



NEWSLETTER

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FOCUS

Protecting Real Property *in a Recovering Market*

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ANNOUNCEMENTS

FIRM NEWS

The Best Lawyers in America List Includes Firm Attorneys

The Best Lawyers in America is a listing of outstanding attorneys who have attained a high degree of peer recognition and professional achievement. The listing recognizes the following shareholders: **Michael A. Bosco, Jr.** (Real Estate Law); **Mark S. Bosco** (Litigation – Banking & Finance and Mortgage Banking Foreclosure Law); **David L. Case** (Trusts and Estates and Litigation – Trust & Estates); **James A. Fassold** (Litigation – Trusts and Estates); **Richard G. Himelrick** (Litigation – Securities); **Christopher R. Kaup** (Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law and Litigation – Bankruptcy); **Leonard J. Mark** (Family Law); **James P. O'Sullivan** (Closely Held Companies and Family Business Law); and **Michael E. Tiffany** (Real Estate Law).

Arizona Business Magazine Issues Recognitions

The following Shareholders are recognized by the *Arizona Business Magazine* as "Top Lawyers" for 2013, and/or were ranked by *Ranking Arizona*: Banking: **Mark S. Bosco** and **Michael A. Bosco, Jr.**; Bankruptcy/Reorganization: **Mark S. Bosco** and **Christopher R. Kaup**; Business/Corporate Law: **James P. O'Sullivan** and **Robert A. Royal**; Commercial Litigation: **Richard G. Himelrick** and **Christopher A. LaVoy**; Construction Litigation: **Kevin P. Nelson** and **William J. Simon**; Employment/Labor: **Pamela L. Kingsley**; Estate/Trust Litigation: **James A. Fassold** and **Alisa J. Gray**; Government Relations: **Timothy A. La Sota** and **Michael E. Tiffany**; Intellectual Property: **Richard E. Oney** and **Dow Glenn Ostlund**; Mergers and Acquisitions: **William H. Finnegan** and **James P. O'Sullivan**; Real Estate: **J. Lawrence McCormley** and **Michael E. Tiffany**; Securities/Corporate Finance: **Michael E. Tiffany**; Tax: **David L. Case** and **William H. Finnegan**.

PROFESSIONAL AND PERSONAL ACHIEVEMENT

DAVID L. CASE organized and chaired the "Trust & Estate" track for a four-day educational program in San Diego for the State Bar of Arizona, and also prepared materials and spoke at the program on tax and estate planning regarding the new federal wealth transfer tax legislation.

WILLIAM M. FISCHBACH III was appointed to the board of directors for Goodwill of Central Arizona. Goodwill's commitment is to put people to work through job training, education, and career services. In 2012, Goodwill of Central Arizona raised over \$96 million in retail revenue, using it to serve nearly 42,000 Arizonans and help find over 15,500 job opportunities.

RICHARD G. HIMELRICK spoke and presented papers on Arizona



Richard G. Himelrick

securities law and class actions at two State Bar seminars. An article he authored, "Aiding or Encouraging Securities Fraud after *Sell v. Gama*," will be published in a forthcoming issue of the *Arizona Attorney*. The new edition of his treatise, *Arizona Securities Law: Civil Liability, Remedies, and Defenses*, is scheduled for publication this fall.

J. JAMES CHRISTIAN has been named as one of the *Phoenix Business Journal's* 2013 Diversity Champions. The program honors individuals who are leading the way in creating and ensuring diversity in the community. All honorees were selected by a panel of local business leaders, in conjunction with the *Phoenix Business Journal's* Diversity Advisory Board. James is also a Local Heroes Award recipient through One Community's Third Annual Spotlight on Success Program. This program celebrates LGBT and allied business leaders for promoting diversity in the workplace, in public accommodations, and in housing.



