified in favor of HB 2984 on behalf of The Housing Partnership, "the property owner has been given increased land value by virtue of the upzone, and that increased value is the equivalent of an incentive under a voluntary program."[23] Supporters of this reading can argue that the Legislature's choice to include the word "optional" in RCW 36.70A.540(1)(c) actually demonstrates the legislature's intent to authorize both optional and mandatory programs: if the Legislature had intended for *all* programs authorized under the bill to be voluntary, it would not have been necessary to use the qualifier "optional" to describe the programs in which developers may choose not to participate without penalty.[24] Proponents of a mandatory reading can also argue that mandatory programs are a natural extension of the GMA's housing requirements.

The second interpretation of RCW 36.70A.540(3) is that this subsection merely expands the scope of optional programs authorized under RCW 36.70A.540(1)-(2). This reading distinguishes voluntary programs that merely *provide for* the development of housing from voluntary programs that *specify a minimum level* of housing (such as twenty percent of the total number of housing units) that must be provided in order for the developer to participate. Under this reading, all cities and counties may adopt voluntary programs "providing for the development of low-income housing units through development regulations" under RCW 36.70A.540(1)-(2), but in order to adopt a voluntary program that establishes "a minimum amount of affordable housing that must be provided" by developers who choose to participate in the program, the city or county must first satisfy the three criteria in RCW 36.70A.540(3)(a)-(c).

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In a recent article describing the legislative process that led to the bill's passage, Representative Larry Springer, the bill's primary sponsor, argued that "[t]he critical key to broad acceptance was the bill's voluntary nature."[25] This "voluntary" reading of RCW 36.70A.540(3) finds support in the legislative history of HB 2984, including statements made by Representative Springer during debate over the bill[26] and the adoption of an amendment that eliminated language authorizing programs "that *encourage or require* the development of low-income housing units" and substituted the language of the final bill authorizing incentive programs "*providing for* the development of low-income housing units."[27]

It is unclear how a court would interpret RCW 36.70A.540(3) when presented with these conflicting interpretations, although there appears to be more support for Representative Springer's "voluntary" reading of the bill. The legislative history supporting a voluntary reading is compelling, but not controlling. While a court would probably find that the statute is ambiguous and that consideration of legislative history is appropriate,[28] the rules applied by courts in attempting to discern legislative intent do not point to a clear result. Courts will consider sequential drafts of a bill, but have cautioned against over-reliance on successive drafts as an absolute tool for interpreting a statute.[29] By the same token, statements made by a statute's sponsors during legislative debate are "noteworthy,"[30] but the comments of a single legislator are generally considered inadequate to establish legislative intent.[31] Nevertheless, Representative Springer's statements that the bill was meant to be purely "voluntary" would probably have persuasive value in court.

If a court determined that HB 2984 authorizes only voluntary affordable housing programs, any local ordinances adopting mandatory programs could be challenged on the basis that they exceed the authority granted by HB 2984, by state enabling acts, and by the Washington Constitution. However, regardless of whether or not HB 2984 authorizes mandatory programs, the local ordinance at issue would still be subject to various limitations on regulatory burdens, as discussed in Section IV below. In either case, the legality of the ordinance would most likely be determined in an as-applied challenge, requiring the court to evaluate both the terms of the ordinance and the circumstances surrounding its application to a particular development.

IV. The Redmond Program

In 1993, prior to the Legislature's passage of HB 2984, the City of Redmond enacted Ordinance 1756 "to provide for housing opportunities for all economic segments of the community."[32] One of the first affordable housing ordinances in Washington,[33] Redmond's program is not only innovative but unique: the City appears to be the only Washington jurisdiction with a mandatory affordable housing program.

Redmond requires that at least ten percent of the units in new housing developments of ten units or greater *must* be affordable units.[34] In return, the City grants one bonus market-rate housing unit for each affordable unit, up to fifteen percent above the maximum allowed density permitted on the site.[35] For example, if the maximum allowed density for the site is twenty units per acre, a density bonus of up to three units per acre (15 percent of 20 units/acre) is available, yielding a total allowed density of 23 units per acre. The City's regulations define affordable housing as "[h]ousing that may be purchased with monthly payments that do not add up to more than thirty percent of the total monthly income of a household earning less than eighty percent [or fifty percent for low-cost units] of the median annual income for the Seattle Metropolitan area."[36]

The City grants additional credits for "low-cost" affordable housing units, defined as housing priced at the fifty percent median annual income in the Seattle Metropolitan area.[37] Each "low-cost" affordable unit counts as two affordable units toward the City's ten percent requirement. In exchange for providing low-cost units, the developer is awarded two bonus market-rate units, up to twenty percent above the maximum density permitted. For example, if a 100-unit subdivision is planned for a five-acre site zoned 20 units/acre, five low-cost units would satisfy Redmond's affordable housing requirement. In exchange for providing five low-cost units, the developer would be awarded ten bonus market-rate units.[38]

Redmond's Planning Department reports that approximately 130 affordable units have been built under the City's affordable housing regulations, mostly in the downtown corridor, and that roughly 120 affordable units are pending.[39] The Department also notes that the City believes its regulations are consistent with the intent of the state legislation and therefore has no current plans to revise or reenact the regulations pursuant to HB 2984.

Redmond's ordinance has been strongly criticized by the development community. Jim Potter, a board member and past president of the Master Builders Association of King and Snohomish Counties, recently wrote:

> [I]n one recent housing development in the city of Redmond, the developer's cost to provide two affordable housing units in a 22-unit project was $300,000. In order to pay for the affordable housing, the developer has to increase the price of each additional housing unit by $15,000. In this example, Redmond's inclusionary housing requirement very clearly penalizes home buyers by making the remaining housing less affordable to everyone else.[40]

Potter's calculations, however, fail to tell the whole story. The formula is in fact far more complicated. First, Potter assumes that demand for housing is completely inelastic, i.e., that increases in the cost of housing production will be borne completely by the consumer. Second, the calculation fails to include the value derived from the "density bonus" (additional market rate units)

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available under the City's regulations. The cost imposed by Redmond's affordable housing ordinance is more accurately measured by comparing the profit per bonus market-rate unit with the cost of providing affordable units less the discounted price (or rent) paid by the "affordable" consumer.

In short, the burdens and benefits produced by Redmond's affordable housing program are not easily defined. If the program was challenged in court, the challenger would likely argue that local government is not authorized to adopt mandatory programs (by HB 2984, enabling acts, or the Constitution) and that the regulations violate statutory and case law prohibiting overly burdensome land use regulations.

