CECB Carnahan, Evans, Cantwell & Brown, P.C.

on the Subject

April 2009

Celebrating 30 Years of Service

Founded in 1979, Carnahan, Evans, Cantwell & Brown, P.C. (CECB) is excited to be celebrating 30 years of service to the community. CECB is a locally owned and operated law firm with offices in Springfield and Branson, Missouri, noted for providing superior and effective client service and proactive problem solving to a diverse client base. Clients include national and regional businesses, financial institutions, large and small businesses, not for profit organizations, and individual clients. CECB has nine attorneys with a Masters of Law in Taxation, has been recognized locally, regionally, and nationally by their peers as a preeminent law firm, and is "A-V rated" by Martindale-Hubbell, which is the highest rating the publication awards. The Firm's attorneys practice in a wide variety of areas including business litigation, taxation, corporate and general business, environmental, employee benefits, estate planning, probate, trusts, banking and financial institutions, employment, real estate, and tax and wealth strategies, resulting in a powerful synergy. The attorneys at CECB are also deeply committed to service in civic and charitable activities, including serving on the boards of numerous civic and community organizations.

Going Green to get the Green!

by Julie T. Brown

On February 17, 2009, President Obama signed a stimulus bill (The American Recovery and Reinvestment Act of 2009) that made some significant changes to the federal tax credits for energy efficiency. The Act provides tax credits to individuals and businesses that "place into service" in 2009 or 2010 certain energy efficient products, such as windows, doors, roofs, HVAC, water heaters, geothermal heat pumps, solar panels, solar water heaters, and others. The highlights of this Act include:

- The tax credits that were previously effective for 2009, have been extended to 2010 as well.
- The tax credit has been raised from 10% to 30% of the cost of the qualifying energy efficiency equipment.
- The tax credits that were for a specific dollar amount have been converted to 30% of the cost.
- The maximum credit has been raised from $500 to $1,500 for the two year period (2009-2010). However, some improvements such as geothermal heat pumps, solar water heaters and solar panels are not subject to the $1,500 maximum.
- If you are building a home, you may qualify for certain of the tax credits (such as for geo-thermal heat pumps, photovoltaics, solar water heaters, small wind systems and fuel cells, but not the tax credits for windows, doors, insulation, roofs, HVAC or non-solar water heaters).

In addition to the federal tax credit, certain energy efficient equipment purchases may also qualify for a rebate from local utility companies. For instance City of Springfield Utilities offers incentives for their commercial customers to increase the efficiency of their facilities. Rebates are available for programmable thermostats, efficient toilets, rain-sensing irrigation equipment and efficient lighting. The City Utilities website includes worksheets that calculate the exact incentive which will be awarded, up to a maximum of $5,000. Go to: http://www.cityutilities.net/conserve/rebates.htm for more information.

City Utilities also offers similar incentives for residential consumers who purchase eligible energy efficiency equipment, including, furnaces, heat pumps, air conditioners, programmable thermostats, building insulation, geothermal heat pumps and routine HVAC maintenance. For example, a five ton qualifying air conditioner could result in a rebate of $500, plus $25 for each SEER above 14. A qualifying natural gas furnace can result in a rebate up to $400.

So, if you are looking to make your business or home more efficient, want to protect the environment, or are just in need of a new air conditioner or furnace, you should look into the tax incentives and rebates available for your purchase. CECB can assist you in navigating the myriad of forms that will need to be completed in connection with these incentives. ■

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We are pleased to announce that Cara F. Dwyer has joined the Branson office of CECB .

Ms. Dwyer is an Associate in the Estate Planning Practice Group of Carnahan, Evans, Cantwell & Brown, P.C.

Ms. Dwyer concentrates her practice in the areas of estate planning and administration and estate, gift and income taxation.

Prior to joining Carnahan, Evans, Cantwell & Brown, P.C., Ms. Dwyer was an Associate in the Wealth Planning Practice Group at the St. Louis office of Polsinelli Shalton Flanigan Suelthaus (now Polsinelli Shughart).

Ms. Dwyer received her undergraduate degree in Marketing from George Washington University in 1995. Ms. Dwyer received her law degree in 2004 from St. Mary's University School of Law and her LL.M. in Taxation from Washington University School of Law in 2007.