DAN LEAP/ISTOCKPHOTO

JAMES P. O'SULLIVAN received the 2013 State Bar of Arizona Continuing



James P. O'Sullivan

Legal Education Award. This award is given each year by the State Bar to one individual in recognition of the individual's outstanding contributions to the Continuing Legal Education Program.

MICHAEL E. TIFFANY has been listed as a leader in his field in the



Michael E. Tiffany

2013 edition of *Chambers USA: America's Leading Lawyers for Business* in the Real Estate practice area. Mike has more than 40 years' experience of Arizona legal practice.



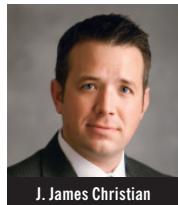
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ANNOUNCEMENTS

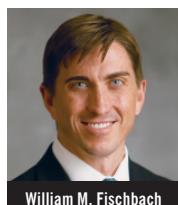
FIRM NEWS

TIFFANY & BOSCO NAMES NEWEST SHAREHOLDERS



J. James Christian

J. JAMES CHRISTIAN was named Shareholder in the firm's Phoenix office. His litigation and transactional practice focuses on investment and securities, automotive, and complex litigation matters. James advises businesses of all sizes on a number of topics such as regulatory compliance, fiduciary responsibilities, and general corporate law. James has been with Tiffany & Bosco since 2004.



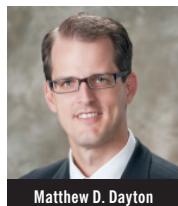
William M. Fischbach

WILLIAM M. FISCHBACH III has been named Shareholder in the firm's Phoenix office. Will joined the firm in 2009 and concentrates his practice in commercial and civil litigation with an emphasis in real estate, banking, contract disputes, personal injury, and automotive law. Prior to joining Tiffany & Bosco, Will served as an attorney in the United States Army Judge Advocate General's (JAG) Corps, where he completed tours of duty in Iraq, Afghanistan, Uzbekistan, and the Republic of Korea. He received a Bachelor of Science degree from Arizona State University in 1994 and a J.D./M.B.A. from Tulane University Law School in 1999.



Brett M. Hager

BRETT M. HAGER joined the firm as a Shareholder in July 2013 to work with Rob Royal in the Business Litigation and Business Divorce group. Brett, a licensed private pilot, also focuses on further developing his existing aviation practice. Brett has successfully prosecuted many aviation injury and wrongful-death claims, including a fatal seaplane accident in Oregon, a fatal high-tension wire-strike over the Salt River, a fatal accident involving a flight student on a solo out of Deer Valley Airport in inclement weather, the fatal crash of a Beechcraft King Air last December in Montana, and the non-fatal crash of a Beechcraft Bonanza on Deer Valley Road, to name a few. Additionally, Brett defends aviation claims and enjoys representing pilots, aircraft owners, and various other aviation-related entities. Brett has always enjoyed a diverse practice and considers himself somewhat of a "generalist." Brett earned his B.S. degree in editorial journalism from the University of Illinois, Urbana-Champaign, and his J.D., *magna cum laude*, from Tulane University Law School.



Matthew D. Dayton

MATTHEW D. DAYTON joined the firm as an associate at the Nevada office in May 2013. Matt is a fourth year associate admitted to practice in all Nevada state and federal courts and represents clients ranging from individuals to large, national lending institutions. Currently, his practice is focused on representing lenders, loan servicers, and trustees in foreclosure-related matters, mediations, judicial reviews, and representing creditors in bankruptcy courts. Matt was raised in North Canton, Ohio — home to the National Football Hall of Fame. He attended Brigham Young University for his undergraduate degree, where he received his Bachelor of Arts in English Teaching. After a couple of years of teaching in the classroom, Matt attended the William S. Boyd School of Law in Las Vegas, Nevada and received his Juris Doctorate in 2009.

