THE DUFFORD WALDECK QUARTERLY

A NEWSLETTER FOR OUR CLIENTS

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SECOND QUARTER DUFFORD, WALDECK, MILBURN & KROHN, L.L.P. 2011

DUFFORD WALDECK LAUNCHES NEW WEBSITE

by Kris Nichols

On June 24th, we launched our newly updated website. New features include an *In the News* section, expanded attorney profiles and many user friendly features that can assist you in finding the attorney who can best assist you with your particular legal needs.

Check it out at www.dwmk.com.

CONSERVATION EASEMENT DEVELOPMENTS

by William H.T. Frey

There have been a number of new developments in the area of Conservation Easements that potential donors need to keep in mind if they plan a donation for 2011. Some of the key developments include the following.

Credit Limitation. In order to reduce the Colorado deficit, in 2010 the legislature placed a $26,000,000 cap on conservation easements donated in 2011, 2012 and 2013. To claim the credit, a certificate must be obtained from the Division of Real Estate. The credits are apportioned out on a first come, first issued, basis and if the donations in a year exceed the cap, the certificates for those excess donations can only be used to claim credits in 2012 or 2013 (and reduce the amounts available in those years). Many people are aware of this change (I wrote it about it in this Newsletter in the third quarter of 2010). However, to balance the budget in 2011 and 2012, the legislature recently reduced the amount of credits available in 2011 and 2012 to $22,000,000 for each year and increased the credit for 2013 to $34,000,000. If you plan to donate in 2011 and need to claim or sell the credit in 2011, it is important to closely monitor the levels of credit already allocated and donate before the annual allocation is exhausted. As of July 15, 2011, only $12,331,847 of 2011 credits were still available.

Tax on Sale of Credits. In the case of *Tempel v. Commissioner*, 136 T.C. No. 15 (April 5, 2011), the United States Tax Court addressed the tax treatment of the sale of Colorado conservation easement tax credits. In summary, the court held that the tax credits were capital assets that had no basis. Because the tax credits in that case were held for less than 1 year, the proceeds from the sale of the credits was taxed as a short term capital gain. The decision leaves many questions unanswered and is only the initial opinion in a much larger case that will be decided later, so it is impossible to tell if the resolution of that issue will be appealed by either side. However, the tax treatment for the proceeds from a sale of credits has been the subject of substantial uncertainty and you should be sure that your tax preparer considers this decision in reporting the sale of your credits. The determination that the credits are capital assets opens the door to treating the sale of the credits as long term capital gain if they are sold more than a year after they are acquired; but the case did not clearly

address how to determine the acquisition date. Those who hold credits off the market, or those forced to hold them because of the cap, may be able to benefit from long term capital gain treatment on the sale of their credits. In such circumstances, the actual date the credits are sold may be critical.

Alternative Resolution of Credit Disputes. Because of the huge backlog of credit challenges at the Department of Revenue, the legislature passed HB 2011-1300 allowing a dispute about conservation easement tax credits to be removed from the Department of Revenue administrative process and immediately transferred to District Court for resolution. The taxpayer does not need to pay the tax or post a bond to move to the court process and there is a provision allowing penalties and interest to be waived if the case is moved from the Department of Revenue to the courts. According to new regulations published 7/25/11, the election to move to the court system has to be made by October 1, 2011, and the election must be made by the donor of the credits. If you are a credit buyer and are unsure if the seller of your credits will act, there is a process for you to ask the Department of Revenue to appoint a new tax matters representative (TMR) for your credits and, if a change is allowed, the new TMR will have 30 days to make the election. Obviously, if you purchased credits and those credits are being challenged by the Department of Revenue, there are some real benefits to this election; but, you must be proactive and not merely rely upon the donor (if the election is not made, it appears likely there will not be a resolution until 2016 at the Department of Revenue level for many cases and many donors may be content to put off the case as long as possible).

In addition to these major developments, there have been recent cases decided concerning the documentation required to claim a conservation easement deduction which indicate the taxpayer must fully and completely comply with even the finest points of the documentation required by the IRS regulations. The IRS is also requiring strict compliance with the qualified appraisal rules. Even minor errors in the appraisal or the forms filed with the IRS can be fatal to the deduction for the conservation easement. This attack on the format and procedural requirements for easements follows significant losses by the IRS in its attempts to narrowly construe conservation purposes and disallow deductions based on the nature of the easement itself. Attention to detail is critical.

COLORADO SUPREMES ISSUE GROUNDBREAKING CASE ON THE ENFORCEABILITY OF NON-COMPETE AGREEMENTS

by Sam D. Starritt

On May 31, 2011, the Colorado Supreme Court issued a long-awaited opinion in the *Lucht's Concrete Pumping, Inc. v. Horner* case, which gutted an earlier Court of Appeals decision of the same name regarding the enforceability of non-competition agreements presented to at-will (either party may terminate the relationship at either time) employees during the course of employment.