Ms. Dwyer was raised in St. Louis, Missouri. After graduating from George Washington University, Ms. Dwyer lived in Branson, Missouri for five years before moving to San Antonio, Texas in 2001 to pursue her law degree.

Ms. Dwyer is a member of the Missouri Bar and the Illinois Bar.

Business Succession Planning and the Irrevocable Life Insurance Trust: Liquidity to Preserve Your Business for Future Generations.

by Cara F. Dwyer

After decades of hard work, sweat and tears, you are the proud owner of a successful family business. Your dream is to have the business passed down from generation to generation. The seamless succession of your business to future generations is at risk in either of the following scenarios:

1. Business is booming. You have amassed significant assets, but they are largely illiquid business assets such as inventory and real estate. If your estate is saddled with a heavy estate tax burden and you have limited liquid assets to satisfy it, your family could be forced to sell the business to pay the taxes.

2. All of your children have expressed an interest in the perpetual continuation of the family business for generations to come. One of them has a change of heart after your death, however, and would prefer to receive cash, instead of a share of the business, in satisfaction of his or her share of your estate. If there are not ample non-business assets to fund the child's share, he or she could force the sale of the business to reap his or her inheritance.

The scenarios above end in the demise of your dream. Despite all your years of hard work, it may be necessary to sell your business in order to pay estate taxes or to equalize your assets among your children. An Irrevocable Life Insurance Trust, also known by its popular acronym, ILIT, is an estate planning technique that should be considered in order to avoid that result.

An ILIT is an irrevocable trust that owns a life insurance policy insuring your life. If properly established and administered, the death proceeds paid to the ILIT will not be included in your estate for estate tax purposes and 100% of the proceeds are then available to provide needed liquidity upon your death. An ILIT can be a valuable component of your business succession planning.

As with most planning tools, you need to consider the drawbacks of an ILIT as well. As the name implies, an ILIT is irrevocable. Once you have created and funded it, you cannot terminate it and you cannot reach assets you have transferred to it. Furthermore, you cannot have any "incidents of ownership" in the life insurance policy. Thus, you cannot own the policy. If you own the policy, its value will be added to your estate upon your death, which could perpetuate an estate tax problem. Finally, an ILIT requires some attention to detail in its funding and management.

All your hard work should not end in vain. Although you cannot control all the factors that can affect the succession of your business upon your death, business succession planning, including consideration of the use of an ILIT, is something that you can and should do in order to improve the chances of preserving your business for future generations.

Schedule an appointment today with the Estate Planning Practice Group of CECB. We have over 150 years of combined private practice experience in estate and business succession planning and we are ready to go to work for you.

Smoke Alarm Regulations for Rental Property

by Frank C. Carnahan

Owners of residential rental property inside Springfield must have one smoke detector in each bedroom, one in the common hall to the bedrooms and one on each dwelling floor. For dwellings constructed after April 2, 2001, smoke alarms must be electrically powered and interconnected so all alarms sound if one is set off. Smoke alarms that communicate wirelessly by infrared are available so that re-wiring through walls is not required.

IRS Leniency for Delinquent Taxpayers

By Frank C. Carnahan

IRS Commissioner Doug Shulman announced 5 specific steps to offer leniency to taxpayers owing taxes.

1. giving tax assistors greater authority to suspend collection actions in certain circumstances, such as a recent job loss, relying solely on Social Security benefits, or is facing steep, unexpected medical costs (tax debt is not extinguished, but collection activity will be deferred);

2. taxpayers missing an installment agreement payment will not automatically have their agreement suspended (no guidance provided if more than 1 payment could be skipped);

3. broadened eligibility for its "offer in compromise" program for some taxpayers who appear to have enough equity in their home to cover their tax debt. The IRS established a special unit to review specific cases;

4. Taxpayers missing a payment under an existing offer-in-compromise agreement can work with IRS officials to avoid defaulting on that agreement; and

5. The IRS will speed levy releases for taxpayers in financial hardship

http://www.irs.gov/newsroom/article/0,,id=202244,00.html

IRS offers expedited Lien Discharge and Subordination Process

The IRS announced an expedited lien discharge / subordination process for financially distressed homeowners to avoid having a federal tax lien block refinancing of mortgages or the sale of a home. The request should be mailed to one of 40 Collection Advisory Groups nationwide. See Publication 4235 for address information. IR-2008-141, Dec. 16, 2008. http://www.irs.gov/newsroom/article/0,,id=201343,00.html.

