TAKING LAND FOR ECONOMIC DEVELOPMENT

A city negotiated with property owners to acquire a strip of land and some temporary easements for the purpose of installing a deceleration lane for traffic that would access a new development. Included in that development was a building to be occupied by a well known national retailer of consumer goods. After initial negotiations to acquire the real property failed, the city filed a petition in state court to condemn the property.

The owner of the property subject to being taken tried to capitalize on the fact that the state legislature had recently subjected the power of eminent domain to a new additional limitation. In 2006, after the U.S. Supreme Court had determined in a controversial ruling that the transfer of land to a third party for the purpose of furthering a city's economic development plan was a sufficiently public use to permit the constitutional exercise of eminent domain, the legislature passed a new law to prohibit the use of eminent domain "if the taking is primarily for an economic development purpose."

The property owner argued that the deceleration lane primarily served the economic development purpose of providing vehicles access to the nearby retailer. He reasoned further that the addition of the deceleration lane would ultimately cause the expansion of the city's property and sales tax bases by providing the retailer's customers easier access to the retailer's parking lot.

A state appellate court upheld the taking. Although the collateral consequences of the addition of a deceleration lane might include some enhancement to economic development, the primary purpose of the new lane clearly was the same as for any other road project— simply to promote traffic safety and the efficient flow of traffic on the city's streets. The court acknowledged that many permissible uses of eminent domain provide collateral benefits to private industry. When land is acquired by eminent domain for a public building, such as a school, nearby convenience stores or restaurants may also benefit. Using eminent domain to install utilities likewise can be beneficial to surrounding businesses. There are countless other instances where the exercise of eminent domain indirectly enhances economic development, but such situations do not come within the newly enacted prohibitions on the use of condemnation by the government, because such takings do not have as their primary purpose the stimulation of economic development.

Four reasons offered by the court for upholding the condemnation provide some criteria for gauging whether any other such challenges by property owners have a chance of succeeding on a similar theory:

First, the city did not take the property primarily for the "use" of a commercial enterprise in any traditional sense. The city will be the owner of title to the land, and the primary users will be members of the public at large.

Second, the city's acquisition of the real property did not serve the primary purpose of increasing tax revenue because the actual land acquired will not contain any entity that will generate sales or property taxes.

Third, the city's acquisition of the land was not primarily serving the purpose of increasing employment. Construction of the deceleration lane will require the temporary use of labor, but the purpose of a deceleration lane is unrelated to the creation of additional jobs, as opposed to traffic control.

Finally, the use of the property cannot be construed as primarily related to general economic conditions, because there was no evidence that this affected the city's determination to exercise its eminent domain powers. The decision-making body, the city's engineering department, acquired the property at issue to allow traffic to proceed in an orderly and efficient fashion and to limit the potential collisions as a result of cars decelerating on the right of way. There also was no evidence that the nearby retailer in some way used economic pressure to convince the city to install the deceleration lane. ■

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PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NEVADA 89145
702-385-2500 • FAX 702-385-2086
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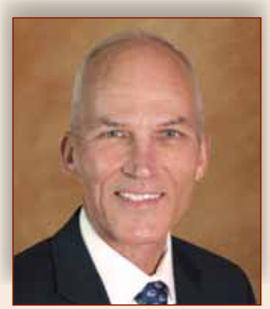
Legal Matters

Issue 1, 2011

HUTCHISON & STEFFEN MAINTAINS FIRM GROWTH

As the New Year unfolds, Hutchison & Steffen continues to move robustly into the year with the addition of seven new associates, and proudly welcomes the Firm's newest Partner, Joseph "Sid" Kistler.



Joseph "Sid" Kistler

To enrich and reinforce the wide array of services provided to clients, the Firm has sought and recruited experienced attorneys throughout the country who possess the experience, credentials, and personal character that clients have come to expect from the team at Hutchison & Steffen. The Firm has expanded its banking, bankruptcy, and complex commercial litigation services with the addition of Sid Kistler. The Firm's healthcare advocacy practice has been enhanced to support the growing legal demands of healthcare medical professionals in a variety of matters. Other practice areas of recent increased development include administrative law, trust and probate litigation, insurance defense, and employment law.

Hutchison & Steffen recognizes the changes demanded by today's economy, and understands the substantial impact these changes have on clients. While the Firm continues to grow, Hutchison & Steffen remains focused on aligning the Firm's best asset–its people–with the legal needs of each of its clients. Hutchison & Steffen welcomes all of its new associates, and congratulates Sid Kistler on his appointment as Firm Partner.

Prior to being named a partner at the Firm, Sid served as partner and lead commercial and banking litigation attorney for another major Nevada law firm for more than 20 years. His impressive career spans 30-plus years, trying numerous cases at both the state and federal level, including the litigation of adversary actions before the U.S. Bankruptcy Court. Sid is admitted to the Bar in both Nevada and North Carolina and is admitted to practice and has appeared before the United States Supreme Court, the U.S. Court of Appeals for the Ninth Circuit, the U.S. Court of Military Appeals, and the State and Federal Courts in Nevada. In Nevada, Sid is a member of the Nevada Trial Lawyers Association, the Clark County Bar Association, the American Bar Association, and the State Bar of Nevada.

Continued...

U.S. SUPREME COURT:

ARBITRATION IS THE NEW EMPLOYMENT LAW

The employment law component of the docket during the most recent term of the U.S. Supreme Court was dominated by decisions on arbitration. Some of the cases have the potential to affect large numbers of employers and employees.

