



Preserving the Blessings of the Family Cottage

by Vacation Home Planning Practice Group

Of course a family cottage is a blessed vacation home. But it can also create its share of challenges. Let's look at some common ones and consider how to deal with them.

BOUNDARY DISPUTES

Several unique features of cottages combine to create a common situation: the boundary lines may not actually be where the neighbors think they are. Little development occurs in the area, so there is rarely a need for surveys. And many cottages have been owned for generations, so the current users may have no idea where the lines are. They may have believed for years that certain trees, gulleys, fence lines or other landmarks mark the actual property lines.

A boundary dispute can arise when you wish to buy, a neighboring property is sold, a new structure will be built, an access road is improved, and the likes. Do the actual property lines still apply? Maybe not.

A 15-year period of either adverse possession or acquiescence can actually alter the boundary lines and thus the ownership of your cottage property. Adverse possession requires that the possession be "hostile," without permission by the landowner. Acquiescence, however, can alter property lines without any hostility. Acquiescence can give rights where neighboring property owners have continued to treat a certain line as the boundary for 15 years.

Is the 15-year clock ticking away on an adverse possession or acquiescence claim regarding your cottage? The only way to know for sure is to start

with an accurate survey. Then compare it to the actual possession and use of the cottage. Are there significant differences? In whose favor? Are you or your neighbor using a portion of each other's property with permission? Is that permission in writing?

SHARING THE COTTAGE: USE, EXPENSES, AND RENTALS

Some extended families have developed systems for deciding how to share the cottage. Some systems are written, some are not. Some have worked well for years. But the stability of these arrangements can change if a change occurs in, for example, a family member's financial condition, place of residence, health, etc. Does your written policy address these changes? It should.

Sharing the responsibility for cottage taxes, insurance, upkeep, and other cottage expenses can be difficult, especially where different family members have different financial positions. Those most able to afford these expenses may not be those who use the cottage most often. How will brother Bill and sister Sue share a cottage, when Bill lives only an hour away from the cottage, has plenty of time to spend there during the summer, but has little extra cash to pay for taxes and Sue makes a very good living but lives in another state and rarely has time to visit? How should they fairly allocate the cottage property taxes, insurance, and other maintenance expenses? What if the cottage needs a new roof? Your policy should address those issues.

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Short-term rentals of the cottage property to outsiders present some unique challenges. Is the rental even permitted by local zoning, association bylaws, and deed restrictions? Or do these rules limit use of the land to residential purposes? Are a cottage owner's rentals a commercial or business use rather than a residential use? Several recent Michigan cases have reached different results based on the wording of the particular rules.

Who will take care of the rental process (giving and getting keys, signing rental agreements, preparation and clean-up)? What form of rental agreement should be used? Should insurance be required? What about a security deposit? Your cottage policy documents should cover these matters.

Michigan has at least three different statutes that directly regulate residential leases. Those laws may require certain language in the rental agreement for some situations.

There may be advantages under Michigan's Truth in Renting Act if the cottage is the senior generation's principal residence. In that case, short-term rentals are exempt from the Act's residential lease restrictions, allowing a more landlord-friendly use and thus benefiting the cottage owners.

PROPERTY TAXES AND UNCAPPING

Vacation homes that have been owned by the same person for many years are probably taxed at a much lower rate than 50 percent of fair market value. This lower tax base, created by Michigan's Proposal A, can increase dramatically when the cottage is inherited or otherwise transferred. Transferring a cottage to the next generation may create a financial crisis if that generation cannot afford to pay the higher taxes.

Can you transfer interests in the cottage without uncapping the property taxes? Yes, in some cases, but the uncapping cannot be postponed indefinitely. Careful use of joint tenancies, for example, can postpone the property tax uncapping. But creating joint tenancies presents a new set of issues, not the least of which is the loss of control over the cottage property. Using a limited liability company (LLC) to own the cottage is another common technique, but at least one Michigan decision raises a question about whether the transfer to an LLC uncaps the property taxes.

In some situations the cottage property may also be the principal residence of the senior generation. In this case the cottage is exempt from 18 mills of school tax. Be careful not to lose that exemption by, for example, putting the cottage into an

LLC: a recent Michigan case ruled that the principal residence exemption was not available to a married couple who placed their cottage into their LLC.