The American Recovery and Reinvestment Act of 2009

by Frank C. Carnahan

Approximately one-third of the nearly $800 billion is for tax incentives for individuals and businesses, many retroactive to January 1, 2009.

Individual incentives

Making Work Pay credit against income tax of the lesser of: (i) 6.2% of the individual's earned income; or (ii) $400 ($800 for married couples filing jointly) retroactive to January 1, 2009 through December 31, 2010, but limited for higher income wage earners.

Individuals receiving Social Security benefits, disabled veterans and others on fixed incomes will receive one-time payments of $250, but which reduces the Making Work Pay credit by $250.

First-time homebuyer tax credit of 10% of the purchase price up to $8,000 ($4,000 for married individuals filing separately) for homes purchased by first-time homebuyers between January 1, 2009 and December 1, 2009, but without the prior law repayment requirement. Income limitations preclude higher income individuals and couples from taking advantage of the credit.

New car deduction above-the-line for state and local sales taxes or excise taxes paid on qualified new motor vehicles purchased from the date of enactment through the end of 2009. Income thresholds and other limitations apply.

AMT patch, increasing the AMT exemption amounts and allowing taxpayers to take most personal credits to reduce AMT liability for 2009.

Child tax credit refundable portion for 2009 and 2010 increased to 15% of earned income over $3,000 subject to restrictions and phase-outs.

Unemployment compensation up to $2,400 excluded from a recipient's gross income in 2009.

Education. The income phase-outs are expanded and the maximum credit for the current Hope education credit (renamed the American Opportunity Tax Credit) are increased. The credit extends over four years of post-secondary school education, and makes 40% of the credit refundable. Beneficiaries of qualified tuition plans (known as "529" plans) can use tax-free distributions to pay for computers and computer technology.

Transit benefits. The income exclusion amount for employer provided transit passes and van pooling increased from $120 to $230 per month starting in March 2009 and through 2010 with an inflation adjustment.

Earned Income Tax Credit (EITC) is enhanced for taxpayers with three or more qualifying children and helps eliminate an existing "marriage penalty" across the board.

Energy incentives reward taxpayers for installing energy-efficient property and alternative energy sources in their homes. This time around, the residential credits are limited to HVAC (heating ventilation and air conditioning) and building envelope items, but exclude lighting. The efficiency standards for much of the qualifying property have been increased to very high January 1, 2009, building code standards, and many HVAC and building envelope dealers do not stock equipment at these high energy efficiency levels. The credit is extended for 2009 and 2010 and triples the $500 credit to $1,500. The previous 10% credits and the $50, $100 and $150 sub-capped items are now all eligible for the full 30% credit up to $1,500. A tax break is implemented for purchasers of plug-in electric vehicles.

Business incentives

50% Bonus depreciation to be taken on top of regular depreciation is extended through 2009 (longer for certain types of property). The first-year depreciation cap limits for bonus depreciation for vehicles are raised by $8,000. Eligible businesses can monetize accumulated AMT and research tax credits in lieu of taking bonus depreciation for 2009. This may require analysis of multiple available options and predictions about the value of these items as future tax benefits, and becomes even more complex when carrybacks may free up tax credits claimed in those earlier years for carryback to even earlier tax years.

Code Sec. 179 expensing is revived for 2009 up to $250,000, and the threshold for reducing the deduction is $800,000. Advanced planning is required when an S corporation plans to utilize Code Sec. 179 to expense assets, because Code Sec. 179 occurs at both the S corporate level to elect the deduction and then at the shareholder level to utilize the deduction.

Net operating loss carryback period increased to five years for small businesses (those with average gross receipts of $15MM or less).

Work Opportunity Tax Credit for employers who hire individuals from targeted groups, such as veterans and young people.

Cancellation of indebtedness by eligible businesses can be recognized over five years, beginning in 2014, for specified types of business debt repurchased or forgiven by the business after December 31, 2008 and before January 1, 2011.

Energy incentives for developers and producers of alternative and renewable energy, including wind, biomass and solar power.

