ANews

President's Message

I hope you have all enjoyed your summers, that you have found time to relax with family and friends, and that you have registered for the New York meeting, October 6 – 9 at the Waldorf Astoria. It promises to be an informative and fun-filled meeting. Watch for the Meeting App in mid-September!

We especially look forward to welcoming the 43 Fellows in the Class of 2016. Please extend a warm welcome to these new Fellows and include them – and other "newish" Fellows – in your dinner plans – especially Saturday night (more about that later). Collegiality is a special quality of the College. The Meetings Survey results revealed that some Fellows found that collegiality lacking in the Saturday night dinners so, please, consider inviting new folks to join you at your tables.

The Programs Committee, led by Ann Waeger, Chair, Beth Mitchell, Chair-Designate, and Co-Vice Chair of Fall Meetings, Art Menor, Co-Vice Chair with Beth, Meeting Leader, Janet Johnson, and the Session Coordinators and Session Leaders – Kevin Shepherd, Nancy Little, Andrew Herz, Marie Moore, Fred Strober, Anne Babineau, Charlie Menges, Jane Snoddy Smith, Tom Huston, Tony Natsis, Fred Klein, Jodi Fedor, Rick Jones and Sarah Biser – have put together a terrific program. The meeting opens at 4:00 p.m. on Thursday with a program entitled "Revisiting Robert Moses' New York: What Would the Power Broker Think of Today's New York?", followed by a reception for the Class of 2016 Fellows and first time attendees, the Welcoming Reception for all Fellows and guests, and the Women's Reception.

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President's Message

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The plenary sessions and round tables on Friday and Saturday mornings will address topics such as unique issues arising from multi-decade development projects, insights into real estate investment committees, challenges in developing workforce housing, dealing with demands of high tech office users, secrets of mortgage-backed securities and many more. And don't forget the Committee Meetings at which trends and timely topics will be discussed.

There are many special tours being offered – and, of course, it being NYC – many fun things to do on your own.

Plan to stay for the Saturday night dinner dance in the Waldorf's Starlight Ballroom – dancing to the big band sounds of the Rhythm Doctors Orchestra. Dress for this very special occasion is Black Tie.

Registration Fees have been subsidized to encourage you to attend.

Those who have registered will know that ACREL now has on-line registration – a result of the acquisition and installation of new data base software in the ACREL office. Jill, Henri and Julie have had a very busy spring and summer getting the data base and a new website up and running. We hope you find them helpful.

The Executive Committee and several of the Administrative Committees have been busy also – more on that score elsewhere in this newsletter and at the Business Meeting in New York. Looking forward to seeing you there.

Kathy Murphy

Meetings Calendar

2016 Annual Meeting
October 6-9, 2016
Waldorf Astoria
New York, NY

2017 Mid-Year Meeting
March 30-April 2, 2017
The Four Seasons Hotel
Austin, TX

2017 Annual Meeting
October 19-22, 2017
InterContinental Hotel
Los Angeles, CA

2018 Mid-Year Meeting
March 22-25, 2018
Waldorf Astoria
Orlando, FL

STAFF BOX

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Editor
Jill H. Pace
Executive Director

ACRELades

J. Cary Barton of San Antonio, TX received the Outstanding 50 Year Lawyer Award from the Texas Bar Foundation. The award recognizes attorneys whose practice spanned 50 years or more, and who adhere to the highest principles and traditions of the legal profession and service to the public.

Edward M. Bloom of Boston, MA was honored with the highest honor of the Real Estate Bar Association of Massachusetts, the Richard B. Johnson Award, at REBA's spring conference. The award is for lifetime achievement, recognizing the recipient's "outstanding and selfless contributions to advancing the practice of real estate law."

Christopher J. Devlin from Portland, ME, is the co-author of the chapter on Maine law in Commercial Lending Law, a Jurisdiction-by-Jurisdiction Guide to U.S. and Canadian Law, Second Edition, published in June by the ABA Business Law Section.

Jay A. Epstien of Washington, DC and **John L. Sullivan** of Boston, MA were profiled in the Cornell Law School Forum when John succeeded Jay as chair of DLA Piper's US real estate practice. Read the article in the next issue of ACREL Notes.

Richard L. (Rick) Spencer of Houston, TX received the Professionalism Award from the Texas Bar College, a group within the State Bar of Texas. Rick also recently completed his term as Chair of the State Bar Real Estate Probate and Trust Law Section, the largest section in the Texas State Bar, with about 8800 members.

George Lefcoe's textbook, *Real Estate Law and Business: Brokering, Buying, Selling, and Financing*, has been published by Carolina Academic Press. The website includes the Table of Contents and an explanation of the coverage. The desk copy request info is at the bottom of the page.
http://www.cap-press.com/books/isbn/9781632847966/Real-Estate-Law-and-Business

ACREL Members Save 20%! Announcing the publication of the updated and expanded third edition of *A Practical Guide to Commercial Real Estate Transactions* by three ACREL fellows: **Gregory M. Stein, Morton P. Fisher, Jr.,** and **Michael D. Goodwin.** Published by the ABA Section of Real Property, Trust and Estate Law, this ABA bestseller combines theory with practice as the authors explain how to effectively handle all aspects of a real estate transaction, focusing on the drafting, negotiation, and revision needed to get the deal done. For the ACREL member savings, order at http://ambar.org/practrealestate3 and enter discount code PRACRE3A. You can also call the ABA Service Center at 800-285-2221, request Product Code 5430934 and mention this code. Discount expires March 31, 2017.

Michael J. Gelfand of West Palm Beach, FL, recently completed his term as Chair of the Real Property, Probate and Trust Law Section of the Florida Bar. The Chair-Elect is **Andrew M. "Drew" O'Malley** of Tampa, FL.

Send us your news for future issues!

Report of the 2016 ACREL Nominating Committee

The ACREL 2016 Nominating Committee, consisting of Kenneth M. Jacobson (IL), Chair; Thomas F. Kaufman (DC), Mark A. Senn (CO), Beverly J. Quail (CO) and Robert A. Fishman (MA) submits this report to President Kathryn C. Murphy in accordance with Article V, Section 3 of the College's Bylaws.

1. Pursuant to Article VI, Section 2(b) of the College's Bylaws, Roger D. Winston (DC) becomes President on January 1, 2017.