Allocation of Power

In the most significant of these decisions, the Court determined the allocation of decision-making powers under the Federal Arbitration Act (FAA), where an agreement to arbitrate includes an "agreement within the agreement," delegating to the arbitrator the power to determine the enforceability of the arbitration agreement.

If a party specifically challenges the enforceability of that particular "delegation" agreement, the district court considers the challenge before ordering compliance with the agreement. However, if a party challenges the enforceability of the agreement as a whole, such as by a contention that it is unconscionable, as in the case before the Court, that challenge is for the arbitrator. In other words, in the latter situation, the courts must give effect to the agreement according to the terms agreed upon by the parties, by putting the matter before the arbitrator.

This is in keeping with the FAA's general rule that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The Court also relied on its previous recognition that parties can agree to arbitrate "gateway" questions of "arbitrability," such as whether the parties have agreed to arbitrate in the first place, or whether their agreement covers a particular controversy.

Contract Formation

All was not lost for those predisposed to have courts, not arbitrators, decide as many employer employee disputes as possible. In another case, an employer sued an international union and a local union, alleging that the local's strike breached a no strike clause in a collective bargaining agreement (CBA). The employer also alleged that the international union had engaged in tortious interference with a contract by promoting the strike and that both defendants were liable for claims under the federal Labor Management Relations Act.

Resolution of the claims against the unions was affected by a dispute over the ratification date of the CBA, which contained an arbitration clause. The Court ruled that the dispute was a matter to be resolved by the federal district court, rather than by an arbitrator. The argument over the formation or existence date fell outside the scope of the arbitration clause, which was limited to claims "arising under" the CBA. The Court applied the prevailing general rule that where the matter at issue concerns contract formation, such a dispute is generally for the courts to decide. In addition, a court may order arbitration of a particular dispute only where the court is satisfied, as it was not in the case before the Court, that the parties had agreed to arbitrate that dispute.

Class Action Arbitration

In another case, the Court was concerned with when parties can be made to submit to arbitration for an entire class of claims, and its answer was, in short, not unless they clearly consent to it. There are fundamental differences between the more typical bilateral arbitration and class action arbitration. In the latter case, an arbitrator chosen according to an agreed upon procedure no longer resolves a single dispute between the parties to one agreement but, instead, resolves many disputes between hundreds or perhaps even thousands of parties.

The presumption of privacy and confidentiality that applies in many bilateral arbitrations does not apply in class arbitrations, thus potentially frustrating the parties' assumptions when they first agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well.

The commercial stakes of class action arbitration are comparable to those of class action litigation, even though the scope of judicial review is much more limited. In a case involving antitrust allegations against shipping companies by some of their customers, these differences between bilateral arbitration and class action arbitration were too great for arbitrators to presume that the parties' mere silence on the issue of class action arbitration constituted consent to resolve their disputes in class action proceedings. ■

...continued from front page.

Z. Kathryn Branson

Z. Kathryn Branson practices in the area of business and commercial litigation, including partnership/shareholder disputes and contract enforcement/defense. A native Las Vegan, Katy attended the Meadows School and later the Las Vegas Academy where she graduated second in her class. She attended Whitman College in Walla Walla, Washington, and obtained a dual degree in Economics and Spanish. Katy graduated in the top third of her class from the William S. Boyd School of Law, at the University of Nevada, Las Vegas, and then spent a year as a judicial law clerk. ■

Tanya S. Gaylord

Tanya S. Gaylord's practice focuses on business and commercial litigation, and trust and probate litigation. Originally from Bulgaria, Tanya graduated from the Technical University in Sofia with a Master of Science degree in Electronic Engineering. She earned her Juris Doctorate Degree from the William S. Boyd School of Law, at the University of Nevada, Las Vegas, where she served as Notes Editor of the Law Review. ■

Michael S. Kelley

Michael S. Kelley is a member of the Firm's litigation department, practicing primarily in commercial and business litigation. He attended the University of Utah, earning a Bachelor of Science Degree in Biology, and graduated from the University of Utah, S.J. Quinney College of Law, where he was a member of the Utah Law Review and was a William H. Leary Scholar. ■

Timothy R. Koval

Timothy R. Koval practices primarily in business and commercial litigation. He was raised in Incline Village, Nevada, and earned his Bachelor of Arts degree in Economics from the University of Nevada, Reno and his Juris Doctorate from the William S. Boyd School of Law, at the University of Nevada, Las Vegas, where he was an Articles Editor of the Law Review. ■

Jessica S. Taylor

Jessica S. Taylor practices in the areas of medical malpractice, healthcare professionals advocacy, administrative law, and insurance defense. Originally from San Diego, California, she received her Bachelor of Arts Degree in Political Science from San Diego State University, with distinction, and then earned her Juris Doctorate, graduating cum laude, from the William S. Boyd School of Law, at the University of Nevada, Las Vegas. ■

Rik Wade

Rik Wade is a member of the Firm's litigation department, practicing in business and commercial litigation. Originally from Rock Springs, Wyoming, Rik obtained his Bachelor's Degree from the University of Utah and then his Juris Doctorate Degree with honors from the S.J. Quinney College of Law, where he was Editor-in-Chief of the Utah Law Review. ■

Diane L. Welch

Diane L. Welch practices primarily in business and commercial litigation, trust and probate litigation, and employment law. She received her Bachelor of Arts Degree in Criminal Justice from the University of Nevada, Las Vegas, and graduated magna cum laude from the William S. Boyd School of Law, at the University of Nevada, Las Vegas, where she was named Outstanding Graduate. During law school, Diane was an Articles Editor for the Nevada Law Journal and participated on the Society of Advocates Moot Court Team. ■