COBRA premium assistance allows terminated employees to pay 35% of the premium and the employer pays 65% and takes a credit against employment taxes. Studies show only a small percentage of eligible individuals elect COBRA continuation coverage due to the cost, and subsidized coverage may increase those percentages. Employees electing COBRA coverage on average tend to be those most in need of medical care, which may increase plan cost. Individuals involuntarily terminated from September 1, 2008 through February 16, 2009, who (1) did not elect COBRA when it was first offered or (2) did elect COBRA, but are no longer enrolled (e.g., because they couldn't pay the premium) are given a special grace period for electing COBRA coverage. This election period begins on February 17, 2009 and ends 60 days after the plan provides the required notice. Plans must notify individuals of this special grace period by April 18, 2009.

Other qualified individuals can exclude 75% of gain from the sale of certain small business stock. The ten year holding period for S corp built-in gain is reduced to seven years. The New Markets Tax Credit program is increased. Estimated tax payments for certain individuals whose income comes from small businesses are decreased. Withholding on government contractors is delayed. Tax-exempt and tax-credit bond rules are revised to help states and local governments generate revenue. ■

For Your Convenience…

Please feel free to utilize our wireless high-speed internet capabilities when visiting our Springfield office. Using your own personal laptop, you can connect to the internet in any of our conference rooms or in our reception area.

Mechanic's Lien: Ensuring Payment In A Distressed Economy

by John L. Waite III

A mechanic's lien is a useful tool that is available to contractors, architects, engineers, surveyors, and landscapers to ensure that the property owner who benefits from their services is liable for payment. For the unwary property owner, this may result in paying for these services twice. Below is a brief overview of Missouri's Mechanic's Lien law and some general guidance for those who may find themselves in a troubling economy. As with all legal matters, every situation is different and requires foresight to ensure that appropriate steps are taken to protect legal rights and interests. I strongly recommend that anyone who wishes to assert a mechanic's lien obtain legal counsel before assuming they are entitled to such a lien.

In a nutshell, a mechanic's lien is a tool that allows any person who performs any work and/or furnishes materials on any building or improvement on land, including repairs, to assert a lien against the real property for the payment of the work and/or materials. The lien attaches to the subject property and in some cases, may entitle the lien holder to force a sale of the property to ensure payment to the contractor. A contractor may also be allowed to step in front of the mortgage lender and property owner when the sale proceeds are distributed to interested parties.

Generally, the enforcement of a mechanic's lien involves a four step process. The first step requires the contractor to provide certain notices to interested parties, as discussed in more detail below. Next, the contractor files a Statement of Mechanic's Lien with the appropriate Circuit Court. Third, the contractor files a lawsuit to enforce the lien. And lastly, assuming the mechanic's lien is upheld and results in a Court Order, foreclosing upon the lien itself. This article will focus mainly on the first two steps, which tend to cause the most problems for contractors.

PRE-LIEN NOTICE REQUIREMENTS

Before a mechanic's lien may be asserted, there are certain notice requirements that must be followed. The type of notice required depends upon whether the contractor deals directly with the property owner or an intermediary, such as a general contractor. In other words, is your contract with the property owner or someone else? If the contract is directly with the property owner, you are considered an original contractor pursuant to Missouri's Mechanic's Lien laws. But if your contract is with someone other than the property owner, then you are a subcontractor.

Original Contractor Notice.

Missouri's lien statutes require that the original contractor, a person contracting directly with the owner (i.e., a general contractor), must give the owner a specific statutory notice prior to the beginning of the project and before any payments are made under the contract.

The following language must be included in at least ten-point bold type in the contract:

NOTICE TO OWNER

FAILURE OF THIS CONTRACTOR TO PAY THOSE PERSONS SUPPLYING MATERIAL OR SERVICES TO COMPLETE THIS CONTRACT CAN RESULT IN THE FILING OF A MECHANIC'S LIEN ON THE PROPERTY WHICH IS THE SUBJECT OF THIS CONTRACT PURSUANT TO CHAPTER 429, R.S. MO. TO AVOID THIS RESULT YOU MAY ASK THIS CONTRACTOR FOR "LIEN WAIVERS" FROM ALL PERSONS SUPPLYING MATERIAL OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT. FAILURE TO SECURE LIEN WAIVERS MAY RESULT IN YOUR PAYING FOR LABOR AND MATERIAL TWICE.