2. In accordance with the provisions of Article VI, Section 2(a) of the Bylaws, the Nominating Committee nominates the following Regular Fellows for election at the Annual Meeting as officers for the indicated positions commencing January 1, 2017:

Jay A. Epstien (DC)	President-Elect
Steven A. Waters (TX)	Vice-President
Marilyn C. Maloney (TX)	Treasurer
Peter Aitelli (CA)	Secretary

3. Pursuant to Article V, Section 3 of the Bylaws, the Nominating Committee nominates the following Regular Fellows for election as Governors at the Annual Meeting for the indicated terms commencing January 1, 2017:

Rebecca A. Fischer (CO)	3 year term
Tina R. Makoulian (PA)	3 year term
Margaret A. Rolando (FL)	3 year term
Susan G. Talley (LA)	3 year term
Sterling S. Willis (LA)	3 year term

Under Article V, Sections 3(a), no more than two nominees for Governor in any year shall be incumbents having served one (1) three-year term (Margaret A. Rolando and Susan G. Talley).

Submitted: June 3, 2016

Kenneth M. Jacobson, Chair

Get Your Hands Off My Contingency! Competing Demands on the Use of the Contingency in Real Estate Joint Venture Development Transactions

by John Mallinson[1]

"Only one safe rule for the historian: that he should recognize in the development of human destinies the play of the contingent and the unforeseen."

H.A.L. Fisher, History of Europe, Vol. 1

Introduction

Imagine a real estate development joint venture between an institutional investor (the "Capital Partner") and a developer (the "Development Partner"), in which the Development Partner agrees to take responsibility for certain development costs in excess of or otherwise not covered by the development budget. Also assume that this cost overrun protection, which the partners refer to as a "Cost Overrun Guaranty"[2], covers some costs ("Guaranteed Costs") but not other costs ("Non-Guaranteed Costs"). Under these facts, which are not uncommon, an issue arises that is often overlooked at the time the joint venture is formed: How is the contingency line item in the development budget to be allocated between the Guaranteed Costs and the Non-Guaranteed Costs when there is not enough contingency to cover both? This article begins with some background and a general discussion of the issue. Next follows a hypothetical illustrating the issue in practice and a range of potential approaches that could be adopted in the joint venture agreement in response. The article concludes with the observation that, irrespective of a party's ultimate desired outcome, addressing this circumstance at the outset will mitigate both the chances of a dispute with no clear resolution and the prospect of unwelcome surprise.

Background

One of the key risks in a real estate joint venture development project is that the cost to complete the project may unexpectedly exceed its original budget. Development cost (i.e., the hard and soft costs in a project development budget) is one of the main drivers of investment returns. Development cost overruns can lead to significantly diminished or negative returns, even when all other investment drivers, such as rental rates, are positive.

A prudent Capital Partner may seek to deal with unanticipated costs in several ways. First, to the extent it is reasonably able or equipped for such purpose, it will perform due diligence on the various

[1] John Mallinson is a Managing Director and the General Counsel of AIG Global Real Estate Investment Corp. ("AIGGRE"), the real estate equity investment arm of American International Group, Inc. ("AIG"). This article is not intended to provide legal advice. The author thanks Stevens Carey and Richard MacCracken of Pircher, Nichols & Meeks and Bruce Tribush of Goodwin Procter LLP for their valuable editorial comments on this article. The views expressed (which may vary depending on the context) are not necessarily those of the individuals mentioned above, AIGGRE, AIG or the publication. It is important to remember that every transaction is different and what is appropriate for one transaction may not be appropriate for another. Any errors are those of the author.

[2] "Cost Overrun Guaranty" is a misnomer when it is used to describe the Development Partner taking on this obligation. But this obligation is often guaranteed by a creditworthy affiliate. It has become common to refer to the Development Partner's Cost Overrun Guaranty to include both the Development Partner's primary obligation and any affiliate guaranty.

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components of the development put together by the Development Partner, such as the quality of the contractors, architect and other professionals, the reasonableness of the cost estimates in the budget and the adequacy of the joint venture's rights under the various legal agreements with third parties, most notably the contract with the general contractor. As cost certainty is often a paramount objective the construction contract will typically provide for a guaranteed maximum or fixed price. Second, it will anticipate that unbudgeted costs may occur and pay careful attention to the adequacy of the contingency in the development budget.[3] It is not uncommon that a Capital Partner will increase the contingency as a condition to approving a transaction. The Development Partner might prefer to keep the contingency (and the rest of the budget) at its original level to ensure that the project will meet the Capital Partner's return expectations and therefore approve the project or not downwardly adjust its fees or promote to compensate for the lower returns.

The Capital Partner rarely has the same local knowledge, project history or time in regard to development matters as the Development Partner and is to a large extent dependent on the Development Partner to orchestrate the myriad components of the development in a manner that will meet budget. Due, in part, to this asymmetry of knowledge and reliance, the Capital Partner may, as a third measure, require that the Development Partner provide a Cost Overrun Guaranty pursuant to which the Development Partner will assume much if not all of the development risk in the transaction. In exchange for the Cost Overrun Guaranty, the Development Partner will be allocated a disproportionate share of the profits of the venture, or a "promote", as well as receive a development fee.

Cost Overrun Guaranties often contain some component of Non-Guaranteed Costs. One example may be costs arising from fluctuations in a floating interest rate in excess of the budgeted financing line item. If and when Non-Guaranteed Costs are part of the formulation of a Cost Overrun Guaranty, an additional risk arises that is often overlooked: the actual availability of the contingency itself. What happens when there are two legitimate claims on the use of the contingency – one for Guaranteed Costs that will inure to the benefit of the Development Partner and one for Non-Guaranteed Costs that will inure to the benefit of the Capital Partner – but inadequate funds in the contingency to satisfy both?

Discussion

The context in which the conflict arises contains the following elements: (i) a Cost Overrun Guaranty from the Development Partner to the Capital Partner which does not cover all overruns; (ii) the absence, as is often the case, of any provision in the joint venture agreement that addresses competing demands on the contingency; and (iii) the incurrence of a mixture of cost overruns consisting of both Guaranteed Costs and Non-Guaranteed Costs that collectively exceed the available contingency balance.

Each of the Development Partner and the Capital Partner may approach a transaction anticipating that the contingency will be there to address, to some extent, their respective and often shared risk exposures. It is not unusual that the conflict simply is not thought about in any active sense at the time of execution of the joint venture agreement. The expectation a party might have had if it realized the issue existed may not be vocalized until the conflict is at hand. A Development Partner might perceive that when a Capital Partner agreed that a certain cost was a Non-Guaranteed Cost that is was also agreeing that the cost was outside the scope of the budget and therefore outside the scope and use from the contingency as well. Conversely, a Capital Partner may not think it was giving up the benefits of the contingency and may even view the lack of coverage for the cost under the Cost Overrun Guaranty as giving

[3] It should be noted that the contingency line item in the development budget is distinct from, and should not be confused with, the contingency line item in the underlying construction budget with the project's general contractor.