Firm Welcomes New Associate

GOOD WORKS

MARK S. BOSCO was appointed as a Founding Member of the board of directors of the Care Fund (formerly Homeowners Financial CARE Fund). Mark's role as a board member is to serve as a leader in promoting awareness and serving as a steward for fundraising and development. The Care Fund was established in 2013 as a 501(c)(3) non-profit organization dedicated to financially and resourcefully supporting Arizona families who endure financial hardship while experiencing extended illness or injury of their children up to 18 years of age. The Care Fund provides mortgage, rent, and housing expense relief to Arizona families. It is the only granting organization of its kind in Arizona.



MAY LU co-chaired the 2013 ASU Asian Pacific LEAD Academy's Mock Trial from June 10 to 12, 2013. The Academy provides

academic support and leadership skills training for Arizona high school students, as well as teaches Asian American and Pacific Islander cultures, history, and current issues.

KEVIN P. NELSON was named a Member of the Board of Directors of The Boys & Girls Clubs of Greater Scottsdale. The non-profit organization offers more than 100 youth development programs at the



Kevin P. Nelson

organization's nine branches and 12 outreach sites located in Scottsdale, Phoenix, Mesa, Fountain Hills, and the Salt River Pima-Maricopa and Hualapai Indian Communities. They provide youth development services that instill strong core values and life enhancing skills in a safe environment. The programs help promote healthy lifestyles, good character, and academic success.

David v. Goliath

*The Supreme Court
Applies Takings
Doctrine to Land Use
Regulation*



PROTECTING REAL PROPERTY

BY WILLIAM E. LALLY

In a recent opinion, the U.S. Supreme Court invoked the “unconstitutional conditions doctrine” in the context of land-use regulation and sided with a property owner who had challenged powerful government regulators. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013). This case highlights the David and Goliath battles that often characterize negotiations between government land planners and property owners. As the battles become increasingly sophisticated, property owners debate whether to challenge questionable requirements or give in and finish their projects.

The thought of challenging a governmental entity with seemingly endless legal resources is a sufficient disincentive to initiating a legal battle. As a result, regulators routinely get what they want. But in June 2013, the Supreme Court held that conditions for permit approval must comply with the unconstitutional conditions doctrine. *Id.*

The facts date back to 1972, when Coy Koontz purchased 14.9 acres east of Orlando, Florida, on which he planned to construct a building.



William E. Lally

In Florida, a landowner must obtain a permit from the local water management district if a proposed development

impacts the wetlands. Accordingly, in 1994, Koontz applied for a permit from the St. Johns River Water Management District (the “District”) to develop 3.7 acres of his land. In exchange, Koontz offered to impose a conservation easement on the remaining eleven acres.

The District rejected this proposal but offered to issue the permit if Koontz either reduced the size of the development to one acre or paid to improve fifty acres of District-owned land. Koontz sued and alleged that the unreasonable request constituted an unlawful taking because the tests set

forth in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), “allow[ed] the government to condition approval of a permit on the dedication of property to the public so long as there [wa]s a ‘nexus’ and ‘rough proportionality’ between the property that the government demands and the social costs of the applicant’s proposal.” *Koontz*, 133 S. Ct. at 2595 (citing *Nollan*, 483 U.S. at 837, and *Dolan*, 512 U.S. at 391).

The Supreme Court agreed and “h[e]ld that the government’s demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.”¹ *Id.* at 2603.

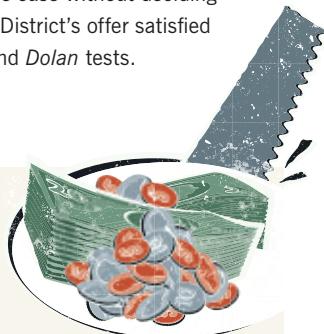
Thus, the Court acknowledged “the special vulnerability of land use permit[s]” and expanded the takings doctrine to the realm of land-use regulation. *Id.*

During an influx of real estate development and activity, local municipalities may explore ways to transfer the burden of growth to the private sector. As Arizona’s real estate economy continues to rebound, private developers should be mindful that governmental land-use regulation has limits.