This notice must be provided in the original contract or prior to the time materials are first delivered to the project, the contractor first commences work on the project, or the first invoice is delivered.

Subcontractor Notice.

The type of notice that a subcontractor must provide on a project turns on whether the project is residential owner occupied or non-owner occupied.

(A) Non-Residential or Non-Occupied Projects

A subcontractor must give the owner notice of its intent to file a mechanic's lien at least ten (10) days prior to filing the lien. As discussed below, a mechanic's lien must be filed within six (6) months of the last work performed on, or materials furnished to, a project. The subcontractor must actually "serve" the notice of intent on the owner(s) "by any officer authorized by law to serve process in civil actions, or by any person who would be a competent witness." There must be proof of personal service, either by an officer's return that is endorsed or an affidavit of service by any other person. In certain circumstances, the subcontractor may be allowed to "serve" the owner by filing a copy of the notice of intent with the Recorder of Deeds for the County in which the property is located.

If a subcontractor fails to follow these notice requirements, it cannot file a mechanic's lien against the property. For this reason, a subcontractor must carefully calculate its time in order to ensure that it can serve the notice of intent to file a mechanic's lien at least ten (10) days prior to the date the time for the filing of the Statement of Mechanic's Lien expires.

The notice of intent must contain certain information on the subcontractor's claim, including the amount of claim and the identity of the original/general contractor.

(B) Residential Owner Occupied Projects

For owner-occupied residential property of four units or less, a different notice is required. A subcontractor must obtain a "Consent of Owner" in order to protect its lien rights for remodeling, repairing or improving such property. "Owner occupied residential property" is residential property that the owner either currently occupies or intends to, and does occupy, as a residence within a reasonable time following completion of the project.

No lien claimant (except an original contractor) can file a mechanic's lien against the property unless the owner, pursuant to a written contract, has agreed to be liable for such costs in the event that the general contract does not pay the subcontractor. This consent is in addition to the above-described Notice of Intent, and must be signed separately from that Notice. Additionally, the Consent of Owner must be printed in at least ten print bold type and contain the following words:

CONSENT OF OWNER

CONSENT IS HEREBY GIVEN FOR FILING OF MECHANIC'S LIENS BY ANY PERSON WHO SUPPLIES MATERIALS OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT ON THE PROPERTY ON WHICH IT IS LOCATED IF THEY ARE NOT PAID.

If the subcontractor files a mechanic's lien, this "Consent of Owner" must be attached to the lien statement.

If a subcontractor is supplying materials or labor for repair, remodel, or an addition on an

Continued on Page 5

Mechanics Lien:
Continued from Page 4

existing residential home, it should be aware of this statute and special precautions should be taken. The subcontractor should obtain the "Consent of Owner" from the owner of the project or request that the original/general contractor to whom the subcontractor is supplying work and/or materials obtain such consent from the owner.

STATEMENT OF MECHANIC'S LIEN

Missouri law draws no distinction between original/general contractors and subcontractors when it comes to computing the time in which a claimant must file its mechanic's lien statement. A mechanic's lien statement must be filed in the Circuit Court where the property is located within six (6) months after the indebtedness accrues. Missouri courts interpret the time in which the indebtedness accrues to mean the last date that work is performed on, or materials furnished to, the project. For materials supplied to the project, the last day furnished is typically the last date that materials were delivered.

A Mechanic's Lien Statement must include the following:

(1) a just and true account of the amount due;

(2) a true description of the property, or so near as to identify the same;

(3) name of the owner;

(4) name of the lien claimant;

(5) name of the contractor (if lien statement is for subcontractor); and

(6) verification, under oath by the lien claimant or its agent, that the information in the lien statement is true and correct and that the lien claimant has satisfied all requirements for filing the lien (such as Notice of Intent or Consent of Owner).

LAWSUIT TO ENFORCE MECHANIC'S LIEN

Within six (6) months of filing the Mechanic's Lien Statement, the lien claimant must file its lawsuit to enforce a mechanic's lien. If the lawsuit is not filed, the mechanic's lien expires. Under Missouri law, a contractor is only required to file the lawsuit against the property owner and any original/general contractor that may be involved with the project. However, as a practical matter, a contractor should name any person or entity who may claim an interest in the property.