SUCCESSION PLANNING

Many families will be worried about how the cottage may be inherited by successive generations, especially when the number of people in each successive generation increases. Absent special arrangements, a cottage that is inherited by multiple children will be owned by those children as tenants in common. That co-ownership may not be desirable, however, since any tenant in common can seek partition of the cottage property, which would destroy the integrity of the family home. You can keep the cottage in the family by using trusts, cottage LLCs, and joint tenancy arrangements. But each of these devices requires careful planning with respect to control, funding of cottage expenses, and ultimate ownership—to name just a few of the issues involved.

Cottage LLCs, for example, are touted as a popular vehicle for keeping the cottage in the family. But cottage LLCs differ from business LLCs in several significant ways. The cottage LLC may have a limited purpose, but a business LLC typically does not. The cottage LLC will probably provide for automatic membership for inheriting family members. Business LLCs almost never allow automatic membership. Cottage LLCs also need to require mandatory capital contributions to fund cottage expenses, but business LLCs will rarely require mandatory contributions. It's important to know that there is much about a cottage LLC that will be unfamiliar to a typical business LLC attorney.

CONCLUSION

Enjoying your cottage or vacation home and keeping it in the family requires careful planning. Your professional advisors need a thorough understanding of the applicable real estate, LLC, estate planning, estate tax, and co-ownership laws. For more information on how to preserve your family cottage, please contact one of the members of Miller Johnson's Vacation Home Planning Group:

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There's Still Time to Take Advantage of the HIRE Act

by Michael E. Stroster; strosterm@millerjohnson.com; 616.831.1780
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The Hiring Incentives to Restore Employment (HIRE) Act was only signed into law on March 18, 2010, but businesses need to act quickly to take full advantage of its benefits. Among other provisions, the new law provides immediate tax exemptions that diminish over time and will completely disappear by Jan. 1, 2011.

The HIRE Act is focused on providing incentives to combat unemployment and restore many of the jobs lost during the latest recession by providing tax incentives for businesses to hire unemployed workers. The law provides two valuable tax benefits (exemption and a credit) to employers that hire workers who were previously unemployed or only working part-time. The tax exemption is available retroactively back to Feb. 3, 2010, with the goal of immediately enhancing employers' cash flow. The credit is available to employers who retain their newly hired employees and can be taken in 2011.

WHICH EMPLOYERS ARE ELIGIBLE FOR HIRE ACT BENEFITS?

Both taxable businesses and tax-exempt organizations qualify for the payroll tax exemption and tax credit. This includes most for-profit entities, agricultural employers, and public colleges and universities. The HIRE Act specifically excludes local government employers and household employers.

WHAT TAX BENEFITS ARE AVAILABLE UNDER THE HIRE ACT?

Exemption from Social Security Taxes. If a qualified employer hires a qualified worker, the employer will be exempted from having to pay its 6.2 percent share of the Old Age, Survivors and Disability Insurance tax (commonly known as the Social Security payroll tax) on that employee for the remainder of 2010.

Business Tax Credit. For each qualified worker hired and kept on the payroll for a continuous 52 weeks, the employer is eligible for an additional business tax credit of up to \$1,000 after the 52-week threshold is reached. This credit is taken on the employer's 2011 income tax return. An additional requirement is that the employee's pay in the second 26-week period must be at least 80 percent of his or her pay in the first 26-week period. The amount of the credit is the lesser of \$1,000 or 6.2 percent of the gross wages paid during the continuous 52 week period.



Michael E. Stroster



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WHO IS A QUALIFIED WORKER?

The employer will qualify for the HIRE Act tax benefits if the new employee:

- was hired after Feb. 3, 2010 and before Jan. 1, 2011.
- was not hired to replace another employee, unless:
 - the former employee voluntarily quit.
 - the former employee was terminated for cause.
- is not a family member or controlling owner of the employer.
- certifies by affidavit, under penalty of perjury, that he or she was unemployed or employed for 40 hours or less during the 60 days continuous period prior to starting work. (The IRS created a model affidavit for this purpose and it is available at www.irs.gov.)

In addition to these tax benefits, the HIRE Act extends federal highway funding, extends a small business expensing tax break, and establishes a new bond program for school and energy projects.

If you have any questions about the HIRE Act and whether your organization can benefit from its provisions, please contact the authors or your Miller Johnson attorney.