V. Limitations on Regulatory Burdens

Washington law provides a number of limitations on the regulatory burdens that may be imposed by government. Each of these limitations may be used to argue that mandatory housing requirements impose an undue burden on developers.[41]

A. Takings

Developers could argue that inclusionary housing regulations constitute a taking of private property without just compensation. Washington's takings clause has been held to impose greater limitations than its federal counterpart. In considering such regulatory takings claims, Washington courts currently apply a multi-step analysis that asks whether the challenged regulations "substantially advance a legitimate state interest" and whether the "adverse economic impact on the affected landowner outweighs legitimate state interests."[42] A court might also ask whether there is (1) an "essential nexus" between the affordable housing requirement at issue and the interests that justify the regulation; and (2) "rough proportionality" between the burden imposed by requirement and the impact of the development.[43]

Regardless of which test is applied, a court's resolution of a takings challenge to inclusionary housing regulations is likely to hinge on whether the developer can demonstrate that the regulations have a significant economic impact. However, if the "nexus" and "rough proportionality" tests are applied, the local government will face a heavier burden in showing that the affordable housing requirement at issue is proportional to the impact of the proposed development.

B. Substantive Due Process

Developers might also argue that inclusionary housing requirements violate substantive due process. Washington courts will consider both takings and substantive due process claims as alternative claims in the same case. In evaluating substantive due process claims, Washington courts ask "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner."[44]

Unlike the takings analysis described above, which focuses primarily on the impact of the ordinance on the landowner, substantive due process emphasizes the requirement that government action must be "reasonable." A developer could argue that, even if inclusionary housing programs have some public benefit and impose relatively little burden on the developer, the burden on the developer is still not justified because such programs do not come close to solving the problem of affordable housing and because there are other, less oppressive solutions.[45]

Because substantive due process challenges require greater scrutiny of the relationship between the government action and its purpose, a developer challenging inclusionary housing requirements would be more likely to succeed in asserting a substantive due process violation than a takings claim.

C. Unauthorized Tax

Finally, developers may argue that inclusionary housing requirements constitute an unauthorized tax in violation of RCW 82.02.020. In light of the provision in RCW 36.70A.540(1)(b) that local governments may adopt affordable housing incentive programs "whether or not the programs may impose a tax, fee, or charge on the development or construction of property," such challenges are unlikely to succeed as long as the local program complies with the terms of RCW 36.70A.540.

D. Application to the Redmond Program

The outcome of a challenge to the Redmond program would likely depend on the extent to which it burdens the specific development at issue. As previously noted, the economic impact of Redmond's regulations depends on both the profitability of "bonus" units and the net cost of providing affordable units. The court would likely be required to resolve conflicting evidence and expert testimony regarding the dynamics of the housing market and the profitability of the development in question. If the developer could show that the affordable housing requirement had a significant negative impact, the court could find that the regulations constitute a taking or violate substantive due process. Moreover, because the Redmond program was adopted before HB 2984 and the City has not adopted an ordinance or resolution re-adopting the program pursuant to the terms of HB 2984, there may be an argument that the program is an unauthorized tax because it does not comply with HB 2984.

VI. Conclusion

Jurisdictions in Washington clearly have the authority to implement voluntary "incentive zoning" programs pursuant to HB 2984. It is less clear, however, whether the portion of HB 2984 codified at RCW 36.70A.540(3) extends such authority to mandatory "inclusionary housing" programs like Redmond's. Proponents of a mandatory reading of the statute would argue that the statute's choice of words ("affordable housing that *must* be

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provided")[46] shows an intent to authorize mandatory programs. The legislative history of HB 2984, however, repeatedly characterizes HB 2984 as a "voluntary" bill. If the intent was to authorize mandatory programs, this intent was not made clear in proceedings before the legislature.

Even assuming that mandatory programs are authorized by HB 2984, enabling acts, or the Constitution, inclusionary housing programs like Redmond's are still vulnerable to an argument that they are overly burdensome. Local jurisdictions can protect themselves against such arguments by attempting to ensure that the "bonuses" provided under their regulations are valuable enough to fully offset the cost of providing affordable housing.[47] This will require a flexible program that allows the government and developers to pick and choose from a "menu" of bonuses that can be tailored to each development.[48]

Fairness should be the guiding principle for local governments in establishing successful and defensible affordable housing programs. As the Washington Supreme Court has emphasized, the need for affordable housing "is a burden to be shouldered commonly and not imposed on individual property owners."[49] The Legislature's adoption of HB 2984 did not alter this fundamental requirement.

1 In other contexts, "incentive zoning" is used to refer to programs that provide incentives in exchange for the developer's provision of amenities other than housing, such as open space.

2 In Seattle, developers willing to designate 11% or more of the floor area sought as bonus development as affordable housing can take advantage of relaxed height restrictions and density bonuses. *See* Seattle Municipal Code ("SMC") 23.49.015(B)(1)(a). Affordable housing may be located on-site, on an adjacent site, or the developer may provide a payment in lieu of construction. SMC 23.49.015(A)(2).

3 For a closer look at Seattle's current incentive zoning program and proposed expansions to the program, *see* Courtney Kaylor, *Recent Developments in Incentive Zoning in Washington: A Seattle Case Study*, Washington State Bar Association Environmental and Land Use Law Newsletter (April 2008) (hereinafter "*Seattle Case Study*").

4 Redmond Community Development Guide ("RCDG") 20D.30.10-010. This requirement applies to all new developments of ten or more units that either (i) consist of senior housing or (ii) are located within certain designated neighborhoods. In exchange for such affordable housing, developers are entitled to a density bonus. *Id*.

5 *See State v. Thomasson*, 61 Wn.2d 425, 378 P.2d 441 (1963); *Lauterbach v. City of Centralia*, 49 Wn.2d 550, 304 P.2d 656 (1956).

6 *See Nelson v. Seattle*, 76 Wn.2d 715, 453 P.2d 832 (1969).

7 RCW 36.70A.020(4).

8 RCW 36.70A.070(2).

9 RCW 36.70A.115.

10 *See* Henry W. McGee Jr., *Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker: Part IV: Discussions on the States and Local Level: Chapter 7: Federalism: Equity and Efficacy in Washington State's GMA Affordable Housing Goal*, 3 Wash. U. J.L. & Pol'y 539 (2002).

11 *See, e.g., San Telmo Associates v. City of Seattle*, 108 Wn.2d 20, 735 P.2d 673 (1987); *R/L Associates, Inc. v. City of Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989); *Sintra v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992); *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992).

12 *San Telmo Associates v. City of Seattle*, 108 Wn.2d 20, 22, 735 P.2d 673 (1987) (citing former Seattle Municipal Code 22.210 et seq.).

13 *San Telmo,* 108 Wn.2d at 24; *R/L Associates, Inc. v. City of Seattle,* 113 Wn.2d 402, 409, 780 P.2d 838 (1989).

14 *Sintra, Inc. v. City of Seattle*, 119 Wn.2d at 22; *Robinson v. City of Seattle*, 119 Wn.2d at 55.