The most common problems seen with mechanic's lien lawsuits are (i) failure to accurately describe the property, (ii) failure to properly itemize the work performed or materials supplied, and (iii) failure to comply with the various time constraints set forth in the statutes. As mentioned earlier, because each situation differs and because courts strictly construe mechanic's liens, professional legal advice from an attorney should always be considered.

EXECUTION ON A MECHANIC'S LIEN

Once the contractor obtains a Court Order and/or Judgment that validates the lien, a contractor may be entitled to force the property into a foreclosure sale. In addition, to the mechanic's lien, the contractor is also entitled to a money judgment. As to the property owner, a money judgment may not be as advantageous as the lien but when an original/general contractor is involved, a money judgment allows the subcontractor to seek payment from either the property owner or the original/general contractor.

As initially discussed, this article provides a very brief and general overview of Missouri's Mechanic's Lien law and should not be relied upon as legal advice for your specific situation. There are numerous nuances within this area of the law that is beyond the scope of this article. For instance, what happens when the property is sold after work and/or materials are provided to the project but before the Statement of Mechanic's Lien is filed? Or the impact of a property owner's bankruptcy on the contractor's right to assert a Mechanic's Lien. These are questions for your attorney to answer. ■

The COBRA Premium Assistance Payroll Credit

by Frank C. Carnahan

The IRS unveiled new information on the use of the COBRA Premium Assistance Payroll Credit to offset quarterly employment tax liabilities on its web site, including an extensive set of questions and answers for employers, a revised version of the quarterly payroll tax return for employers to use to claim credit for the COBRA medical premiums they pay for their former employees.

http://www.irs.gov/newsroom/article/0,,id=204708,00.html.

The IRS will issue a refund if the COBRA credit exceeds payroll tax liabilities, after offsetting any unpaid payroll tax liabilities. Employers will be notified of any offset. COBRA premium assistance is only available to individuals involuntarily terminated between September 1, 2008 and December 31, 2009. The Department of Labor web site describes involuntary termination as "being told not to come back to work until further notice", and the IRS web site indicates "an employer-initiated layoff is generally an involuntary termination of employment for eligibility for COBRA premium subsidy." The Department of Labor web site also has information at:

http://www.dol.gov/ebsa/cobra.html. ■

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New Missouri Law Requires Renewal of Fictious Name Registration

by Julie T. Brown

Missouri statutes now require corporations using a fictitious name to periodically renew such names by filing with the Missouri Secretary of State a renewal form. Previously, a fictitious name filing remained effective indefinitely. Under current law, if you filed a fictitious name registration prior to August 28, 2004, you must renew the fictitious name prior to August 29, 2009. For all fictitious names registered after August 28, 2004, the expiration date will be five years from the date the fictitious name application was filed.

Please contact our office if you need assistance in renewing your fictitious name registration. For other information, you may access the Missouri Secretary of State's website at www.sos.mo.gov More information can be obtained directly by calling the Missouri Secretary of State's Business Services Division toll free at (866) 223-6535. ■

Zoning Regulations: Who Needs Them?

by Richard T. Ashe

Stone County does, now that a Judge has voided the County's zoning regulations because, ironically enough, they failed to adequately zone and regulate development activities in the County.

On December 30, 2008, Associate Circuit Court Judge Carr Woods ruled that the Stone County Commission violated Missouri law by: (1) failing to divide the County into 'zoning districts'; (2) allowing land-use changes and re-zoning decisions to be made by non-elected officials as part of the plat approval process; (3) failing to approve residential subdivision plats within 30 days; and (4) charging a special-use permit fee that had not been officially approved by the County Commission. In addition to voiding the County's current zoning regulations, the decision also required the County to credit the Plaintiff-developers tens of thousands of dollars in fees previously paid to the County.

a. Zoning Districts.

The most basic reason for having zoning laws is to separate residential property, commercial property and industrial property so that these different land uses do not adversely affect one another. These separate areas are called 'zoning districts,' and they restrict what kind of activities can occur in a given area. Once zoning districts are created, building regulations can then be adopted that are specifically suited to each zoning district. Ideally, zoning districts are created in a way that accounts for both past and future land use activities.

Under Missouri law, a County Commission cannot exercise its zoning powers unless the County is first divided into zoning districts.