LEED Tax Abatement: Waste of Time or Strategic Opportunity?

by Jeffrey S. Ammon; ammonj@millerjohnson.com; 616.831.1703



Jeffrey S. Ammon

Pending bills in the Michigan House of Representatives would create property tax abatement for LEED-certified (Leadership in Energy and Environmental Design) projects. Some believe this is a creative, proper method for inducing “green” construction (in step with incentives offered by other states). Others are not so sure. But whatever your view, there is much more (or much less) to this proposed incentive than meets the eye.

The bills would add LEED projects to an existing tax abatement statutory scheme that has numerous intricacies, subtleties, traps, and opportunities. Read on to learn more about how the proposed LEED abatement compares to current incentives and whether the LEED abatement is better or worse.

DOES LEED TAX ABATEMENT OFFER A BETTER TAX BREAK?

Not necessarily. For example, LEED tax abatement is never as good as the tax break that developers can already get for restoring commercial properties. A restoration abatement provides a 100 percent exemption, but LEED provides at most 50 percent. And that 50 percent is available only for platinum LEED projects. Gold, silver, and certified LEED projects save less. A developer restoring a building might therefore save more money by skipping the LEED abatement in favor of other abatements.

True, the state can exempt a few more mills under LEED tax abatement, but that additional benefit is capped at six years. Other commercial abatements have no such cap.

OTHER SUPPOSED ADVANTAGES (THAT MAY NOT REALLY BE ADVANTAGES AT ALL)

Let’s look at just a few of the pending bill features that are touted as advantages.

LEED abatement is available regardless of whether the facility serves a commercial, industrial, or any other purpose. So, even a LEED-certified residence could qualify.

But this lack of restriction on purpose is probably not significant. First, other tax abatement statutes are available for projects having almost every other kind of industrial and commercial purpose. Second, a LEED tax abatement for residential purposes is probably unrealistic. Will a city really see a sufficient public purpose in granting a LEED tax abatement for a wealthy homeowner’s brand new principal residence or vacation getaway?

Another supposed advantage: a developer can apply for LEED tax abatement even after the project is completed and after the certification is received. But is this really an advantage? If the developer waits until the project is completely finished before asking for the incentive, would any city seriously hand out this windfall? In these days of local government cash-strapped budgets, that would look (correctly) like a handout, not a true incentive.

LEED tax abatements need not satisfy the somewhat intricate zoning and planning rules that apply to some kinds of commercial tax abatements. But none of those zoning restrictions applies to commercial tax abatements for restoring existing buildings. And much of the development in this current economy is likely to be the reuse of existing facilities. The existing tax abatement may be much better suited to your project than LEED tax abatement, even if the restored facility will achieve LEED certification.

A TRUE ADVANTAGE – MAYBE

We note one true advantage to the LEED bills, although it will only come into play if something goes wrong later in the project. The bills would prohibit a city from revoking a LEED abatement for any reason except one: fraudulent misrepresentation of LEED certification. This ban on revocation can be a real advantage, because most cities currently require tax abatement recipients to sign an agreement that provides for revocation and clawbacks when certain events occur. This ban on revocations would prohibit a local unit from seeking revocation for those other reasons, and it may consequently ban clawbacks also.

LEED Tax Abatement, *continued on page 6*

Important Changes in Labor Law Coming With or Without EFCA

by Keith E. Eastland; eastlandk@millerjohnson.com; 616.831.1749

By now every human resource professional has heard about the proposed Employee Free Choice Act (EFCA—sometimes called the card check legislation). If passed, EFCA would radically alter rules on organizing and collective bargaining, giving unions a significant advantage. Fortunately, that legislation hasn't arrived yet, but while Congress has been debating its merits, labor unions and the Obama administration have not been standing still. They've been focusing on those charged with interpreting the law: the members of the National Labor Relations Board (NLRB). Indeed, President Obama recently made two controversial recess appointments to the Board, Craig Becker and Mark Pearce. The addition of these two Board members marks a seismic shift in the philosophy of the Board, and you can bet that this change will result in new rules that favor organized labor at the expense of employers and individual employee rights.