15 *See e.g., San Telmo,* 108 Wn.2d at 24-5.

16 Interview with Representative Larry Springer, (D-Kirkland) (January 31, 2008).

17 RCW 36.70A.540(1)(a).

18 RCW 36.70A.540(1)(a)(i)-(vi).

19 RCW 36.70A.540(3)(a).

20 RCW 36.70A.540(3)(b).

21 RCW 36.70A.540(3)(c).

22 RCW 36.70A.540(3)(d).

23 Luis, Michael, *The Ins and the Outs: A Policy Guide to Inclusionary and Bonus Housing Programs in Washington*, The Housing Partnership, Aug. 2007, at 6 (hereinafter "*The Ins and the Outs*").

24 Supporters of a mandatory reading could cite the rule of construction that statutes should be interpreted so as not to render any portion superfluous. *See Ford Motor Co. v. City of Seattle, Executive Services*, 160 Wn.2d 32, 41, 156 P.3d 185 (2007) ("Constructions that would render a portion of a statute 'meaningless or superfluous' should be avoided.") (citing *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001)). Of course, one could also argue that the legislature used the word "optional" in RCW 36.70A.540(1)(c) to clarify that all programs authorized under HB 2984 are voluntary.

25 Larry Springer, "A new tool for cities to promote affordable housing," *About Growth*, Washington State Department of Community Trade and Economic Development (CTED), Spring-Summer 2006, at 8 (hereinafter "*About Growth*"). The Housing Development Consortium (HDC), an affordable housing group that recruited Representative Springer to sponsor the bill, has also described HB 2984 as a "voluntary" bill. In a recent newsletter, the HDC argued that "HB 2984 does not fit the definition of mandatory inclusionary zoning; it doesn't create a universal mandatory requirement to be placed on builders or local governments." Housing Development Consortium, "Inclusionary Zoning in Washington….Really?" *Housing News: Housing Development Consortium Monthly Newsletter*, April 7, 2006. Similarly, an article published during the Senate's consideration of HB 2984 stated that "[t]he bill seeks to avoid language that makes inclusionary zoning mandatory – which is opposed by development groups such as the Building Industry Association of Washington. 'Their main concern is with language that they are afraid will require them to do certain things,' says the bill's primary sponsor, Representative Larry Springer, (D - Redmond.) Developers 'don't like to be required to do anything.'" *See* Justin Ellis, *"Sweetening the Pot," Real Change News*, Feb. 22, 2006.

26 *See, e.g., Hearing on HB 2984 Before the H. Comm. on Local Gov't*, 2006 Leg., Reg. Sess. (Wash. 1/26/06) (statement of Rep. Larry Springer, Member, House Comm. on Local Gov't, that HB 2984 "is an incentive program, not a mandate. No one is required to do anything … The key here is that the builder will not do it if it doesn't pencil out for him"), available at *http://www.tvw.org* (last visited April 2, 2008); *Hearing on H..2984 Before the H.*, 2006 Leg., Reg. Sess. (Wash. 3/4/06), available at *http://www.tvw.org* (last visited April 2, 2008).

27 *See* SHB 2984, H AMD 848, by Representative Springer, adopted February 14, 2006, available at *http://www.leg.wa.gov/pub/billinfo/2005-06/Htm/Amendments/House/2984-S%20AMH%20SPRI%20MOET%20025.htm* (last visited April 2, 2008).

28 *See Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002).

29 *See Bellevue Fire Fighters Local 1604 et al. v. City of Bellevue*, 100 Wn.2d 748, 753, 675 P.2d 592 (1984); *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 449, 536 P.2d 157 (1975).

30 *See Washington State Legislature v. Lowry*, 131 Wn.2d 309, 326, 931 P.2d 885 (1997).

31 *See Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997).

32 RCDG 20D.30.10-010.

33 The City of Bellevue was actually the first Washington municipality to enact an affordable housing incentive zoning program, but Bellevue's program is no longer operative.

34 RCDG 20D.30.10-020(1). At the time of its enactment, Redmond's affordable housing ordinance only applied to the City Center (downtown) Neighborhood. However, in recent years, and pursuant to the City's neighborhood planning processes, the requirement has been enlarged in geographic scope and now includes the neighborhoods of Willows/Rosehill, Grasslawn, North Redmond, and Education Hill.

35 *Id*.

36 RCDG 20D.30.10-010(1).

37 RCDG 20D.30.10-020(2).

38 The City's ordinance also provides for discretionary approval of alternative

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Washington's Expanded Domestic Partnership Act

by Megan J. Ballard, Associate Professor of Law – Gonzaga University School of Law, Spokane

Washington's first domestic partnership law, which became effective on July 22, 2007, represented an important initial step in meeting the legislative goal of "promoting family relationships and protecting family members during life crises."[1] Significantly, it defined domestic partners and created a registration system for domestic partnerships. [2] Yet this 2007 domestic partnership law was quite limited as the Legislature initially crafted it. The WSBA *Bar News* published an article in September 2007 detailing its limitations from a family law perspective, concluding that the legislation "does little to alter the landscape of family law in the state."[3] This newsletter article originally intended simply to highlight the changes made by this law, as well as its glaring gaps, from an estate planning perspective. The Legislature, however, acted speedily to plug these gaps, and Governor Gregoire signed a bill March 12, 2008, significantly broadening the scope of the initial domestic partnership law.[4] This new legislation will take effect June 12, 2008. In light of the recent legislative expansion of the 2007 domestic partnership law, this article will first review salient features and omissions of the initial law as it related to decedents' estates, then explain how provisions in the new legislation, House Bill 3104, remedy these initial flaws.[5]

Intestacy and Community Property

The most significant estates-related change under the initial domestic partnership law is the addition of a surviving registered domestic partner as a taker under intestacy.[6] The 2007 law revised RCW 11.04.015(1) to provide that a surviving registered domestic partner is due the same share as that of a surviving spouse. This addition also means that a surviving registered domestic partner is a "party" for purposes of the Trust and Estate Dispute Resolution provisions.[7]

Yet a domestic partner could not take an intestate share mirroring "that of a surviving spouse" with no concurrent change to the definition of community property. The 2007 domestic partnership law did not address community property. This omission left surviving domestic partners and creditors of a decedent in uncertain territory. With no allowance for community property between domestic partners, courts likely would have turned to the meretricious relationship doctrine. The Washington Supreme Court's recent opinion in *Olver v. Fowler* hints at how courts might have created a common law of community property for registered domestic partners. *Olver v. Fowler*, 168 P.3d 348, 161 Wn.2d 655 (2007). [8] The recent adoption of House Bill 3104, however, makes such judicial action unnecessary when a registered domestic partner dies intestate. It is possible, however, that courts might apply the meretricious relationship doctrine to a couple that meets the statutory definition of a domestic partnership, but fails to register the partnership.