For a promise to become an enforceable contract, the person making the promise generally must receive something of value in exchange for his or her promise. This value received is called consideration. Like any other contract, some consideration must be received by an employee in exchange for the employee's covenant not to compete with the employer, if the covenant is otherwise enforceable under Colorado law.

The issue in *Lucht's Concrete* was whether an at-will employee was bound to a non-compete agreement with the employer when that non-compete agreement was agreed to after the employee had started working for the employer. The employer argued that since the employee did not have an employment contract guaranteeing the employee a job for some specific term, the consideration offered to the employee in exchange for the covenant not to compete was that the employee could keep his job.

During the time the *Lucht's Concrete* was pending at the Supreme Court, non-competition agreements and non-solicitation agreements presented during at-will employment were not enforceable without additional consideration, because the Court of Appeals had held that continued at will employment was "illusory" and no consideration at all. The rationale had been that since the employee was offered at will employment to begin with, nothing new was given upon the demand that a non-compete be signed. Under that ruling, employers were required to give pay raises, promotions, additional benefits or anything else in order to support the non-compete with consideration other than continued employment.

The Colorado Supreme Court's reversal concludes that an employee's continuation of at-will employment

does constitute sufficient consideration to support a non competition agreement, which is presented to the employee after hire. The decision was based on the Court's rationale that an employer has the right to terminate an employee at any time for any reason. The employer's promise to forbear or refrain from doing something that it is legally entitled to do, namely, terminate employment constitutes enough consideration to support a contract.

This decision could have much broader application than just non-compete agreements. Even though these agreements are against public policy, and the Court of Appeals was therefore looking for a way that it could be held unenforceable, the real issue in the case was the nature of at-will employment. *Lucht's Concrete* emphasizes that with each new day comes a new right for an employer to terminate an employee. Therefore, for as long as the employer delays the exercise of that right, the employee is given a new lease on employment, and all kinds of mid-stream agreements may be enforceable as being supported by consideration, if they are not unenforceable for some other reason. Nevertheless, employers must be mindful that non competition agreements must be reasonable to be enforceable, which means they must be not overly burdensome as far as geographic scope and duration. How the geographic scope limitation will play out in the age of global internet sales and marketing (is it reasonable to preclude someone from competing throughout the world when that is your market?) remains to be decided in Colorado, but that case is sure to come.

DUFFORD WALDECK PARTNER RICH KROHN ATTENDS COUNTY TREASURERS/PUBLIC TRUSTEES CONFERENCES

Rich Krohn attended and participated in the semi-annual conferences of the Colorado County Treasurers Association and Public Trustees Association of Colorado, in Black Hawk, Colorado on June 23-24, 2011.

Rich currently represents both the Colorado County Treasurers Association and the Public Trustees Association of Colorado.

At the conference, Rich advised members on current legislation affecting the Associations and also provided advice on legal questions currently facing each group in the form of question and answer sessions.

DWMK PARTNER SAM STARRITT APPOINTED CHAIR OF THE COLORADO-DENVER BAR ASSOCIATION JOINT MANAGEMENT COMMITTEE

The president of the Colorado Bar Association has appointed Dufford Waldeck partner Sam D. Starritt as the Chairman of the Joint Management Committee of the Colorado State Bar. The purpose of the Joint Management Committee is to make studies and recommendations on all problems involving the joint operation of the offices of the Colorado Bar Association and the Denver Bar Association, including staff salaries and fringe benefits, division of costs, office policies and procedures, and related matters, as well as any special problems referred to it by the President, governing board, or executive council or executive committee of either association.

Sam will serve a one-year appointment on the Joint Management Committee.

DUFFORD WALDECK PARTNER RICH KROHN SPEAKS AT REAL ESTATE SYMPOSIUM

Dufford Waldeck partner Richard H. Krohn was one of the presenters at the 29th Annual Real Estate Symposium sponsored by the Real Estate Section of the Colorado Bar Association held July 14-16, 2011 in Vail, Colorado. The Symposium has become the annual gathering place for the Colorado real estate community. He has been a presenter at the Symposium more than a dozen times.

Rich spoke on 2011 Colorado legislation impacting public trustee foreclosures; current Public Trustee foreclosure issues under consideration or recently addressed by individual public trustees or by the Public Trustees Association of Colorado; and HOA junior lien redemptions in public trustee foreclosures.

Rich represents all of the Colorado public trustees through the Public Trustees Association of Colorado, as well as representing many of the individual public trustees offices. In conjunction with his work for the public trustees, Rich has been one of the principal drafters of the new foreclosure statutes that govern conduct of public trustee foreclosures in Colorado.