THE NLRB AS A POLITICAL ANIMAL

A unique aspect of federal labor law is that most of its rules are determined through decisions of the NLRB, a politically-appointed body of five individuals. Traditionally, the NLRB has not issued formal rules and regulations. Instead, it has announced rules in individual cases, much as federal and state courts do. But there is an important difference between courts and the NLRB: the Board is made up of political appointees. That means, its rules often change when its make-up shifts. Because the Board's rules affect substantial employment issues for union and non-union employers, it is important for all employers to keep abreast of expected changes as the newly constituted Obama Board begins its work.

RECENT CHANGES IN THE BOARD'S MAKE UP

Since Dec. 2007, the NLRB has been operating with just two members, Democratic Chairman Wilma Liebman and Republican appointee Peter Schaumber. Between April and July 2009, President Obama nominated three individuals to fill the open seats: Mark Pearce (D), Craig Becker (D), and Brian Hayes (R). Mr. Pearce and Mr. Becker are widely considered to be pro-union appointees, and their nominations were met with strong opposition. Mr. Becker's nomination proved the most controversial. His pro-labor past includes service as general legal counsel for the AFL-CIO and SEIU and as a law professor who authored multiple articles that have drawn immense

criticism for controversial pro-union views. Here are two examples of these positions:

- There is suspicion that Mr. Becker favors mandatory unionization for all workers and believes that employees should not have the right to reject unionization. This concern is bolstered by his statement that: "Just as U.S. citizens cannot opt against having a congressman ... workers should not be able to choose against having a union as their monopoly-bargaining agent."
- In a 1993 law review article, Mr. Becker stated, "[E]mployers should be stripped of any legally cognizable interest in their employees' election of representatives."



Keith E. Eastland

Mr. Becker's nomination was sharply debated in the Senate. Senator John McCain called him "the most controversial nominee I've seen in a long time" and promised to "do anything I can to block his nomination," including putting a hold on it. Initially, none of President Obama's three NLRB appointees were confirmed by the Senate. Nevertheless, on March 27, 2010, after Congress went into recess, the President used his recess appointment power to fill two of the Board's open seats with Mr. Pearce and Mr. Becker. Subsequently, on June 22, 2010, the Senate acted to confirm the nominations of Mr. Pearce and Mr. Hayes, but not Mr. Becker. These new appointments give the Democratic party a three to two advantage on the Board.

EXPECTED CHANGES IN THE LAW

It's no secret that under the Bush Administration the NLRB issued many decisions and rules that benefited employers and preserved their rights. The new Board, however, views the world of labor relations through a very different lens, and we expect it to target and reverse many of the gains employers enjoyed under the Bush Board. We also anticipate that the Obama Board will expand existing pro-union rules and standards or issue new ones.

There are more than 50 recently decided or pending cases that are ripe targets for the Obama Board to resolve in a manner adverse to employers.

“Some believe the property tax abatement for LEED-certified projects is a creative, proper method for inducing “green” construction. Others are not so sure.”

REMEMBER . . .

Remember that developers will still need to consider the same strategies and tactics with LEED tax abatement that we always considered with tax abatement for commercial and industrial projects. For example, the developer’s tax savings will be significantly affected by how the tax abatement “facility” is

defined and whether it includes all or only certain portions of the proposed construction and renovation. That is only one of a number of strategic decisions that developers will need to make up front to maximize tax savings.

Remember also that this article is not a complete list of the advantages, disadvantages, tips, and traps that would be available under LEED tax abatement. But the point is simple: any project for which you’re considering tax abatement or other economic development incentives needs a well developed incentive strategy, one that is crafted long before the project is announced or shovels hit the ground. That strategy should be guided by legal counsel with years of experience in structuring and combining these incentives.

For more information, please contact the author or any of the Miller Johnson attorneys in our construction or property taxation practice groups.

Changes in Labor Law Coming, continued from page 5

Here are a few of the important expected changes.

- Employers can expect additional restrictions on their property, speech, and management rights. For example, the new Board could overrule a decision that allows employers to control the use of their own computer and email systems. Current law permits employers to restrict employees from using company owned email systems for union solicitation. But under the Obama Board, employees could be granted a statutory right to use their employer’s email system for union activities.
- Supervisors are generally not granted rights to organize under the NLRA, but we anticipate that the new Board will take a much more restrictive view on who is a supervisor in order to expand the number of employees represented by unions. For example, many nursing supervisors or charge nurses may no longer be considered supervisors by the Board. A change in this rule would require every employer to reassess which supervisory employees are actually supervisors for purposes of federal labor law.