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the Capital Partner an even greater equitable claim to contingency funds.

Hypothetical

Consider the following hypothetical:

A Development Partner is unwilling to guaranty any costs attributable to unforeseen site conditions and it becomes a deal-breaking issue. The Capital Partner approves the transaction but requires, to mitigate this risk, that $1 million be added to the budget's existing $3 million contingency bringing the contingency to a total of $4 million. The Capital Partner also requires that the Development Partner's promote be reduced due to the Development Partner assuming less of the transaction's development risk. This Non-Guaranteed Cost materializes as unstable soil is discovered in one quadrant of the development parcel requiring additional materials and labor and representing $1 million in additional cost. However, the contingency is depleted by the incurrence of costs (totaling $4 million additional) for defects in the foundation work due to a defective design in excess of the architect's liability policy (that was largely exhausted by an unrelated project) and municipality mandated additional parking. The Development Partner sequenced this work prior to the work addressing the unforeseen site conditions, albeit the soil work could have commenced just as easily first. $5 million in funding is needed: $4 million to satisfy a draw on the contingency and $1 million in additional capital for soil conditions.

The hypothetical leads to disappointing results for both sides. The $1 million the Capital Partner added to the contingency for unforeseen site conditions was absorbed by other costs. Additional funding is required and the investment returns expected by the Capital Partner have dropped. While the Development Partner might have averted liability under a Cost Overrun Guaranty, it may have permanently impaired its relationship with the Capital Partner and put at risk a future equity source by appearing to have gamed the outcome. And the Development Partner might even face a claim by the Capital Partner that, by ordering the work as it did, it violated the implied covenant of good faith and fair dealing. Counsel and internal staff at each of the parties may face uncomfortable questions from senior level principals.

Potential Approaches

If the joint venture agreement is silent on the resolution, the parties are left to resolve the issue on a business level, failing which there may be litigation or arbitration. Perhaps, as in the hypothetical, the outcome may hinge on the happenstance of when the cost was incurred or, to the detriment of the Capital Partner, how it is sequenced to be incurred by the Development Partner. Perhaps one partner will become adamant in its position and not fund, leaving the project potentially stalled. Perhaps one partner will reluctantly fund to preserve its investment in the project or avoid exposure under a loan guaranty, but the relationship going forward on this and other transactions, if any, will be damaged. In virtually all of these circumstances, value could have been added by anticipating the issue and addressing it openly in advance.

As this issue is often overlooked, there is not a prevailing market norm for what the joint venture agreement should provide. Structurally, some categories of approaching the conflict are:

- Joint venture agreement is silent on the matter
- Non-Guaranteed Costs take priority
- Guaranteed Costs take priority
- The contingency is available pro rata based on fixed percentages (e.g., 50/50) with any remaining contingency in one category available for the other category
- The contingency is available pro rata in accordance with the relative amount of overruns incurred constituting Guaranteed Costs and Non-Guaranteed Costs

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The fact patterns that can arise in the real world are myriad and the optimal equitable result is difficult to predict. The author has found some parties satisfied to have the contingency available on a pre-negotiated percentage basis (e.g., 50/50) or *pro rata* basis (based on proportion of competing costs incurred), with some mechanism in place to account for timing inequities. In these structures, Guaranteed Costs and Non-Guaranteed Costs may be paid as they are incurred. At such time as completion has occurred or the contingency is exhausted, a refund or true-up provision would require compensating payments to be made to bring the parties' contributions in line with the agreed basis. Other parties may bargain for or require a differing approach, such as an absolute priority for either of Non-Guaranteed Costs or Guaranteed Costs, or the nature of the deal may drive another outcome.

While there is no single approach to address potential conflicting uses of contingency funds that will be workable for all Capital Partners and all Development Partners in every instance, it is this author's opinion that the accident of timing (i.e., early overruns being paid first) should not be the determining factor due to the potential for arbitrary results. Moreover, a "first pay" rule is susceptible to manipulation by the Development Partner, who may have the ability to time the performance of work or expenditure of costs to maximize its individual benefit from the contingency. Relative to timing, refund or true-up provisions may be advisable pursuant to which, at such time as the contingency has been exhausted or before capital transaction proceeds are distributed, a partner who benefited from the contingency beyond the agreed framework would be obligated to refund amounts so received or receive reduced distributions in a corresponding amount.

Conclusion

Joint venture agreements for real estate development projects are often silent on the potentially significant issue of the allocation of contingency between Guaranteed Costs and Non- Guaranteed Costs. Development projects are complicated enough without leaving this potentially divisive issue unaddressed. Capital Partners and Development Partners are well advised to consider this conflict issue at the outset of the transaction so as not to be taken by surprise. Adding provisions to the joint venture agreement to address the conflict, irrespective of which party may benefit the most, will at least minimize the opportunities for dispute and potentially damaging impacts to the execution of the project and the relationship of the parties. ■

The Justiciability of Wetlands Determinations and Other Final Agency Actions:
United States Army Corps of Engineers v. Hawkes Co.

by James S. Burling[1]

Challenging a Wetlands Jurisdictional Determination and the Administrative Procedure Act

On May 31, the Supreme Court ruled for the landowner in *United States Army Corps of Engineers v. Hawkes Company*.[2] In *Hawkes*, the Corps had determined that a peat bog in northern Minnesota had enough of a connection to a navigable waterway 120 miles away for the federal government to have jurisdiction. The Hawkes Company, which is in the business of harvesting peat moss, brought an administrative appeal, arguing the Corps lacked jurisdiction over the wetland that had no connection to interstate commerce. Hawkes won the administrative appeal, but on remand the Corps' district engineer perfunctorily reinstated the jurisdictional determination or JD.

The Corps told Hawkes that it desired judicial review of the JD, then Hawkes had just three choices. First, Hawkes could abandon its peat mining plans. Second, the company could apply for a permit that would require several hundred thousand dollars in costs and several years in time. This was after a Corps bureaucrat said the agency would never issue a permit, and even kindly advised a long-term employee to look for a new job. But only after trying to get a permit, could the family challenge the wetlands JD. The third choice was to harvest the peat anyway and hope for the best in the inevitable civil and criminal enforcement action – risking fines of at least $37,500 per day plus considerable time in a federal prison. Hawkes appealed.