Under the expanded domestic partnership law, domestic partners can now acquire community property. The 2008 law amends RCW 26.16.010 – formerly defining the separate property of a "husband" – to define the separate property of "spouses."[9] It then amends RCW 26.16.020 – formerly addressing the separate property of a "wife" – to define the separate property of a "domestic partner."[10] Parallel to the definition of the separate property of spouses, the separate property of a domestic partner is all property owned by a person prior to registration of the

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Affordable Housing Incentive Programs under HB 2984: Bonus or Burden?

compliance methods, such as the provision of affordable housing units off-site or cash payments in lieu of providing actual housing units. *See* RCDG 20D.30.10-030(2)(a)-(c). To date, however, no developer has opted to meet the City's affordable housing requirements pursuant to alternative compliance methods. Telephone Interview with Sarah Stiteler, Senior Planner, City of Redmond Planning and Cmty. Dev. Dept. (Dec. 6, 2007). In fact, Redmond is just now working with A Regional Coalition for Housing ("ARCH") to develop a formula for calculating the payment in-lieu. RCDG 20D.30.10-030(2)(b).

39 Telephone Interview with Sarah Stiteler, Senior Planner, City of Redmond Planning and Cmty. Dev. Dept. (Dec. 6, 2007).

40 Jim Potter, *"Housing set-asides won't solve affordability problem,"* Puget Sound Business Journal (July 6, 2007).

41 *See generally Seattle Case Study*, supra n. 3 (providing detailed analysis of constitutional limitations on incentive zoning).

42 *See Guimont v. Clarke*, 121 Wn.2d 586, 609, 854 P.2d 1 (1993). Ultimately, the U.S. Supreme Court's decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S.Ct. 2074 (2005) may change this analysis by eliminating the inquiry into whether the challenged regulation "substantially advance a legitimate state interest." *See* Dayton, Paul, et al., "The State of Regulatory Takings in Washington: Reconsideration of the State's Takings Formula under *Lingle v. Chevron U.S.A. Inc.*," Environmental and Land Use Law Newsletter, Washington State Bar Association, Vol. 34, No. 1 (May 2007). But for now, Washington courts continue to apply the takings analysis articulated in *Guimont*, including the "substantially advances" prong. *See, e.g., Peste v. Mason County*, 133 Wn.App. 456, 473, 136 P.3d 140 (2006).

43 *See Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994). Washington courts have not resolved the question of whether these more rigorous tests apply to regulations that impose fees or in-kind exactions.

44 *See Guimont*, citing *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 330, 787 P.2d 907, cert. denied, 498 U.S. 911, 112 L.Ed.2d 238, 111 S.Ct. 284 (1990).

45 In considering the interests of the public, courts consider factors such "the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it, and the feasibility of less oppressive solutions." *Presbytery*, 114 Wn.2d at 330.

46 *See* RCW 36.70A.540(3)(d).

47 *See The Ins and the Outs*, supra n.17, at 9.

48 *See The Ins and the Outs*, supra n.17, at 10.

49 *See Robinson v. City of Seattle*, 119 Wn.2d 34, 55, 830 P.2d 318 (1992), citing *San Telmo Associates v. City of Seattle*, 108 Wn.2d 20, 25, 735 P.2d 673 (1987).

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Washington's Expanded Domestic Partnership Act

domestic partnership, or that acquired afterwards by gift, bequest, devise, descent, or inheritance.[11] The new legislation goes on to amend RCW 26.16.030 to define community property as property "acquired after marriage or after registration of a state domestic partnership by either domestic partner or either husband or wife or both."[12] The recent expansion similarly changes other provisions in Chapter 26, including quasi-community property provisions.[13] House Bill 3104 also adds that, upon the death of a domestic partner, one-half of the community property shall be confirmed to the surviving domestic partner, by amending RCW 11.02.070.[14] Community property rights of domestic partners apply from either the date the partnership was registered or June 12, 2008 (the effective date of the new community property rights provisions), whichever is later.[15] Finally, the Legislature provided clarity to same-sex couples who move to Washington. Washington's domestic partnership provisions apply to these couples if they were previously joined under a law in another jurisdiction substantially equivalent to Washington's domestic partner laws.[16] Curiously, the Legislature extended this recognition only to same-sex partners. A heterosexual couple with one partner over the age of 62 that may have registered as a domestic partnership under California law, for example, presumably will be required to register under Washington's provisions.[17]

Omissions of Initial Law and Remedies provided by New Legislation

The following is a nonexclusive list of other estates-related omissions of the initial law and the remedies embodied in the expanded legislation.

- The initial law provided no protection for a surviving domestic partner when a decedent executed a will prior to registering the domestic partnership, similar to the omitted spouse protection. House Bill 3104 cures this by amending RCW 12.12.095 to provide for domestic partners who are unintentionally omitted from a decedent's will.[18]
- While the original domestic partnership law did make a surviving domestic partner an "heir" and therefore a party under a TEDRA proceeding, the new law changes the definition of a TEDRA "party" under RCW 11.96A.030(4) by including a surviving domestic partner as a party "with respect to his or her interest in the decedent's property."[19]
- The initial law provided for automatic revocation of a *nonprobate* transfer to a former domestic partner after the termination of a registered domestic partnership, amending RCW 11.07.010.[20] But it did not similarly provide for the automatic revocation of provisions in a *will* in favor of a former domestic partner after termination of the partnership. House Bill 3104 fills this gap by amending RCW 11.12.051 to automatically revoke such provisions unless the will provides otherwise.[21]
- The first domestic partnership law did not authorize a surviving domestic partner to petition the court for a "basic award" during probate proceedings. The recent revisions amend RCW 11.54.010 to allow for such a petition.[22]
- The initial law included no homestead protection for domestic partners. This omission is remedied by changes to the homestead provisions of RCW 6.13.[23] These amendments change the phrase "husband and wife" to "spouses," and add "domestic partners" to the homestead sections.
- While the initial domestic partner legislation did authorize a surviving domestic partner to serve as a personal representative or appoint one, if necessary, it made no other changes to probate administration.[24] The new law allows a surviving domestic partner to administer the community property (amending RCW 11.28.030);[25] requires that notice of a hearing on letters of administration be given to a surviving domestic partner (amending RCW 11.28.131);[26] and allows a surviving domestic partner who is a personal representative to avoid paying a bond under certain circumstances (amending RCW 11.28.185).[27] House Bill 3104 also allows a court to grant nonintervention powers to a surviving domestic partner (amending RCW 11.68.011).[28]

As this review illustrates, the Legislature's first domestic partnership law did not go far enough to meet its stated goal of providing a legal framework to support Washingtonians involved in "intimate, committed, and exclusive relationships with another person to whom they are not legally married."[29] The new law represents a significant improvement in granting to domestic partners important rights and responsibilities in the areas of community property and estate planning.