Stone County did not follow this rule when it adopted zoning regulations in 1995. Instead, it simply recognized the existence of all prior land use activities throughout the County, and then passed a single, county-wide building regulation for future land uses that required new buildings to be set-back a certain distance from property lines. No other building codes or regulations exist in the County.

Judge Woods' ruling prevents the County from exercising its zoning powers until it adopts "a zoning scheme with original zoning districts for various classes and uses."

b. Land-Use Changes.

When a developer or land owner in Stone County wants to sub-divide a parcel of land into residential lots, it must first get approval from the Stone County Planning and Zoning Department through the 'plat approval process'. In short, the plat approval process requires the P&Z Department to review the development plat to make sure it abides by County building regulations. This job may be done by non-elected officials because, according to Missouri law, the act of comparing development plans to building regulations is not serious enough to require the voting public to hire and fire each person making the decision.

Non-elected officials at the P&Z Department, however, are not permitted to make decisions that will modify a building regulation to suit a particular project, such as a land-use change request. According to Missouri law, the modification of building regulations is serious enough that voters should be able to hire and fire the persons making these decisions. The County Commission, therefore, is the only body legally able to decide requests for land-use changes.

Judge Woods found that these kinds decisions were often made in Stone County by the P&Z Department during the plat approval process. His ruling requires the County Commission to make these decisions, and prohibits the P&Z from making these decisions.

c. 30-Day Approval Period.

Missouri law requires that the plat approval process be completed within 30 days. Judge Woods' ruling voids Stone County's current plat approval process, which takes no less that 40 days to complete, and further states that plat approvals and other zoning requests not decided within 30 days are automatically approved.

d. Special Permit Fees.

Missouri law requires that a County Commission set the amount of each development-related fee, such as building permit fees, special use fees and plat filing fees. In Stone County, the Commission never actually approved the fees charged by the P&Z Department for condominium plats. As a result, Judge Woods voided this fee and ordered the County to credit the Plaintiff-developer for all such fees previously paid to the County.

e. Other Development Related Fees.

Missouri law also requires that all development-related fees be set at an amount that is reasonably related to the service provided by the County. Based on the evidence before the Court, Judge Woods was unable to determine whether or not all of the development-related fees charged by the County were reasonable.

If the County does not take the hint from Judge Woods and make certain that its fees are reasonably related to the services it provides, it is likely that this issue will be resolved by the next lawsuit faced by the County.

Carnahan, Evans, Cantwell & Brown, P. C. congratulates Joseph D. "Chip" Sheppard, III on two great accomplishments in 2008.

Joseph D. "Chip" Sheppard, III receives the President's Award from the Springfield Metropolitan Bar Association

Carnahan, Evans, Cantwell & Brown, P.C. ("CECB") is pleased to announce that Joseph D. "Chip" Sheppard, III has received the President's Award from the Springfield Metropolitan Bar Association. The recipient of the award is selected in recognition of extraordinary service to the Bar Association and the legal profession.

Joseph D. "Chip" Sheppard, III Named a 2008 Finalist for Missouri Lawyer of the Year by Missouri Lawyers Weekly

Joseph D. "Chip" Sheppard, III was recently named 2008 Finalist for Missouri Lawyer of the Year by Missouri Lawyers Weekly. The nomination arose from Chip's volunteer contribution of time to the effort to promote the Missouri Plan for the selection of judges based on merit rather than partisan politics. Chip a Shareholder of Carnahan, Evans, Cantwell & Brown, P.C., concentrates his practice in the areas of real estate, business, securities and intellectual property litigation, dispute resolution and transactions.

IRS Correspondence Audits

by Frank C. Carnahan

IRS correspondence audits are conducted by mail through a service center "campus", and used where there is: (i) a single or limited audit issues (e.g., a line item on return rather than the entire return); (ii) the query lends itself to asking for documentation to substantiate tax return entries (vehicle purchase information for deduction, canceled check for charitable deduction, birth certificate or school records for EIC); and (iii) there is a limited likelihood for the necessity of a face-to-face interview or discussion with the taxpayer or their representative/preparer. Telephone contact is encouraged. Tax examiners use judgment when evaluating responses, so results may vary. These examinations have increased significantly since 2000, and constitute a significant percentage of the Service's audits.