After completing all administrative procedures, Hawkes next tried to sue in federal district court, but the case was dismissed. Following the logic of an adverse precedent from the Ninth Circuit in F*airbanks North Star Borough v. United States Army Corps of Engineers*,[3] the court found that the JD did not constitute final agency action justiciable under Section 704 of the Administrative Procedure Act or APA.[4]

The Eighth Circuit reversed, holding:

The prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no

[1] Director of Litigation, Pacific Legal Foundation, Sacramento, California. Attorneys from Pacific Legal Foundation represented Hawkes Co. at the Supreme Court.

[2] __ U.S. __, 136 S. Ct. 1807 (2016).

[3] 543 F.3d 586 (9th Cir. 2008). In *Fairbanks* the borough had sought to build a playground on permafrost wetlands and disputed that the wetlands were within the jurisdiction of the Corps. The Ninth Circuit found that the JD was not appealable under the Administrative Procedure Act.

[5] U.S.C. § 704 reads:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

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adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test ... its expansive assertion of jurisdiction.[5]

The government petitioned to the Supreme Court and oral argument was held on March 30, 2016. At the argument, the United States repeatedly argued that the JD had no legal consequences; that the JD only explained the state of the law set out by the Clean Water Act and had no independent legal effect. In fact, the JD was simply something that was "helpful" to landowners. It was pretty clear at argument that the justices weren't buying it and the only question left was how badly the government would lose.

The answer came on May 31 and it was "quite badly." All eight justices joined the majority opinion written by Chief Justice Roberts, and all agreed that landowners have the right to challenge a JD in court. This is significant. For more than 40 years the Corps has been issuing JDs and denying landowners the right to challenge them in court.[6] Without oversight, the Corps has extended its reach into isolated ponds because they were visited by ducks,[7] into dry farmland,[8] into vast expanses of permafrost wetlands in Alaska,[9] and into usually dry desert arroyos. The only times that the Corps' assertions of jurisdiction have been heretofore limited were in those instances where landowners were facing severe penalties and had standing as defendants.

The Court in *Hawkes* found those choices to be unacceptable, and that because the JD is a "final agency action" with "legal consequences," landowners have a right to judicial review in accord with section 704 of the Administrative Procedure Act. There were two grounds for the Court's decision.

The first was based on a memorandum of understanding entered into between the Corps and the EPA in which each agency agreed to abide by wetlands determinations of the other. Thus, if the Corps issued a "negative JD," a finding of no wetlands, then the EPA would not second-guess that determination and bring an enforcement action. The Court reasoned that since a negative JD's safe harbor was clearly of legal consequence so too was a positive JD as in *Hawkes*.

The second, and more far-reaching, rationale for the Court's decision was based on the precedent set by cases like *Abbott Labs. v. Gardner*,[10] and *Frozen Food Express v. United States*.[11] In those two cases, the Court held that a citizen need not risk severe penalties in order to challenge a final administrative action under the APA. Similarly, in *Bennett v. Spear*[12] the Court noted that a final agency action ought to have "legal consequences" before it is justiciable. In *Hawkes*, the Court found that in accordance with *Abbott Labs., Frozen Foods,* and *Bennett*, when there are no adequate alternatives available, then the agency action may well be justiciable.[13] The *Hawkes* Court found that under *Abbott Labs*. and *Sackett*, citizens didn't have to risk criminal penalties in order to challenge a regulation. "Respondents," the Court noted "need not assume such risks while waiting for the EPA 'to drop the hammer.'"[14]

The Court was equally unimpressed by the argument that Hawkes only had to go through the permitting process before it could challenge the JD.

[5] Hawkes v. United States Army Corps of Engineers, 782 F.2d 994, 1001-02 (8th Cir. 2015).
[6] *See, e.g.,* Hoffman Group, Inc. v. Environmental Protection Agency, 902 F.2d 567, 568 (7th Cir. 1990) (finding of jurisdictional wetlands not justiciable outside permit or enforcement process).
[7] *See, e.g.*, Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) (striking down migratory bird rule).
[8] Rapanos v. United States, 547 U.S. 715, 722 (2006).
[9] *See, e.g.,* Fairbanks Northstar Borough, 543 F.3d 586.
[10] 387 U.S. 136 (1967) (holding that drug labeling regulations were justiciable because of the serious penalties for noncompliance).
[11] 351 U.S. 40 (1956) (Interstate Commerce Commission listing of commodities as either subject to or exempt from the statute was a final agency action subject to judicial review).
[12] 520 U.S. 154 (1997) (ranchers and irrigation districts had right to challenge agency action concerning the Endangered Species Act).
[13] 136 S. Ct. at 1815.
[14] *Id.* (citing Sackett v. United States, 566 U.S. at ___, 132 S. Ct. 1367, 1372 (2012)).

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The Court found that the vaunted permitting process was "arduous, expensive and long," citing a laundry list of information requests demanded by the Corps from Hawkes – from a "hydrogeological assessment of the rich fen system" to groundwater pH studies to an inventory of vegetation "in the area."[15] But as the Court noted, all of this "adds nothing to the JD" and has no bearing on the question whether the federal government has jurisdiction. [16]

Lastly, the majority opinion reacted to the Corps' suggestion that it was doing landowners a favor by giving them JDs in the first place by rejecting the creation of a "count your blessings" exception to the APA.[17]

So what if the Corps now were to decide *not* to perform JDs at all? That could highlight the very irrationality of the current state of wetlands jurisdiction. At oral argument, Justice Kennedy had mused that the Clean Water Act and its wetlands rules might itself by "unconstitutionally vague." [18] Now, in a concurrence in *Hawkes*, writing for himself and Justices Alito and Thomas, Kennedy opined that

> [t]he Act, especially without the JD procedure were the Government permitted to foreclose it, continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation.[19]

If anything, this could well portend judicial hostility to the "Waters of the United States" or WOTUS rule.[20] While defenders of property rights are obviously pleased by the *Hawkes* decision, the overarching conflict between landowners and the enforcemnt of wetlands regulations remains. If Congress does not reform the Clean Water Act, then the Court is going to have to make its application constitutional. The *Sackett* and *Hawkes* decisions are steps in that direction.

