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# Report From Counsel

**Insights and Developments in the Law** **Spring 2014**

## Why Trademarks?

*By Scott I. Wolf, Esq.*

Most of you reading these words have businesses. The business generates income that feeds you, your family, and provides a livelihood for your employees. Your business has a name, of course, and you sell products or provide services every day. You have worked hard to build an identity in the marketplace for whatever you sell. You can protect that identity through trademarks.

A trademark (or service mark), is a word, slogan, design or phrase that identifies the source of a product. Even color can be a trademark—think pink for insulation (Owens Corning), or robin's egg blue for jewelry (Tiffany & Co.). For words and designs, think "Have a Coke and a Smile" or the Starbucks logo. However, a business cannot trademark a phrase that is generic (tissue paper, moving services), or completely descriptive (Braintree Real Estate Attorney for legal services), though marks that seem descriptive can, over time, develop secondary meaning in the marketplace and be eligible for trademark protection.

Trademarks prevent confusion in the marketplace of similar goods/services. A trademark immediately informs the public that the goods or services are not only produced by the a unique company, but also that they adhere to the standards of the company producing them. This is called "goodwill" and gives a business an edge over competitors without effective branding. To use Coke as an example, a consumer facing a choice between Coke and store brand cola often chooses Coke because he knows that the quality of the product is consistent, whether it be for safety or taste, and also that it represents a certain lifestyle choice. While none of you are as large as Coke, you all have brand identities worth protecting. Think about the following as you decide whether your brand is worth protection: 1. Trademarks make it easy for consumers to find you since your mark is always presented the same to the public; 2. Customers will identify your mark with the quality of the goods and services you provide Trademarks help prevent marketplace confusion; 3. Trade-

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## A Victory for Massachusetts Landlords

*By Scott I. Wolf, Esq.*

A recent Supreme Judicial Court case has given a lifeline to many landlords who face lawsuits for personal injuries arising out of building code violations. Mass General Laws C. 143 § 51 provides that " . . . the party in control, of a place of assembly, theatre, special hall, public hall, factory, workshop, manufacturing establishment or building shall comply with the provisions of this chapter and the state building code relative thereto, and such person shall be liable to any person injured for all damages caused by a violation of any of said provisions." This is a strict liability statute, which means that it doesn't matter whether the injured party wholly or partially caused the injury, the landlord, tenant, or party in control is 100% liable for the injury.

In the matter of *Sheehan v. Weaver*, Weaver owned a residential building with 1st floor commercial use. A resident of the building got drunk and injured himself after falling off a staircase that was also in violation of the state building code. The SJC made two important rulings. First, the court ruled that § 51 applies to all violations of the State building code. The second ruling, and the one that applies to most landlords, is that the word "building" as used in the statute is a narrowly defined term that does not encompass within its ambit of strict liability, a small-scale residential structure like that occupied by [the landlord] or commercial uses not "designed and maintained for continuing public assembly".

The takeaway here is that the owner of a mixed use building, or the owner of small scale commercial properties that

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**Schlossberg | LLC**
**35 Braintree Hill Office Park, Suite 204 • Braintree, MA 02184 • (781) 848-5028**
**Fax: (781) 848-5096 • Website: www.sabusinesslaw.com • E-Mail: e-mail@sabusinesslaw.com**

# Public Use Required for Eminent Domain

"Eminent domain" is the power of the federal, state, or local governments (and, in some limited circumstances, private parties, such as utilities and railroads) to take, or to authorize the taking of, private property for a public use without the owner's consent and upon payment of just compensation. That right to compensation is rooted in the federal and state Constitutions. While the delegation of the power of eminent domain is for legislatures, the determination of whether the condemnor's intended use of the land is for "the public use or benefit" is a question of law for the courts.

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The public use or public benefit issue has spawned countless legislative and judicial reactions, especially since a controversial U.S. Supreme Court decision on the topic in 2005. In that case, owners of condemned property challenged a city's exercise of eminent domain power on the ground that the takings were not for a public use but, rather, for the benefit of private developers.

The Court held that the city's exercise of eminent domain power in furtherance of an economic development plan satisfied the constitutional "public use" requirement even though the city was planning to lease the condemned land to private developers for execution of the city's plan. The plan nonetheless served a public purpose, in the form of enhanced economic development, including such beneficial effects as the increased tax revenues and new jobs expected to come with such redevelopment.