Two types of letters are used to begin a correspondence examination: (i) an Initial Contact Letter (ICL) is used to notify a taxpayer of the opening of an audit without proposing a balance due, used on all EITC examinations and when the IRS is questioning a general deduction or credit; and (ii) a Combo Letter, which includes an examination report with the notification of the audit, used on issues where there is reasonable certainty of the potential liability. The combo letter significantly reduces the audit cycle time, and presents the taxpayer with a clearer understanding of the proposed changes.

Returns are selected for a correspondence audit that appear to have a questionable deduction, expense or credit. The IRS uses data to identify returns with high potential for a tax adjustment, including third party information, a potentially inconsistent/contradictory line items on the tax return, and referrals from Criminal Investigation and preparer /promoter actions. The primary audit issues addressed via a correspondence examination include:

• Earned Income Credit (EIC) (returns are selected based on use of prior audits results to project the potential of an EIC disallowance, use of certain return attributes to forecast the likelihood of adjustment, and third-party information, including: (i) Federal Case Registry (FCR), which provides information on custody orders for children receiving public assistance as well as private divorce cases; and (ii) Social Security Administration, to validate the Social Security Number for the Qualifying Child, date of birth, and names of parents);

• Certain Non-filing Conditions (information received from employers and interest payers)

Schedule A Issues (there are a high level of incorrect Schedule A deductions, especially employee business expenses, and charitable contributions);

- Self-employment tax; and
- Adjustments to income, such as alimony.

If a return with an EITC is selected, the EIC portion of the refund will be held pending examination and a letter is generated alerting the taxpayer that the refund is being held, and the non-EITC amount will be refunded to the taxpayer. The letter will contain specific paragraphs that explain the issues being examined.

Examination Workflow uses automation. Cases are assigned to an examiner only if and when correspondence is received from the taxpayer. Cases where there is no-response are systemically advanced through the audit process using an automated system. After 42 days without a response a second, "30 day notice" is issued, 63 days later a Statutory Notice of Deficiency is issued, and 105 days later the case is closed and tax assessed. Each notice can be halted if contact is made at least 10 days prior to the notice going out.

In responding to an Examination Notice, you should:

- Review your tax return
- Read the enclosed Form 886 outlining what information is being requested
- Answer any questions on the attachments
- Provide a phone number where you can be reached (night time if appropriate)
- Respond by the due date
- Enclose the Response Page from the Examination notice
- Use the return envelope provided. If you need to use a larger envelope, use the complete address shown on the provided return envelope. Do not use the address you would use for filing an amended return. ■

Tenant Security Deposits: What you don't know can hurt you

by Rodney H. Nichols

Many residential and commercial landlords are unfamiliar with the requirements which Missouri law imposes upon landlords with respect to security deposits. In Missouri, security deposits are governed by §535.300, RSMo.

By law, a landlord is not permitted to demand or receive a security deposit in excess of two months' rent. A landlord is not permitted to retain any portion of a security deposit following termination of the tenancy unless the landlord, within thirty (30) days of termination of the tenancy, has conducted an inspection of the unit in order to determine what amount, if any, should be withheld from the security deposit. The landlord is required to give the tenant reasonable notice, in writing, of the date and time when the landlord will inspect the unit following termination of the rental agreement and the tenant has the right to be present at the inspection. Within thirty (30) days after termination of the tenancy, the landlord is required to return the full amount of the security deposit to the tenant or furnish the tenant a written, itemized list, of the damages for which the security deposit or any portion thereof is to be withheld, along with the balance of the security deposit, if any. A landlord may withhold from the security deposit only such amounts as are reasonably necessary:

1. To remedy a tenant's default in the payment of rent;
2. To restore the unit to its condition at the commencement of the tenancy, ordinary wear and tear excepted; or
3. To compensate the landlord for actual damages sustained as a result of the tenant's failure to give proper notice of lease termination, provided that the landlord is required to take reasonable steps to mitigate its damages.

A landlord who fails to comply with §535.300 is not entitled to retain any portion of a security deposit, and a landlord who withholds any portion of a deposit without complying with the statute may be assessed damages in an amount equal to twice the amount of the deposit withheld.

All landlords should utilize checklists to insure their compliance with Missouri law relating to security deposits, and carefully document all aspects of compliance. ■

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- Commercial Litigation and Dispute Resolution
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- Taxation
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