Lastly, it should be noted that Justice Kagan issued a concurring opinion suggesting that the case turned on the existence of a memorandum of understanding between the Corps and EPA where the agencies agreed to be bound by the Corps' JDs.[21] The implication is that if the Corps and EPA were to rescind the MOU, then the logic of the decision would be undermined, and JDs might once again not be subject to judicial review. The majority opinion, however, suggests otherwise.[22] Moreover, in apparent response to Justice Kagan's concurrence, Justice Ginsburg issued her own concurrence noting that the Court's opinion did not depend on the MOU. Ginsburg also suggested that *Abbott Labs*., not *Bennett v. Spear*, remains the touchstone of interpreting the APA.[23]

Beyond Wetlands – *Hawkes* and Other Federal Agencies

Importantly, the implications of the *Hawkes* decision might well go beyond jurisdictional determinations. We now have another benchmark by which to determine when an agency action is final and when it has the legal consequences that bring it within the ambit of section 704 of the APA. The Corps' attempt to limit the legal consequences test of *Bennett v. Spear* to a crabbed formalism did not succeed.

[15] *Id.* at 1816.
[16] *Id*.
[17] *Id*.
[18] United States Army Corps of Engineers v. Hawkes Co., Inc., No. 15-290, 2016 WL 1243207, at *18 (U.S. Mar. 30, 2016) ("[T]he Clean Water Act is unique in both being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it puts into practice."). This is somewhat ironic considering Justice Kennedy authored the "significant nexus" concurrence in *Rapanos v. United States*, 547 U.S. at 742, a test that has been the cause of considerable confusion and contention.
[19] 136 S. Ct. at 1817.
[20] This rule, which can be found at https://www.epa.gov/sites/production/files/2015-06/ documents/preamble_rule_web_version.pdf (last visited July 14, 2016), is presently subject to numerous challenges. *See, e.g.*, Julio Columbo, PLF files brief on jurisdiction of Waters of the United States rule challenges, *available at* http://blog.pacificlegal.org/42296-2/ (last visited July 14, 2016).
[21] 156 S. Ct. at 1817 (Kagan, J., concurring).
[22] *See id.* at 1814 ("affirmative JDs have legal consequences as well").
[23] *Id.* at 1817-18 (Kagan, J., concurring).

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Similar results are now appearing in challenges to the actions of other federal agencies. At the time of this writing, at least two other courts have relied upon *Hawkes* in determining that the actions of other agencies are final and justiciable.

The first case, *Rhea Lana v. Department of Labor*,[24] came down *four days* after the Supreme Court issued the *Hawkes* opinion. In *Rhea Lana*, the Department sent Rhea Lana an "advisory letter" stating that back wages were due Rhea Lana sales people and warning that failure to comply could subject Rhea Lana to increased penalties under the Fair Labor Standards Act for a knowing and willful violation. Relying on *Hawkes*, the D.C. Circuit Court of Appeals found that the letter was final agency action subject to judicial review: "The DOL letter at issue here, like the jurisdictional determination in *Hawkes*, has the kind of 'direct and appreciable legal consequences' on potential liability that count for purposes of finality. *Id.* at 1814."[25]

The second case is *Texas v. Equal Employment Opportunity Commission,*[26] in which the Equal Employment Opportunity Commission issued a hiring guidance document setting forth the standard by which disparate impact hiring practices would be measured. As in *Rhea Lana* and in *Hawkes*, the Government argued the agency action was simply advisory and therefore not "final" under the APA. But the Fifth Circuit disagreed. After a detailed analysis of *Hawkes*, the court held: "'[L]egal consequences' are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability."[27]

In short, the significance of *Hawkes* extends beyond wetlands and the Clean Water Act. It is an important milestone in the jurisprudence of the Administrative Procedure Act and provides a clear benchmark as to when a federal agency action is final and justiciable. ■

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[24] Case No. 15-5014, ___ F.3d ___, 2016 WL 3125035 (D.C. Cir. June 3, 2016).
[25] *Id.* at *6.
[26] Case No. 14-10949, ___ F. 3d ___, 2016 WL 3524242 (5th Cir. June 29, 2016).
[27] *Id.* at *8. Other cases are sure to follow, some in unanticipated contexts. See e.g. **Error! Main Document Only.** State of Texas v. United States, N.D. Tx., Case No. 7:16-cv-00054-0, Preliminary Injunction Order, Aug. 21, 2016, at 17. (finding Obama Administration's transgender bathroom policy a final agency action subject to APA rulemaking based on Hawkes.)

In Memoriam

William D. "Bill" Bartine, Des Moines, IA

We will miss our colleagues in our future deliberations and extend our condolences to their families and friends.

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Can a Sale Be Rescinded if a Residence is "Haunted" or Otherwise "Stigmatized"?*

by John C. "Jack" Murray

From ghoulies and ghosties and long-leggety beasties and things that go bump in the night, Good Lord, deliver us -- Cornish Prayer.

I. "Haunted" Houses

My wife and I were watching a program on TV several years ago with some friends of ours, about a couple that bought a house that was supposedly haunted and later found out the sellers knew of the abnormal activity. Someone with us said to me, "Well, couldn't you sue them for not disclosing that a house is haunted?" I said, "Well, probably not successfully because you'd have to 'prove' that the house is/was in fact, haunted, and I don't know how you'd do that -- but you might be able to rescind the transaction for willful failure to disclose, depending on the factual circumstances." This led me (of course) to research the issue (after all, it was only a few weeks before Halloween!), upon which I uncovered the following:

Courts have not limited disclosure obligations in residential (and even commercial) transactions to the presence of physical defects. The duty to disclose has been extended to include nonphysical defects that detrimentally affect property values. For example, in a widely discussed and analyzed case, S*tambovsky v. Ackley,* 572 N.Y.S. 2d 672 (N.Y. App. Div. 1991), the court held that the seller had a duty to disclose that the house was reputed to be haunted. According to the court, the buyer had no reason to inquire about the apparition and could not have discovered its presence through a reasonable inspection.

The following are the LEXIS case notes from the S*tambovsky v. Ackley* decision:

PROCEDURAL POSTURE: Plaintiff appealed dismissal of his complaint by the Supreme Court, New York County (New York), in action seeking rescission of contract for sale of a house that plaintiff later discovered had a reputation as being haunted.

OVERVIEW: Plaintiff contracted to purchase a house from defendant, and after the sale was complete plaintiff learned the house had a reputation as being possessed by poltergeists. Plaintiff filed a complaint to rescind the contract, which was dismissed by the trial court. The appellate court reversed.

First, the court concluded that due to defendant's reports of the alleged hauntings in national and local publications, she was estopped to deny the poltergeists' existence and thus, as the court stated, "as a matter of law, the house [was] haunted." Noting that reports of hauntings lowered the resale value of the house, the court held that while caveat emptor prevented an action for damages, it did not prevent the equitable remedy of rescission. Here, rescission was appropriate since defendant not only took unfair advantage of plaintiff's ignorance as to the house's reputation, but defendant herself also had created and perpetuated that reputation.