- The new Board is expected to also expand the remedies available for less serious violations of the NLRA by employers.
- Employers can also expect expanded rights for employees to request union representatives during discipline and discharge investigations. The new Board is likely to give such rights, not only to unionized employees but also to any employees who work for a non-union employer.
- Finally, there is a chance that the new Obama Board may issue decisions that adopt the substance of EFCA without Congressional approval. In other words, the Board could issue decisions that make it much easier for unions to organize employees without a secret ballot election. Although such rules would be challenged in federal courts, the possibility of EFCA-like changes without Congressional action remains a possibility.

Please contact the author or your Miller Johnson attorney for a more comprehensive explanation on how the anticipated Board changes may impact your business or industry.

MILLER JOHNSON IN THE NEWS



MILLER JOHNSON partnered with Kalamazoo Communities In Schools 21st Century Community Learning Center to provide legal career exploration opportunity for Loy Norrix students. The three-week program culminated on April 23 when twelve 9th and 10th graders had the opportunity to interview legal professionals, tour the firm, and visit the Kalamazoo County Circuit Court.

T.J. ACKERT was elected Vice President of the Grand Rapids Bar Association (GRBA).

JEFFREY S. AMMON taught a half-day course on construction contracts at the national Construction Financial Management Association's convention on June 26 in Kona, Hawaii. He did a case law update at ICLE's annual Business Law Institute on May 21. Mr. Ammon spoke about Choice of Business Entity at the Michigan State Bar's Young Lawyers Section Conference in Traverse City on June 5. On June 10, he spoke to members of National Association of Legal Secretaries (NALS) Grand Rapids Chapter on zoning. He presented to the Northern Michigan Estate Planning Council in Petoskey on the impact of property tax uncapping and principal residence exemptions on estate planning on June 11.

CHRISTOPHER M. BROWN was sworn in before the U.S. Supreme Court on April 27. He also did a presentation on asset protection planning before the Southwestern Michigan Estate Planning Council on May 18.

DAVID M. BUDAY gave a "Labor and Employment Law Briefing" at the Hospital Network Educational Retreat on May 14.

GARY A. CHAMBERLIN spoke at the ABC Western Michigan Chapter on April 22 on "Compliance Traps for Federal Contractors and Businesses Under the ARRA of 2009." He will be speaking on Aug. 11 at the West Michigan American Payroll Professionals on "Employee Record-Keeping and Retention."

CHRISTOPHER L. EDGAR was honored with the Silver Beaver Award by the Gerald R. Ford Council of Boy Scouts of America.

RACHEL J. FOSTER was elected President of the Western Michigan University Theatre Guild Board President for 2010-2011. She also did a presentation to NALS on Foreclosures on April 27.

RICHARD E. HILLARY was elected a Trustee of the GRBA.

KENNETH G. HOFMAN spoke to Spectrum Health residents on the Legal Aspects of Employment Agreements and Recruiting Arrangements on May 13.

CAROL J. KARR presented "Retirement Time Tune-Up" focused on estate plans at Metro Health Hospital on June 9 to physicians and June 10 to staff.

PETER J. KOK, JAMES C. BRUINSMA, NATHAN D. PLANTINGA, and **SARAH K. WILLEY** did an Employment Law Update for The Employers' Association Human Resource Group on March 17.

CRAIG H. LUBBEN has been presented with the firm's John W. Cummiskey Spirit of Service Volunteer Award recognizing his significant and outstanding contributions to the community through volunteer service. He chose Family and Children Services to receive the \$1,000 donation which is part of the award.

NATHAN D. PLANTINGA and **SARAH K. WILLEY** presented "Employment and Labor Law In Health Care: Changes, Changes, and More Changes" on April 30 at the Michigan Healthcare Human Resources Association conference in East Lansing.

ANDREW PORTINGA was elected Treasurer of the GRBA.

MICHAEL B. QUINN became a Fellow of the Michigan State Bar Foundation.

MATTHEW L. VICARI received the Grand Rapids Bar Association President's Award on April 30.

SARAH K. WILLEY gave a Legal Update on June 4 to the Coldwater Human Resources Council.



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Our number one priority is to simplify the challenges clients face, not complicate them. We call this philosophy "down to earth and down to business."

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