While the Legislature's two-step approach to crafting domestic partnership legislation seems disjointed and odd at first glance, it is possible that Washington lawmakers were quietly following the lead established earlier by their California counterparts. California, also a community property jurisdiction, initially established a domestic partnership registration system in 1999, effective in 2000.[30] Like Washington's initial law, the 1999 California legislation was limited. It served primarily to define domestic partners and establish registration procedures, rather than to create substantive protections for domestic partners. The initial act was followed by three year's worth of amendments. It was not until passage of the 2003 California Domestic Partner Rights and Responsibilities Act that legislators allowed domestic partners to hold community property, effective 2005.[31] California lawmakers were intentional about creating domestic partnership rights and responsibilities in a piecemeal fashion, maintaining that slow, incremental change was necessary to gain a broader base of political support.[32]

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Washington's Expanded Domestic Partnership Act

Regardless of the rationale behind Washington's two-step approach, and the criticisms aimed at the limitations of the first domestic partnership law, Washington's newly revised domestic partnership laws reflect a more comprehensive resolution to many of the legal uncertainties formerly surrounding nontraditional families.

1 RCW 26.60.010 Legislative Findings (2007).

2 "Domestic partners" must share a common residence, be at least eighteen years of age, be unmarried, be capable of consenting to the partnership, not be close relatives, and either be members of the same sex or, if the partners are not the same sex, then one must be at least sixty-two years of age or older. RCW 26.60.030. Legal rights and responsibilities are afforded to domestic partners who register with the Secretary of State's office. RCW 26.60.040.

3 Jason Holloway, Domestic Partnership and the Law, Wash. Bar News, Sept. 2007, at *http://www.wsba.org/media/publications/barnews/holloway.htm*.

4 Legislators introduced the revisions in a House bill introduced in January, H.B. 3104, Expanding Rights and Responsibilities for Domestic Partners. The House approved a substitute bill February 15, 2008 and the Senate passed this version on March 4, 2008. While the law expands rights and responsibilities of domestic partners, it does not expand the definition of domestic partners. That definition remains the same as initially crafted by the 2007 legislation. See *supra* note 3.

5 The expanded domestic partnership legislation also fills some of the family law gaps highlighted by Holloway's article. Significantly, the new legislation provides procedures for dissolution of domestic partnerships, including child support, maintenance and parenting plan obligations.

6 Id. at f.n. 2.

7 RCW 11.96A.030(4), including an "heir" as a party.

8 In September 2007, the Court held that the law of meretricious relationships applies to "divide assets between committed partners' estates where both partners are deceased." *Olver v. Fowler,* 161 Wn. 2d 655, 658, 168 P.3d at 350 (2007). In *Olver*, the Court upheld equitable distribution of property jointly acquired by an unmarried heterosexual couple both of whom died simultaneously in an automobile accident. In other words, property that would have been community property had the partners been married is treated like community property at their deaths — each partner owns an undivided one-half interest – once the partners are deemed to be in a meretricious relationship. The majority opinion makes clear that it is not treating the partners as "spouses" for purposes of intestate distribution of the property, but is only taking the initial step of determining what each partner owned at their death. The Court notes, however, that the domestic partnership law expressly adds registered domestic partners on the same footing as "spouses" for purposes of descent and distribution. *Olver* at 355 note 7. This dicta forecasted the application of equitable distribution of property when a domestic partner dies intestate absent any legislative changes to the definitions of community and separate property.

9 HB 3104, sec. 602, 2008 Leg. Sess. (Wa. 2008).

10 HB 3104, sec. 603, 2008 Leg. Sess. (Wa. 2008).

11 HB 3104, sec. 603, 2008 Leg. Sess. (Wa. 2008).

12 HB 3104, sec. 604, 2008 Leg. Sess. (Wa. 2008).

13 HB 3104, sec. 620-623, 2008 Leg. Sess. (Wa. 2008).

14 HB 3104, sec. 902, 2008 Leg. Sess. (Wa. 2008).

15 HB 3104, sec. 601, 2008 Leg. Sess. (Wa. 2008).

16 HB 3104, sec. 1101, 2008 Leg. Sess. (Wa. 2008).

17 Washington's recognition mirrors that of California in that neither expressly recognizes a senior heterosexual domestic partnership established in another jurisdiction. Cal. Fam. Code § 299.2.

18 HB 3104, sec. 911, 2008 Leg. Sess. (Wa. 2008).

19 HB 3104, sec. 927, 2008 Leg. Sess. (Wa. 2008).

20 HB 3104 does, however, amend this section to revoke nonprobate provisions in favor of a former domestic partner when the partnership is dissolved or determined invalid, not just when it is terminated by the partners. HB 3104, sec. 906, 2008 Leg. Sess. (Wa. 2008).

21 HB 3104, sec. 910, 2008 Leg. Sess. (Wa. 2008).

22 HB 3104, sec. 916, 2008 Leg. Sess. (Wa. 2008).

23 HB 3104, secs. 633-39, 2008 Leg. Sess. (Wa. 2008).

24 *See* RCW 11.28.120, as amended by the 2007 domestic partnership legislation.

25 HB 3104, sec. 913, 2008 Leg. Sess. (Wa. 2008).

26 HB 3104, sec. 914, 2008 Leg. Sess. (Wa. 2008).

27 HB 3104, sec. 915, 2008 Leg. Sess. (Wa. 2008).

28 HB 3104, sec. 925, 2008 Leg. Sess. (Wa. 2008).

29 RCW 26.60.010 (2007).

30 Domestic Partners, ch. 588, 1999 Cal. Stat. 3372.

31 Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. Rev. 1555, 1562 (2003-2004).

32 *Id*. at 1560-61, 1564 and 1566.

Estate Planning Practice Alert

by Akane R. Suzuki, Garvey Schubert Barer, Seattle

You may have already read the article "Disinherited by Vanguard" in the September 3, 2007 issue of *Forbes* magazine. If not, you should read the article as Vanguard's new policy regarding beneficiary designations could have a major impact on your clients' estate plans. You can find the article on the Internet at: *http://www.forbes.com/forbes/2007/0903/068.html* (or search for the article by its title).

Starting in the fall of 2007, Vanguard started requiring that the beneficiary designation of all IRAs of the same type belonging to the same customer (e.g., roll-over IRAs, traditional IRAs, and Roth IRAs) must have the same beneficiaries. In the event of inconsistent designations, Vanguard will apply the newest beneficiary to all of the IRAs of the same type. In other words, if your client has two Roth IRAs and names Child A as the beneficiary of the first IRA on January 1, and then names Child B as the beneficiary of the second IRA on January 5, Vanguard will treat Child B as the beneficiary of both Roth IRAs. Can you "beat the system" by submitting both beneficiary designation forms on the same day? No – according to the *Forbes* article, Vanguard will simply treat the form it processed later as newer.