OUTCOME: Dismissal reversed, as while caveat emptor prevented an action for damages, it did not prevent plaintiff's desired

* Note: the cases and commentary in this article have been compiled by the author, but no warranty or representation is made as the accuracy or completeness of the information contained herein. This article does not constitute legal advice and no attorney-client relationship is created.

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> equitable remedy of rescission. Rescission was appropriate since defendant took unfair advantage of plaintiff's ignorance of house's haunted reputation, which reputation defendant herself had created and perpetuated.

For commentary on this case, *see* Thomas Van Flein, *Bad Cases Make Good Humor*, 24 AK BAR RAG 2 (Alaska Bar Association, November/December 2000), which contains the following summary of the *Stambovsky v. Ackley* decision, at *2:

> *Stambovsky v. Ackley,* 572 N.Y.Supp.2d 672 (N.Y. App. 1991), involved the purchase of a house, and a subsequent suit for rescission when the buyer learned that the house was haunted. The court ultimately concluded that, "as a matter of law, the house is haunted."
>
> The appellate court started off by explaining that "Plaintiff, to his horror, discovered that the house he had recently contracted to purchase was widely reputed to be possessed by poltergeists." The decision turned not on whether the house was in fact haunted, but on the seller's knowledge that it could be (based on the seller's prior public statements) and the seller's failure to disclose this: "Whether the source of the spectral apparitions seen by defendant seller are parapsychic or psychogenic, having reported their presence in both a national publication ("Readers' Digest") and the local press . . . defendant is estopped to deny their existence and, as a matter of law, the house is haunted."
>
> Although the court was "moved by the spirit of equity to allow the buyer to seek rescission of the contract of sale and recovery of his down payment," the court stated that the plaintiff's claim for misrepresentation did not have "a ghost of a chance." The equitable remedy of rescission was determined to be the appropriate response to "a very practical problem with respect to the discovery of a paranormal phenomenon: 'Who you gonna' call?' as the title song to the movie 'Ghostbusters' asks. If you can't call on the court of equity, presumably you are left with Bill Murray as your only remedy."
>
> The court rejected the doctrine of caveat emptor (buyer beware) since to apply it in this context "conjures up visions of a psychic or medium routinely accompanying the structural engineer and Terminix man on an inspection of every home subject to a contract of sale. It portends that the prudent attorney will establish an escrow account lest the subject of the transaction come back to haunt him and his client--or pray that his malpractice insurance coverage extends to supernatural disasters." The court's ruling intended to dispel "the notion that a haunting is a condition which can and should be ascertained upon reasonable inspection of the premises" as a "hobgoblin which should be exorcised from the body of legal precedent and laid quietly to rest." As long as the court is laying to rest old doctrines, how about the Rule in *McMaster's Case*, a rule that still scares law students (Note: In the "*McMasters* case," *Osborne v. McMasters*, 40 Minn. 103, 41 N.W. 543 (Minn. 1889), a woman died as a result of ingesting poison from an unlabeled bottle purchased at the McMaster's drug store. The court held that McMasters was required by law to label all poisons).

See also Stuart C. Edmiston, *Secrets Worth Keeping: Toward a Principled Basis for Stigmatized Property Disclosure Statutes*, 58 U.C.L.A. L. REV. 281 (2010). In this article, the author states that "Since the late 1980s, a majority of states have enacted statutes protecting nondisclosure of stigmas affecting property in residential real estate transactions." The author also states that: "The class of stigmas that do not plausibly indicate a continuing risk of direct physical harm to the occupant might be defined as 'including, but not limited to' a reputation for being haunted, a previous

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occupant's natural death or suicide, the HIV/AIDS status of a previous occupant, and so forth. Such a list resembles, but does not precisely mirror, the lists included in the sweeping formulations found in many current stigma statutes." *Id.* at 316. The author summarizes the *Stambovsky* case as follows:

> In *Stambovsky v. Ackley*, Ackley, the seller, had shared her home's reputation for being haunted with walking tours, the local newspaper, and Readers Digest. When Stambovsky, a buyer from New York City unfamiliar "with the [local] folklore," was brought up to speed, he sought to rescind the contract of sale and recover his down payment. The court held that "where, as here, the seller not only takes unfair advantage of the buyer's ignorance but has created and perpetuated a condition about which he is unlikely to even inquire, enforcement of the contract (in whole or in part) is offensive to the court's sense of equity." Given the highly unusual facts of the case (not many stigmas are both promoted and hushed), the holding is important primarily to the extent that it suggests a perhaps intolerable generosity to plaintiffs suing based on "peripheral, insubstantial, or fancied harms." Unlike Reed, it is not clear that legislators ever considered the case. Commentators, however, have frequently addressed the case, and it has come to inform a distinctive approach to rationalizing stigma statutes generally.

Id. at 290-91.

The author further states that, with respect to the rental of a "haunted" dwelling:

> Property owners might play up a dwelling's reputation as being haunted in advertising it for rent but shy away from disclosing such reputation when they go to sell. See Cherlyn Gardner Strong, "Haunted" Rentals: Advertising a Ghostly Roommate, TucsonCitizen, Nov. 22, 2009, http://tucsoncitizen.com/paranormal/2009/11/22/haunted-rentals-advertising-a-ghostly-roommate."

Id. at fn. 60.

In a later New Jersey case, *Strawn v. Canuso*, 140 N.J. 43, 57-58 (N.J. 1995), the court stated as follows with respect to the *Stambovsky* case:

> [In] New York's so-called 'poltergeist case,' the purchaser argued that the presence of such spirits in his new home was a material element of the sale that should have been disclosed. The court agreed and imposed a duty on the seller to disclose that the property had been haunted. *Stambovsky v. Ackley*, 169 A.D.2d 254, 572 N.Y.S.2d 672 (1991). FN1
>
> FN1. *Stambovsky* … involved "stigmatized property," which has been defined as "property psychologically impacted by an event which occurred or was suspected to have occurred on the property, such event being one that has no physical impact of any kind." National Association of Realtors, *Study Guide: Stigmatized Property 2* (1990), *quoted in* Robert M. Morgan, *The Expansion of the Duty of Disclosure in Real Estate Transactions: It's Not Just For Sellers Anymore,* Fla. B.J., Feb. 1994, at 31. Some states have enacted legislation to provide guidance regarding the types of nonphysical or emotional defects that are material. *See, e.g.*, Fla. Stat. Ann. § 689.25. New Jersey has no such legislation, and we do not address the materiality of such conditions.