Recently a city withstood a similar challenge to its use of eminent domain to acquire an easement on a private landowner's property in order to expand a sewer system by connecting city-owned property to a sewer pump station underneath the landowner's property. The taking was for a public use even though the city ultimately planned to sell its property to a private affordable housing developer, because the sewer easement area would be available to the public at large in accordance with the appropriate rules, regulations, and standards of a metropolitan sewer district.

Apart from the constitutional requirements, the taking of the easement satisfied a state statutory mandate that a taking by a governmental entity must be for a "public use or benefit." Under the public benefit test for eminent domain, the city's desired use of the condemned property was for "the public use or benefit" because that use would contribute to the general welfare and prosperity of the public at large, not just particular individuals or estates.

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## Tax-Free Gains from Home Sales

One of the most significant tax advantages to owning a home comes at the back end of ownership, when you decide to sell it for a profit. A homeowner can exclude up to $250,000 of such profit from the federal capital gains tax. For married couples filing a joint tax return, the exclusion jumps to $500,000.

This big tax break does come with some basic requirements. It applies to the sale only of a principal residence, not of a vacation home or investment property. With some limited exceptions for poor health, job changes, and unforeseen circumstances, the taxpayer must have owned and used the home as a primary residence for at least two of the five years preceding the sale of the home. (But the two years need not be an uninterrupted time span.)

If the history of the home includes some business use, the owner cannot exclude that part of the gain that is equal to the depreciation claimed while the house was used as rental property. This scenario could arise when the owner rents out the house for a period of time but then moves back in, sells it, and otherwise qualifies for the exclusion related to that sale.

There is another two-year rule that comes into play after a taxpayer claims the home-sale exclusion. There is no limit to the number of times that the exclusion can be claimed for multiple sales, but, as a rule, once the exclusion is claimed, the taxpayer must wait two years before claiming another such exclusion.

For a married couple to qualify for the exclusion, it is sufficient if either spouse meets the ownership requirement. However, both spouses must meet the use requirement. Neither spouse is rendered ineligible for the exclusion because he or she had already excluded the gain on a different primary residence during the two years preceding the date of the current sale.

# Recreational-Use Immunity for Golf Injury

The purpose of recreational-use tort immunity statutes, which are common across the country, is to encourage private and public landowners to make their property available for public recreational use. To advance this public interest, these laws usually immunize the owners or occupants of real property from negligence liability toward people entering the land for recreation, often on the condition that the property is made available for use free of charge.

Typically the statutory immunity stops short of protecting defendants from liability for greater degrees of wrongdoing, such as acts or omissions that can be characterized as willful, malicious, or grossly negligent. Originally the perceived need for immunity arose because of the impracticability of keeping large tracts of mostly undeveloped land safe for public use, but the concept has evolved so that it need not necessarily involve vast expanses of wilderness.

The conditions for recreational-use immunity can vary somewhat with the wording of the states' statutes, requiring case-by-case rulings depending on the facts before a court and the wording of each state's law. In keeping with a commonly recognized rule of statutory construction, because recreational-use immunity statutes limit common-law liability that predates such laws, a court must strictly construe language in the statutes in order to avoid any overbroad statutory interpretation that would give unintended immunity and take away a right of action for injured persons.

When a golfer at a city-owned golf course slipped and fell on a walkway leading to a tee box, he claimed that the walkway was dangerously steep and narrow, causing his injuries. The city defended on the basis of a state recreational-use immunity law. Before an intermediate appellate court, the city prevailed on one issue, about the golf course's coming within the statute, but the case was sent back to the trial court for resolution of a second issue, concerning the legal status of the injured golfer.

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The golf course was sufficiently similar to "park" lands to be included in the definition of "premises" under the recreational-use immunity statute even though there is no express mention of golf courses by the legislature. The golf course fit within the common definition of a "park," as it was a parcel of property kept for recreational use that was designed and maintained for the primary purpose of allowing users to engage in a recreational activity. Not only that, but the statute's list of types of land uses constituting covered "premises" includes a catch-all reference to "any other similar lands."

However, for the immunity to apply to the city, it was also necessary for the golfer to have been a "recreational user" under the law. This, in turn, meant that the golfer must have paid either no admission fee or no more than a "nominal fee," to use the term from the statute. In this case, there was no question that a fee was paid to play golf, but since the lower court had not reached the question of whether that fee was "nominal," it would have to decide that issue.