Establishing separate IRAs and naming different beneficiaries for them, rather than having all beneficiaries split the same IRA, is a common estate planning technique. This is particularly true when some of the beneficiaries are individuals and some are charities. The presence of charities in the mix of beneficiaries significantly shortens the maximum deferral period for IRA distributions for the individual beneficiaries unless careful steps are taken to avoid that result. Thus, attorneys often advise their clients to have separate IRAs and designate one for the charities and another for the individual beneficiaries. This strategy will not work, however, if the client happens to have the IRAs at Vanguard. In the typical estate planning process, it is often the client, not the attorney, who is responsible for actually updating the beneficiary designation based on the attorney's advice. Unless the client is paying close attention to the fine print and informs the attorney, the attorney may not realize that the plan she advised cannot be implemented. What's worse, the client and the attorney may go on believing that the plan is in place, when in fact the IRA custodian's rules have overridden the plan and produced a very different result – until it's too late.

So what are we to do? The author of the *Forbes* article found that many of Vanguard's competitors continue to allow different beneficiaries for IRAs of the same type. So, the client can move his IRAs elsewhere and avoid this problem. However, this story is a good reminder that we as attorneys should keep in mind that the contract language is what governs the disposition of nonprobate assets, and it pays to pay attention to the fine print.

Article Ideas?

Please contact Aleana Harris if you are interested in writing an article for the newsletter or if you have ideas for article topics. Aleana's phone number is 206-623-7600 and her email is *aharris@alcourt.com*.

CLE Credits for *Pro Bono* Work?

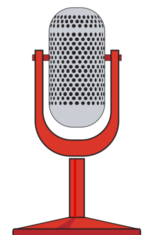
Yes, it's possible!

Regulation 103(g) of the Washington State Board of Continuing Legal Education allows WSBA members to earn up to six (6) hours of credit annually for providing *pro bono* direct representation under the auspices of a qualified legal services provider.

For further information contact Sharlene Steele, WSBA Access to Justice Liaison, at 206-727-8262 or *sharlene@wsba.org*.

Speak Out!

Wanted: Lawyers to volunteer to speak to schools and community groups on a variety of topics. For more information about the WSBA Speakers Bureau, contact contact Charu Verma at 206-239-2125 or *charuv@wsba.org*.



Legislative Alert: Amendment to Deeds of Trust Act

by Aleana W. Harris – Alston Courtnage & Bassetti LLP, Seattle

The Washington State Legislature passed an amendment to the Washington Deed of Trust Act[1] (the "Act") that takes effect on June 12, 2008. Substitute Senate Bill 5378 (the "Amendment") signed into law by Governor Gregoire on March 25, 2008, modifies several provisions of the Act, including the statutory form of Notice of Foreclosure. For the full text of Substitute Senate Bill 5378, please consult the Washington State Legislature's home page at *http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5378* under the link titled "Session Law" near the bottom of the page.

A. Fiduciary Duty Replaced with Standard of Impartiality.

The Amendment does away with the inconsistencies in the trustee's fiduciary duties imposed by the case of *Cox v. Helenius*[2] and replaces it with the trustee's obligation to act impartially between the grantor, borrower and beneficiary. In *Cox*, the Court held that "the fiduciary duty imposed upon the trustee is exceedingly high."[3] Then the Court went on to say that, "a trustee's management responsibilities under a deed of trust are less extensive than those of trustees in other fiduciary settings."[4] The Court also held that the trustee owed fiduciary duties to the borrower and the beneficiary, even though the parties may have competing interests in the foreclosure process. For example, the trustee may not be able to act as a fiduciary to both the borrower and the beneficiary when deciding whether or not to postpone the sale.

The Amendment replaces the trustee's common law fiduciary duties with an obligation to act impartially between the grantor, borrower and beneficiary.[5] Impartiality is consistent with the standard articulated by the Court in *Cox*.[6]

B. Written Notice Required with Continuance by Public Proclamation.

The Amendment addresses the problem of what has been referred to as "stealth continuances" by requiring written notice when the sale is continued by public proclamation.[7] The problem arises when a borrower, grantor or other party is not present at the sale,[8] the sale is continued by public proclamation and the property is sold at a later date without the borrower or grantor's knowledge. The Amendment addresses this problem by requiring the trustee to provide written notice of the new date, time and place of the sale to the borrower, grantor and any party who has a deed of trust, mortgage, lien or claim of lien against the property that was recorded after the deed of trust being foreclosed, but before the notice of sale was recorded.[9]

C. Revised Notice of Foreclosure/New Requirements for Trustees.

Effective as of June 12, 2008, the statutory form of the Notice of Foreclosure is amended to include payoff information.[10] This change was intended to address the borrower's or grantor's need for timely information during the foreclosure process. For example, when there is equity in the property, the grantor may want to sell the property or even refinance the loan. Providing the payoff information in the Notice of Foreclosure gives additional information to the borrower or grantor from the outset of the process. Please consult the Amendment for the specific payoff language that should be included in the Notice of Foreclosure.

Additionally, the Notice of Foreclosure includes a new requirement regarding the trustee's response to requests for updated payoff and reinstatement information. The trustee must respond to a written request for updated information within ten days of receipt of the written request.[11] Please consult the Amendment for the exact statutory language to be included in the Notice of Foreclosure.

The Amendment also seeks to address the continuing concern of accessibility to trustees during the foreclosure process by requiring the trustee to maintain telephone service and a physical presence in the State.[12] Under the prior Act, if a trustee satisfied the statutory requirements for serving as a trustee, the trustee only needed to have a street address in the State for service of process from the date of the Notice of Trustee's Sale through the date of the sale. With no other physical presence in the State, borrowers or grantors have had difficulty actually physically contacting or personally speaking with the trustee or a trustee representative during the foreclosure process. Now in addition to maintaining a street address for service of process, the Amendment requires trustees to maintain a telephone service and physical presence at the address.[13] The physical presence requirement can be satisfied through an agent, employee or representative of the trustee who is located at or conducts business from the address during the foreclosure process.