1. The Court reversed the Florida Supreme Court’s decision and remanded the case without deciding whether the District’s offer satisfied the *Nollan* and *Dolan* tests. *Id.* at 2603.

Recent Court Ruling Clarifies ‘Compensable Damages’ Under Arizona Condemnation Law

In *City of Phoenix v. Garretson*, 232 Ariz. 115, 302 P.3d 640 (App. 2013), the Arizona Court of Appeals held that the owner of a Jefferson Street parking lot in downtown Phoenix may be awarded “compensable damages” resulting from the “loss or ‘material impairment’” of an established access route (via Jefferson Street) to his parking lot even though the lot can be accessed by Madison Street. The “loss or ‘material impairment’” was caused by construction of the light rail on Jefferson Street. — William M. Fischbach III



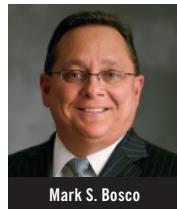
PROTECTING REAL PROPERTY

Mediation of Non-Judicial Foreclosures in Nevada

New rules outline required process for foreclosure of owner-occupied residential properties

BY MARK S. BOSCO

Approximately four years ago, the Nevada Legislature promulgated legislation establishing a mediation program for non-judicial foreclosures on owner-occupied residential property. The delay that resulted from the establishment



Mark S. Bosco

of the mediation program required numerous additional remedial steps by the Nevada Judiciary and Legislature. However, each remedial step taken

necessitated additional delay as lenders and servicers took action to comply with the new requirements. This article highlights the most recent and significant changes to the mediation program that became effective on January 1, 2013.

First, the mediator is required either to set a "Pre-Conference" or to call each party. The purpose of this initial contact is to determine what documentation and information the servicer needs to consider a loan modification or alternative plan. The servicer has five days after the initial contact to provide the mediator and the homeowner with a list of additional documentation and information needed. The homeowner is then required to use his or her "best effort" to submit the documentation in his or her possession within 15 days and to begin the process of obtaining documentation not in the homeowner's possession. Once the homeowner submits documentation, the servicer has 15 days to review the documentation and send a written request to the mediator and homeowner for additional

information. The homeowner then has 15 days to submit additional or corrected documents. Within five days of receipt of the additional or corrected documents, the servicer may request clarification, and the homeowner has five days to provide that clarification. If the homeowner complies with the above-outlined requirements, the servicer cannot subsequently claim a "lack of documents or information." Such a claim could result in sanctions or denial of a certificate allowing the servicer to continue the foreclosure and set a sale date (the "Certificate").

A potential benefit of the initial contact is that the borrower may advise the mediator and the servicer that the borrower intends to abandon the property. That statement would allow the Servicer to focus on a "Short Sale." The new rules require the Servicer to be able to negotiate:



(1) the listing price; (2) the date by which the property will be listed; (3) the period of time in which the property will be marketed; (4) a specified time in which the servicer must accept or reject any offer; and (5) the maximum length of time the escrow may be open. Every "Short Sale" agreement must state whether the deficiency is waived.

The new rules also provide clarification regarding the numerous documents the servicer must produce prior to the mediation. Further, the rules clarify that the servicer must provide a separate "Certification" with each document, including the note and each note endorsement, the deed of trust, all assignments, and the merger documents, if applicable. The "Certification" must include an original signature and be notarized. Failure to provide any "Certification" will result in a denial of a Certificate. That failure also may result in sanctions requiring the servicer to either restart the non-judicial foreclosure or file a "Petition for Judicial Review."

The new rules also require servicers to provide the mediator with a Brokers Price Opinion ("BPO"), dated within 60 days of the scheduled mediation date. The BPO must be signed and dated and performed by a third party independent appraiser or broker.

One positive rule change is that the mediator is now required to provide fixed dates by which the homeowner must vacate the property and by which a Certificate must be issued.