Generally a nominal fee is one charged only to offset the cost of providing the educational or recreational premises covered by the immunity statute. Some of the factors affecting this issue might include, for example, the amount of the fee, the extent to which it approximates the value of the service received in exchange for it, and the fees charged for similar recreational uses in the community.

In something of an ironic twist, if it were to be found that the golfer had paid no more than a "nominal fee," then in exchange for that inexpensive round of golf, the golfer will have ultimately paid a higher "price" in the form of being precluded from recovering damages from the golf course owner for negligence.

## Eminent Domain

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In the case before the court, extending the sewer lines would allow development of the city's neighboring property, which the city sought to sell to the private developer to construct affordable housing. The existing pump station had sufficient capacity to service the city's land, and requiring the city instead to construct a sewer pump station on its land would have resulted in wasteful and unnecessary duplication of the city's resources. These facts added up to a public use or benefit justifying the taking, notwithstanding some benefits undeniably accruing to private parties as well.

# Estate Planning—Powers of Appointment

A power of appointment is the power given to someone to allow that person to designate who will receive property or an interest in property. The creator of the power is called the donor, the individual having the power is the powerholder, and the possible recipients of the property are permissible appointees.

Powers of appointment used for estate planning have many variable forms. The powerholder may hold the power in a fiduciary capacity (such as the trustee for a trust) or nonfiduciary capacity. The power may be presently exercisable by the powerholder or may be exercisable only in the future, such as by the powerholder's will. The powerholder may or may not be the creator of the power. There may be multiple powerholders who must act jointly or a single powerholder. The persons in whose favor the power may be exercised may be unlimited, including the powerholder (sometimes called a general power of appointment), or may be limited. The beneficial interests that may be created in the appointees in whose favor the power may be exercised may be unlimited or limited. Various legal consequences in regard to powers of appointment will be affected by the restrictions imposed on the powerholder.

The trustee of a trust, a common type of powerholder, may be given discretion by the donor to invade principal for a life income beneficiary or for some other person, or discretion to pay income or principal to a named beneficiary, or discretion to allocate income or principal among a defined group of beneficiaries.

In short, the discretion given to the trustee gives the trustee the power to designate beneficial interests in the trust property as future developments indicate. This discretion in the powerholder underscores the primary advantage of using powers of appointment—they provide flexibility to adjust an estate plan to deal with circumstances that may arise years, or even decades, after the estate plan is created. The flip side to this flexibility is the power of appointment's main disadvantage for some—it means that the donor must give up some control over the ultimate disposition of assets in the estate.

There are other potential ramifications for powers of appointment that should be taken into account. For example, assets subject to a general power of appointment will be included in the estate of the powerholder, which could create unfavorable tax consequences. In addition, an improperly exercised limited power of appointment may become a general power of appointment under the law. All in all, whether to use a power of appointment and, if so, with what characteristics, are questions best answered with the advice of a lawyer well versed in estate planning.

## Why Trademarks?

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marks are a very economically efficient communication tool—the mark alone can convey ideas that cannot be reduced to writing, like your business reputation and product/service quality; and 4. Trademarks are assets with value when you sell your business.

We strongly urge you to consider filing for trademarks. The likelihood of others trying to infringe on your mark is low, but we can assure you that it happens. In just the past few years, we have pursued claims against a home health care company, a fitness business, and an industrial products supplier to force them to stop using marks that our clients owned. While we always have the common law remedies to use, in the cases where we had registered marks in our arsenal of claims, the outcomes were on the whole better.

Building your trademark portfolio does not have to break the bank either. Federal filing fees start at $325 for each mark you want to protect; State fees start at $50. We do recommend that we search the market for marks that might interfere with your use of the mark. These searches, done by a local vendor, cost approximately $650. A $2,000 investment for your brand lets the world know your business *means* business. Call today to discuss how we can help.

## Victory for Landlords

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are not designed to accommodate large groups of people, may not be subject to strict liability for violations of the state building code. Rather, the usual rules of comparative negligence may apply. Thus, the ruling does not relieve the commercial landlord or tenants in control of premises from liability, so make sure your liability insurance is current and you are vigilant in repairing and maintaining your properties.