D. Sale is Final Upon Delivery of Deed.

The Amendment allows the trustee to decline to deliver the deed after the sale and to refund the purchase price if it appears that the bidding was collusive or defective, or if the sale might have been void.[14] In *Udall v. T.D. Escrow Servs., Inc.,*[15] the Court held that under the Act, after the sale at auction, the trustee's obligation to deliver the deed was simply a "ministerial act," absent procedural irregularities that rendered the sale void. The Amendment gives the trustee the ability to withhold the deed and refund the purchase price if the bidding was collusive or defective or if the sale might have been void.[16]

E. Court Can Restrain Sale on Any Legal or Equitable Grounds.

The prior version of the Act stated that as long as the statutory prerequisites are satisfied, a court may restrain a sale for any "proper grounds". Given the importance of presale remedies to a borrower, grantor or any party with an interest in the property, the Amendment confirms that any "proper grounds" includes any proper "legal or equitable" grounds. [17]

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Legislative Alert: Amendment to Deeds of Trust Act

F. Restraining Order/Injunction Does Not Preclude Trustee from Continuing the Sale.

Prior to the Amendment, there was concern that RCW 61.24.130(5) could be interpreted narrowly to mean that the sale would need to be properly continued prior to issuance of the restraining order or injunction to be effective.[18] The Amendment clarifies that the issuance of a restraining order or injunction does not prohibit the trustee from otherwise continuing the sale during the time the sale is subject to a restraining order or injunction, if the trustee would otherwise have that right to continue the sale under the Act.[19]

1 Ch. 61.24 RCW.
2 103 Wn.2d 383, 693 P.2d 683 (1985).
3 *Id*. at 388-89.
4 *Id*. at 389.
5 SSB 5378, ch. 153, Laws of 2008, sec. 1, § 61.2.010(3)(4) (Wa. 2008).
6 *See* 103 Wn.2d at 389.
7 SSB 5378, ch. 153, Laws of 2008, sec. 3, § 61.24.040(6) (Wa. 2008).
8 There are many reasons that the borrower or grantor may not attend the originally scheduled sale, including if a bankruptcy petition is filed on the eve of the sale, or if the borrower or grantor is under the mistaken belief that the sale was restrained.
9 The original form of the Amendment required notice of the continuance to be provided to all the parties who received the initial Notice of Trustee's Sale, but this requirement was scaled back in the legislative process as a result of input from interest groups.
10 SSB 5378, ch. 153, Laws of 2008, sec. 3, § 61.24.040(2) (Wa. 2008).
11 *Id*.
12 SSB 5378, ch. 153, Laws of 2008, sec. 2, § 61.24.030(6) (Wa. 2008).
13 *Id*.
14 SSB 5378, ch. 153, Laws of 2008, sec. 6, § 61.24.135 (Wa. 2008).
15 159 Wn.2d 903, 154 P.2d 882 (2007).
16 A borrower's presale bankruptcy filing is an example of what would render the sale void. *See Udall v. T.D. Escrow Servs., Inc*., 159 Wn.2d at 911.
17 SSB 5378, ch. 153, Laws of 2008, sec. 5, § 61.24.130(1) (Wa. 2008).
18 SSB 5378, ch. 153, Laws of 2008, sec. 5, § 61.24.130(5) (Wa. 2008).
19 SSB 5378, ch. 153, Laws of 2008, sec. 5, § 61.24.130(6) (Wa. 2008).

Notes from the Chair

by Alfred M. Falk – Harlowe & Falk LLP, Tacoma

These notes accompany the Winter 2008 issue. Our Editorial Board, led by Editor Aleana Harris, has us almost caught up to schedule. For that, I am grateful, as I'm sure you are. This Newsletter is one of the most valuable resources provided to you by your section. We hope to be fully on track by the Summer, 2008 issue. Thank you for your patience.

Another great resource is our website. It and the list-servs, one each for real property and probate and trust, are all managed by our Webmaster, Elizabeth Stephan, and the Assistant Webmaster, Roberto Soto. You will find many resources on the Members page of the website. All the Newsletters from recent years can be found there. Also, chapters from deskbooks and seminars have been posted there. Finally, for those interested in Section business affairs, you can find minutes of Executive Committee meetings, our Bylaws as amended to date, and our policies relating to reimbursement of expenses, which underwent a recent set of changes to reflect changes in WSBA reimbursement policies.

I want to remind you that the premier event of the RPPT year, our Midyear Meeting, will be held on June 6-8 in Vancouver, Washington. The flyer for this program arrived in my mail as I was preparing these notes. The Midyear Meeting is always a great opportunity to pick up CLE credits for highly informative seminar sessions and to create or renew friendships with fellow practitioners from around the state. Don't miss it.

Recent Developments

Real Property

by Scott Osborne – Kirkpatrick & Lockhart Preston Gates Ellis LLP, Seattle

Three recent decisions from the Washington Supreme Court dealt with counting days, and first amendment rights in the context of a landlord-tenant relationship and limitations on the application of the doctrine of merger in the context of a real estate sale.

Counting Days and RCW 59.12.030(3)

Then shalt thou count to three, no more, no less. Three shall be the number thou shalt count, and the number of the counting shall be three. Four shalt thou not count, neither count thou two, excepting that then proceed to three. Five is right out. Once the number three, being the third number …"
Monty Python from *Monty Python's Flying Circus* repeating alleged divine instructions on how to count to the number "three."

The facts in *Christensen v. Ellsworth*, 162 Wn.2d 365 (2007) are straight-forward. Christensen leased an apartment to Ellsworth. When Ellsworth failed to pay rent that was due on July 2, 1998, Christensen served Ellsworth a notice on July 3, 1998 demanding the payment of rent or vacation of the premises within four days (prior to Wednesday, July 8, 1998). Ellsworth failed to respond, and also failed to respond when Christensen commenced an unlawful detainer action on July 8th. July 3rd was a legal holiday since July 4, 1998 fell on Saturday. July 8th was a Wednesday. When Ellsworth failed to appear, an order of default and writ of restitution were issued.

Six years later, Christensen sought a default judgment based on the order of default. In this proceeding, Ellsworth sought to vacate the order of default pursuant to CR 60(b) (5), and the trial court agreed. The trial court found that it lacked subject matter jurisdiction over the unlawful detainer action because Christensen failed to provide the required notice under RCW 59.12.030(3):

> (3) When he or she continues in possession in person or by subtenant after a default in the payment of rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, … has remained uncomplied with for the period of **three** days after service thereof… [Emphasis added]

Since service had been accomplished through the mail, the statute required a four day period prior to the commencement of the unlawful detainer proceeding. Applying the method of counting days under CR 6(a), the trial court found that service on a Friday (which was a legal holiday) calling for payment on the following Wednesday, did not comply the three-day requirement of the statute. The Court of Appeals affirmed.

The Washington State Supreme Court reversed and remanded the matter to the trial court for further proceedings. While acknowledging that "as a general matter, time calculations rules should be applied in a clear, predictable manner," the Court also observed that it was required to give effect to the plain meaning of statutory language. The Court held that the civil rules did not apply to the three-day waiting period mandated by the statute, and to apply the method of computation in CR 6(a) would be inconsistent with the plain language of the statute. The Court articulated two primary reasons for its ruling. First, the civil rules apply to procedural matters in civil actions, and do not alter the substantive provisions of statutes. Second, the three-day time period in RCW 59.12.030(3) is a waiting period and CR 6(a) applies to the "computation of litigation-related deadlines or limitations periods." *Id.* at 376.