GET ANSWERS

If you have any questions regarding compliance with these new rules, please contact Mark S. Bosco at (602) 255-6006 or msb@tblaw.com.

PROTECTING REAL PROPERTY

New Arizona Law Affecting Estate Planning and Probate

BY DAVID L. CASE

Arizona Senate Bill 1233 (containing new A.R.S. § 29-732.01), authorizing the holding of limited liability company (“LLC”) membership interests in Joint Tenancy With Right of Survivorship (“JTWROS”) and as Community Property With Right of Survivorship (“CPWROS”), and Senate Bill 1232, making several updates and improvements to Arizona’s probate and trust statutes, will facilitate and provide efficiency for many estate planning and probate administration matters.

This author was the primary drafter of Senate Bill 1233. With guidance from State Bar counsel, I shepherded the bill through legislative committees and the Arizona House and Senate and managed changes requested by State Bar members, including several additions by the Business Law Section. JTWROS and CPWROS have long been valuable tools for estate planning to allow the transfer of real property by operation of law at death without probate. Now that many of these assets are held in LLCs, A.R.S. § 29-732.01 was passed to provide reliable authority for titling LLC membership interests in this manner. Previously, some attorneys attempted to provide for ownership of LLCs in JTWROS and CPWROS by agreement, but with no specific authority under Arizona law, this created risk for clients.

A.R.S. § 29-732.01 is a workable statute covering the requirements for titling and transferring LLC membership interests to and from JTWROS and CPWROS. It also covers rules on voting and creditor rights while avoiding conflicts with other areas of law such as community property.

Numerous updates and clarifications for the probate and trust statutes were included in Senate Bill 1232. One change was to increase the amount of assets that can be held by a decedent without a probate being required. More specifically, the threshold amounts of assets that can be addressed by use of an Affidavit under A.R.S. § 14-3971 were increased to \$75,000 for personal property and



\$100,000 for real property. Assets held in trust in JTWROS, or as CPWROS, or that are payable at death by contract or beneficiary designation are not subject to probate, and do not count toward these threshold amounts. These new rules, combined with new A.R.S. § 29-732.01, provide more tools to effectively plan for avoiding probate proceedings.

Another important addition is A.R.S. § 14-10814.B.3, which limits (unless otherwise provided in the trust agreement) the discretionary distribution standard, where a trustor of a trust also serves as a trustee, to the beneficiary’s health, education, support, or maintenance, as defined by federal tax law. The purpose is to avoid inadvertent inclusion of assets in the trustor’s estate for federal estate and generation-skipping tax purposes. However, this rule will not apply to “special needs trusts” in order to avoid the loss of state and federal disability benefits.

New A.R.S. § 33-1126.A.10 now provides creditor protection for I.R.C. § 529 college savings plans similar to retirement plan interests, annuity contracts, and life insurance cash value. Updated clarifications to Arizona law relating to trust protectors, nonjudicial settlement agreements for trusts, disclaimers, powers of appointment, and other Arizona Trust Code provisions relating to creditor protection also were passed.



David L. Case



For more information about Tiffany & Bosco's resources in this area, please contact David L. Case at (602) 255-6097 or dlc@tblaw.com.



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Tiffany & Bosco, P.A. has provided a wide range of legal services to the business community since 1967. The firm's experienced attorneys represent domestic and foreign clients on a local, national and international basis. Tiffany & Bosco, P.A. is the Arizona law firm member of MSI, a worldwide network of independent legal and accounting firms. Tiffany & Bosco, P.A. is also a member of the USFN, and the FNMA and FHLMC designated counsel programs.

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This newsletter is published as a service to clients and friends. It is intended to give general information only and not to provide advice on specific legal issues. For information, change of address, or copies, please contact our Editors, Pamela L. Kingsley or Robert A. Royal at (602) 255-6000. ©2013 Tiffany & Bosco, P.A.



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