See generally Anne M. Payne, *Liability to Purchaser of Real Property for Failure to Disclose That Property is Haunted, or Was Scene of Murder, Suicide, or Other Notorious Death* 149 AM. JUR. PROOF OF FACTS 3d 1 (Database updated September 2015) (discussing and analyzing cases regarding "haunting" or past crimes in connection with sale of real property and noting that various jurisdictions may have rules,

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regulations, constitutional provisions, or legislative enactments that deal with these issues); Daniel M. Warner, *Caveat Spiritus: A Jurisprudential Reflection upon the Law of Haunted Houses and Ghosts,* 28 VAL. U. L. REV. 297, 298 (Fall 1993) (arguing that scientifically based law helps to make society generally more rational, and stating that "karmic-based real estate evaluation and judicial recognition of haunted houses is bad law that harms society"); Karl B. Holztschue *The Purchaser Hasn't a Ghost of a Chance: Update on PCDA cases and PCDA Revision*, 201 40922 NYCBAR (2014) (discussing effect of Property Condition Disclosure Act on duty of sellers in New York to disclose conditions at residential property); 26 Marianne M. Jennings, *Buying Property From the Addams Family,* 22 REAL EST. L.J. 43 (1993); Robert M. Morgan, *The Expansion of the Common Law Duty of Disclosure in Real Estate Transactions: It's Not Just for Sellers Anymore,* FLA. B.J., Feb. 1994, at 28-31; Ronald Benton Brown and Thomas H. Thurlow III, *Buyers Beware: Statutes Shield Real Estate Brokers and Sellers Who Do Not Disclose That Properties Are Psychologically Tainted*, 49 OKLA. L. REV. (1996), wherein the authors state, at 640:

> In 1995, the New York Legislature passed its statute protecting transferors of psychologically impacted property and their agents who fail to disclose the fact. Around the time of the law's passage, news stories reported that New York was passing a "haunted house" statute. However, nothing in the statute refers to haunted houses. The law is simply a psychologically impacted property statute that is similar to statutes in other jurisdictions. The clamor about a proposed "haunted house" statue has its origins in the New York case *Stambovsky v. Ackley.* The *Stambovsky* court had reasoned that no purpose was served by requiring a buyer to discover undiscoverable impacts that are within the knowledge of the seller. The buyer does have a duty to exercise due care with respect to the transaction. However, the New York court placed the burden on the seller in the case that a circumstance does not affect the physical condition of the property but materially impairs the value of the contract. This reasoning would include all other psychological impacts discussed in this article. Because these conditions do not affect the physical condition of the property, they would not be discoverable by the buyer making a reasonable inspection. Some states, not including New York, have borrowed the language of Stambovsky for their psychologically impacted property statutes. They specifically include any "act or occurrence which had no effect on the physical structure of the real property." The New York statute does not include this language.

But see *Bishop v. Graziano*, 804 N.Y.2d 236, 238 (2005), where the court stated that:

> The 2002 enactment of the "Property Condition Disclosure Act" attempted, somewhat unsuccessfully, to effect a sea change in a well settled area of New York's Real Property Law. Section 462 of the New York Real Property Law mandates a Uniform Disclosure Statement which requires sellers to make a minimum of forty-eight (48) affirmative representations concerning the condition of a residential house and property. Previously, New York was unequivocally characterized as a "caveat emptor" (buyer-beware) real property transfer state for "as is" purchases of realty, with sellers having no duty to disclose" [citing the *Stambovsky* case].

The author has been informed of a situation in Wisconsin that was reported to the Wisconsin Board of Realtors, where the broker was told that the walls of the listed house "bled." As is common in most states, Wisconsin's real-estate license law only requires brokers to disclose a "haunting" if it has an effect on the physical condition of the property. Given the alleged "physical" effect on the house, that particular haunting was required to be disclosed. But what standards would apply to determine if a "reasonable

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person" would believe a specific occurrence has a significant impact on the value of the property? What if the buyer has cultural or religious objections?

The California Association of Realtors is bound by the disclosure requirements of CAL. CIV. CODE § 1710.2, which states that the death or manner of death of an occupant of real property need not be disclosed if it occurred more than three years prior to the date the transferee offers to purchase, lease, or rent the real property, or that an occupant of that property was infected with the AIDS virus, unless the transferee or prospective transferee makes a direct inquiry regarding deaths on the property. Many brokerage firms have disclosure forms that specifically inquire about deaths on the real property.

Some states even require more by requiring home sellers to disclose "stigmas" affecting a property, including proximity to homeless shelters and the scene of a violent crime. *See generally* Marc Ben-Ezra and Asher Perlin, *Stigma Busters; A Primer on Selling Haunted Houses and Other Stigmatized Property,* PROBATE & PROPERTY, May/June 2005, at p. 59. The authors state, at p. 60, that at least 21 states have statutes addressing stigmatizing issues in one way or another, including the following

> CAL. CIV. CODE § 1710.2; COLO. REV. STAT. ANN. § 38–35.5–101; CONN GEN. STAT. § 20 329dd; DEL. CODE. ANN. tit. 24, § 2930; FLA. STAT.§ 689.25; GA. CODE ANN. § 44–1–16; HAW. REV. STAT. STAT. § 467–14(18); IDAHO CODE § 55–2802; KY. REV. STAT. ANN. § 207.250; LA. REV. STAT. ANN. § 37:1468; MD. CODE ANN., REAL PROP. § 2–120; MO. ANN. STAT. § 442.600; N.M. STAT. ANN. § 47–13–2; OKLA. STAT. TIT. 59, § 858–513; OR. REV. STAT. § 93.275; R.I. GEN. LAWS § 5–20.8–6; S.C. CODE ANN. § 27–50–90; S.D. CODIFIED LAWS§ 43–4–44; TEX. PROP. CODE ANN. § 5.008(c); UTAH CODE ANN. § 57–1–37; VA. CODE ANN. § 55–524.

With respect to rental properties, *see* Rent.com, Rent in Peace: Avoiding Common Rental Horrors (2009), available at http://www.rent.com/press-room/media/Rent+com+RIP+InfoFlash+FINAL-+9+17+09.pdf. (containing survey results indicating that 31 percent of renters would not live in a "haunted" rental unit even for "a million bucks").