> Christensen served the required notice on Friday. Because the notice was served by mail, the unlawful detainer statute required a four day waiting period. The four day waiting period ended on Tuesday and Christensen timely served Ellsworth with a summons and complaint for unlawful detainer on Wednesday.

Id. at 377.

Tenant First Amendment Rights

In a 5 to 4 decision, the Washington State Supreme Court, in *Action Council v. Housing Authority,* 162 Wn.2d 773 (2008), invalidated a rule adopted by the Seattle Housing Authority (SHA) that prohibited tenants from placing signs, flyers, placards, advertising and similar materials from the doors of the units leased by the tenant. The Resident Action Council (RAC), comprised of representatives from various low-income pubic housing communities in the state (including those operated by SHA), commenced an action to enjoin the enforcement of the regulation on the grounds that it violated the tenants' First Amendment rights. The trial court ruled in favor of RAC, and the Supreme Court affirmed.

SHA adopted the total ban on affixing items to exterior surfaces of its units, including doors to further its policy that the units conform in appearance with surrounding residences. SHA also claimed that the various messages and posters placed on doors were sources of controversy among the tenants of the housing developments and required repair expenses to remove. The trial court found these reasons insufficient to justify the restriction on the speech rights of the tenants.

The Supreme Court started its analysis by determining that the individual tenants had "control" over the doors to each unit, including the exterior surface.

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> When a door is necessary to a tenant's use of the premises, and is for the exclusive use of the tenant and the tenant's invitees, it passes as an appurtenant to the leased premises and is part of the leased premises.

Id. at 779-780.

Finding that the doors were part of the premises, the holding in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) was found to be applicable. In that case, the United States Supreme Court invalidated a city ordinance that purported to regulate the nature of signs that could be placed on private property, finding that "residential signs" carried a distinct message for which there were not adequate substitutes.

> Like the ordinance in *Gilleo*, the SHA rule bans too much speech. The signs in this case may reflect reactions to local events or signal support or opposition to political candidates or laws. They do so in a manner that is inexpensive. … SHA has failed to meet its burden of justifying a restriction on speech.

Id. at 782.

A dissent by four justices emphasized that SHA was the state acting in a proprietary capacity with respect to its own property and therefore the analysis applied by *Gilleo* was inapplicable.

> Signs and displays on doors became a particular concern for management. … These have included swastikas, nude pictures and photographs, religious symbols, and profane language. Such door displays created hostility between residents and resulted in serious management problems for property managers. In addition, costs of refinishing decorated doors have been a significant expense for the Housing Authority.

Id. at 787-788.

This case offers something of a cautionary note concerning the ability of landlords to control the use and enjoyment of premises by tenants. Although First Amendment rights are typically not involved in leases between private parties (unlike a state-sponsored housing authority), the Court's reasoning concerning what is or what is not included within the "premises" leased to a tenant, and the degree of control that a tenant has over the "premises," may create some confusion in private landlord-tenant cases in the future. The opinion emphasizes the importance for landlords in drafting clear reservations of rights associated with the grant of a leasehold interest in specific premises. It is hard to believe that event a state-sponsored landlord cannot retain sufficient control over the exterior of rented property that is leased to others to regulate the display of signs and other items that may be visible from adjacent property, although the Court seemed somewhat uninterested in the actual lease provisions applicable to SHA and its tenants.

Merger

Despite the assertions by various commentators that the theory of negligent misrepresentation has disappeared from the real estate law landscape, the theory appears to have enough vitality to defeat a claim that additional, undisclosed encumbrances must be accepted by a purchaser under the doctrine of merger. *Ross v. Kirner*, 162 Wn.2d 493 (2007), involved a sale of real estate from Kirner to Ross located in Clallam County. Ross was provided a survey of the property that showed a single easement bisecting the property which served as access for the adjacent properties on the east and west. The survey did not show additional easements that Kirner had granted to his son benefitting property to the west, and Kirner did not disclose the existence of the easements to Ross. The initial title report provided to Ross did not disclose the existence of these additional easements.

Prior to the closing of the sale to Ross, Kirner had a new survey prepared and recorded, and this survey did disclose the additional easements. Shortly before closing, the title company issued a supplemental report that disclosed the existence of the easements and the deed to Ross was also changed from the prior proposed deed to include the easements. The change in the deed was not specifically pointed out to Ross. The transaction closed, and after the closing, Ross was informed of the existence of the easements.

Ross sued the title company and Kirner for damages. The claims against the title company were arbitrated, and Ross recovered damages for the diminution in value to the property caused by the easements. Ross then amended the complaint against Kirner to seek rescission and recovery of interest on the contract price plus the value of improvements made to the property. The title company also sought damages for fraud, negligent misrepresentation and breach of contract. The trial court dismissed the claims under the doctrine of merger. The Court of Appeals reversed on the grounds that the failure to disclose the additional easements created a claim for negligent misrepresentation, which was not barred by the doctrine of merger.

The Supreme Court noted that the doctrine of merger did not bar actions arising from fraud, misrepresentation or mistake. In order to prove actionable negligent misrepresentation, it must be established:

> … that (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transaction, (3) the defendant was negligent in obtaining or communication the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately cause the plaintiff damages.

Id. at 499.

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The Supreme Court, however, reversed the Court of Appeals to the extent that its opinion suggested that Kirner committed actionable negligent misrepresentation as a matter of law.

> The Court of Appeals properly viewed the evidence and reasonable inferences arising therefrom in the light most favorable to the nonmoving parties, Ross and Ticor [citation omitted]. And there is evidence supporting the negligent misrepresentation claim. But the undisputed evidence does not establish as a matter of law that Kirner committed actionable negligent misrepresentation.

Id. at 500.

In commenting that an omission alone is not enough to establish negligent misrepresentation, since the reliance on the omission must be proven to be reasonable, the Court seemed to indicate that there was an issue of fact as to the reasonableness of reliance of Ross on Kirner's failure to affirmatively disclose the easements, even though the title company clearly knew of the easements by the time the transaction closed.

Not mentioned in the opinion was the notion that the economic loss doctrine as articulated in *Alejandre v. Bull*, 159 Wn.2d 674 (2007) limited the availability of the theory of negligent misrepresentation to support a claim for rescission, as opposed to a claim for damages. Arguably, the rationale in *Alejandre* is not applicable in rescission claims, which are grounded in equity. Can a carve-out from the limitations in *Alejandre* for reformation be more than one bad fact pattern away?

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