II. Failure to Disclose Murder, Suicide, or Former Burial Grounds

Sellers have also been held liable for failing to disclose the fact that the house had once been the site of a murder (or multiple murders). For example, in *Reed v. King*, 145 Cal. App. 3d 261 (Cal. App. 3d Dist. 1983), the court found that defendants' failure to disclose the fact that murders had occurred in the house was material to the real estate contract and permitted the buyer to rescind the contract. The following is an excerpt from the court's decision in *Reed v. King*, at 267-68:

> The murder of innocents is highly unusual in its potential for so disturbing buyers they may be unable to reside in a home where it has occurred. This fact may foreseeably deprive a buyer of the intended use of the purchase. Murder is not such a common occurrence that buyers should be charged with anticipating and discovering this disquieting possibility. Accordingly, the fact is not one for which a duty of inquiry and discovery can sensibly imposed upon the buyer.
>
> Reed alleges the fact of the murders has a quantifiable effect on the market value of the premises. We cannot say this allegation is inherently wrong and, in the pleading posture of the case, we assume it to be true. If information known or accessible only to the seller has a significant and measurable effect on market value and, as is alleged here, the seller is aware of this effect, we see no principled basis for making the duty to disclose turn upon the character of the information. Physical usefulness is not and never has been the sole criterion of valuation. Stamp collections and gold speculation would be

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insane activities if utilitarian considerations were the sole measure of value. We note the traditional formulation of market value assumes a buyer "with knowledge of all the issues and purposes to which [the realty] is adapted."

Reputation and history can have a significant effect on the value of realty. "George Washington slept here" is worth something, however physically inconsequential that consideration may be. Ill-repute or "bad will" conversely may depress the value of property. Failure to disclose such a negative fact where it will have a foreseeably depressing effect on income expected to be generated by a business is tortious. Some cases have held that unreasonable fears of the potential buying public that a gas or oil pipeline may rupture may depress the market value of land and entitle the owner to incremental compensation in eminent domain.

Whether Reed will be able to prove her allegation that the decade-old multiple murder has a significant effect on market value we cannot determine. If she is able to do so by competent evidence she is entitled to a favorable ruling on the issues of materiality and duty to disclose. Her demonstration of objective tangible harm would still the concern that permitting her to go forward will open the floodgates to rescission on subjective and idiosyncratic grounds.

[In] determining what factors would motivate [buyers and sellers] in reaching an agreement as to price, and in weighing the effect of their motivation, [the trier of fact] may rely upon the opinion of experts in the field and also upon its knowledge and experience shared in common with people in general.

The ruling of the trial court requiring the additional element of notoriety, i.e. widespread public knowledge, is unpersuasive. Lack of notoriety may facilitate resale to yet another unsuspecting buyer at the "market price" of a house with no ill-repute. However, it appears the buyer will learn of the possibly unsettling history of the house soon after moving in. Those who suffer no discomfort from the specter of residing in such quarters per se, will nonetheless be discomforted by the prospect they have bought a house that may be difficult to sell to less hardy souls. Nondisclosure must be evaluated as fair or unfair regardless of the ease with which a buyer may escape this discomfort by foisting it upon another.

A more troublesome question would arise if a buyer in similar circumstances were unable to plead or establish a significant and quantifiable effect on market value. However, this question is not presented in the posture of this case. Reed has not alleged the fact of the murders has rendered the premises useless to her as a residence. As currently pled, the gravamen of her case is pecuniary harm. We decline to speculate on the abstract alternative.

In *Milliken v. Jacono*, 103 A.3d 806 (Pa. 2014), the Pennsylvania Supreme Court held, as a matter of first impression, that purely psychological stigmas are not material property defects under the state's Real Estate Seller Disclosure Law ("RESDL", which pertains to physical or structural problems with a property) that sellers must disclose to buyers. A murder-suicide involving the prior owners of the residential property had occurred at the property, but this was not disclosed by the current owners to the purchaser. But the court noted that "The murder-suicide was highly publicized in the local media and on the internet." *Id*. at 807. The court ruled that the seller's failure to disclose this prior event did not constitute fraud, negligent misrepresentation or a violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law because it did not have a significant adverse impact on the value of the property or constitute an unreasonable risk to people

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Haunted...

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on the property. The court noted that "the varieties of traumatizing events that could occur on a property are endless. Efforts to define those that would warrant mandatory disclosure would be a Sisyphean task." *Id.* at 810. The court also noted the difficulty in fashioning an appropriate remedy for such a claim, such as rescission of the contract and repayment of the buyer's costs (as requested in this case), or assigning a monetary value to a subjective psychological stigma. Interestingly, the court noted in a footnote that "[the buyer] understandably asserted claims against her own real estate agent and broker, which were 'Settled, Discontinued and Ended.'" *Id.* at 811, n.7.

See also Susan Funaro, *Ghoul Disclosures: Must Home Sellers Disclose Paranormal Activity?* available at https://www.legalzoom.com/articles/ghoul-disclosure-must-home-sellers-disclose-paranormal-activity (Oct. 2010), where the author states that:

> According to a study by two business professors at Wright University, houses where murder or suicide have occurred can take 50% longer to sell, and at an average of 2.4 percent less than comparable homes. A California appraiser who specializes in diminution in value issues says that a well-publicized murder generally lowers selling price 15 to 35 percent.

But the author also notes that:

> Sometimes, a house's macabre past is an asset rather than a liability, especially if the gruesome past involves celebrities or legends. Ghosts can be a selling point for some towns that rely on their dead inhabitants for tourist appeal.

Christine Alice Corcos, in her article entitled "*Who Ya Gonna C(s)ite?*" Ghostbusters And The Environmental Regulation Debate, 13 J. LAND USE & ENVTL. LAW 231, 272 (Fall 1997), provides the following interesting information with respect to the effect on a home's value where the residence has been constructed over former burial grounds:

> Another theme portrayed in movies is that of hauntings substantially reducing the value of suburban neighborhood property constructed over former burial grounds. This is the theme of *Poltergeist* (MGM 1982) and *Grave Secrets: The Legacy of Hilltop Drive* (Hearst Entertainment Productions, Inc. 1992), both of which postulate venal land developers as a subgroup of avaricious business people. In *Grave Secrets: The Legacy of Hilltop Drive*, the unwary property owners are unable to recover from the title company, which takes the position that they knew or should have known of the prior existence of the burial ground. A sympathetic real estate attorney points out that even though the homeowners have a good case, they are unlikely to prevail at trial, and appeals will be costly. Eventually, the owners abandon the property after unsuccessfully suing their real estate agents for "abuse of corpse." See Ben Williams et al., *The Black Hope Horror: The True Story of a Haunting* (Morrow 1991); see also Michele Meyer, *Houston's Haunted Houses: Spirits Leave Calling Cards All Over Town*, Houston Chron., Oct. 31, 1991, at 1 (discussing the events at the Galveston Wal-Mart, said to be built over a cemetery). ■