

The Real Estate Litigation trial team of **TAMARA O'NEILL MORELAND** and **MIKE MERGENS** successfully represented our client, a Fixed-Based Operation at the Anoka County/Blaine Airport, in an action against the Metropolitan Airports Commission. After a two-week trial, the jury found in our client's favor, enforcing a redevelopment agreement and awarding monetary damages.

CHRISTOPHER DIETZEN, a former Real Estate Litigation Department practice group chair and shareholder at Larkin Hoffman was sworn in as the 88th Associate Justice of the Minnesota Supreme Court on February 20, 2008. Prior to his appointment to the supreme court, Justice Dietzen served as a judge on the Minnesota Court of Appeals.

GARY VAN CLEVE and **JESSICA SMALL**, supported by Larkin Hoffman Land Use attorney, **LINDA FISHER**, brought a lawsuit on behalf of a land developer client challenging the city's denial of requests for rezoning, preliminary plat and preliminary Planned Unit Development (PUD) approvals. The Larkin Hoffman team was successful in securing a settlement resulting in our client receiving all of the development approvals it had sought from the city.

MIKE MERGENS was a guest lecturer at the University of Minnesota Humphrey Institute of Public Affairs where he discussed the interplay between land use planning and case law.

JESSICA SMALL was selected to participate in the Leaders Impacting the Nonprofit Community (LINC) program by the Hennepin County Bar Association, which is a program designed to provide participants with the knowledge base and skills necessary to participate in leadership roles in community, business, government and nonprofit organizations.

Larkin Hoffman is pleased to be the title sponsor of the **2008 LARKIN HOFFMAN MS150** Bike Tour to benefit the Minnesota Chapter of the National Multiple Sclerosis Society. Please consider joining Team Larkin Hoffman on this weekend adventure June 6 to 8. The National MS Society supports you

every mile of the way, while you experience the beauty of the Willard Munger, Sunrise Prairie and Gateway trails. The ride starts in Proctor, near Duluth, with a festive overnight at Grand Casino in Hinckley and finishes at the National Sports Center in Blaine. To join Team Larkin Hoffman please visit our firm web page www.larkinhoffman.com (click on "Events") or contact team captain **GARY VAN CLEVE** for more information.

JOHN STEFFENHAGEN recently spoke regarding municipal incorporation issues at a seminar sponsored by the Minnesota Association of Townships.

Real Estate Litigation team members **SCOTT JOHNSON**, **LISA DAHLQUIST** and **MIKE MERGENS** recently joined Larkin Hoffman Real Estate Transactions attorneys **RYAN BOE**, **FRANCIS GREEN** and **BRAD HINTZE** in presenting a seminar for Lorman Education in St. Cloud. In the seminar, they spoke on all aspects of the law of easements.

Larkin Hoffman Real Estate litigator **ROB STEFONOWICZ** teamed with **ADAM HUHTA**, a shareholder and litigator in Larkin Hoffman's Business Litigation Department, to defeat, on behalf of our client, a mortgage foreclosure priority dispute initiated by three large commercial lenders. The court granted summary judgment in favor of the client thereby dismissing the commercial lenders' claims and confirming our client's priority over the lenders

JOHN STEFFENHAGEN was elected to the Board of Directors of the St. Louis Park Emergency Program (STEP), a charitable organization devoted to helping St. Louis Park residents meet basic needs during difficult times.

This year Larkin Hoffman celebrates 50 years of building community as a Twin Cities law firm. The firm was founded by **JIM LARKIN**, **BOB HOFFMAN**, **JACK DALY** and **KEN LINDGREN** in 1958. Today, Larkin Hoffman is a top law firm in Minnesota and is widely known for its extensive real estate and land use practice. ●

Re:Litigation is a publication of Larkin Hoffman. It is not intended, nor should it be used as a substitute for specific legal advice or opinion, since legal counsel may only be given in response to inquiries regarding particular factual situations. If you would like further information on any of the subjects discussed in this publication, please feel free to contact us.

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RE: LITIGATION

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Letter From The Department Head

By Gary Van Cleve



Gary Van Cleve has

broad experience in all real estate-related litigation areas in state and federal courts at both the trial and appellate levels. He serves as chair of the Real Estate Litigation practice group and on the firm's Board of Directors.

Real estate litigation is only a part of what we offer in the full-service Larkin Hoffman Real Estate Practice Group. We have 23 legal professionals who are dedicated to serving our clients in all aspects of real estate and every phase of real estate development and acquisition.

In addition to litigation, we serve our clients' needs in acquisition, approvals, assembly, construction, financing, leasing and disposition of real estate. Our broad experience and skills allow us to adopt a team approach to real estate challenges and problems, which can benefit you, the client.

Recently, I, as litigator, teamed with one of my longtime partners in land use, Linda Fisher, who was asked by a client to assist in rezoning and land use

approval applications that were encountering strong neighborhood opposition in a metro-area city. Linda advised the client in presenting the applications to the city in the strongest possible light, while I provided advice on positioning the application for possible litigation should the city deny the applications, which it did. Linda's detailed knowledge of the facts, as a result of working with the client on the development applications, proved invaluable in assisting me in the framing of the issues when it came time to draft a detailed complaint for the district court challenging the permit denials. After we served the complaint against the city, and filed it in court, the city immediately came to the table. We successfully negotiated a settlement that allowed our client to move forward with its development project. While not all litigation sagas end this quickly and successfully, I'd like to think that Larkin Hoffman's team approach played an important role in achieving this happy ending for our client. I invite you to check out our website

(www.larkinhoffman.com) to learn how Larkin Hoffman's approach has helped other clients with their real estate challenges.

In this issue of *Re:Litigation*, Tamara O'Neill Moreland writes about the controversy surrounding whether a county has any time deadline for acting on a plat application. In a case now pending before the Minnesota Supreme Court, the trial court said counties have no deadline for acting on plat applications, while the Minnesota Court of Appeals said that there is such a deadline under the state 60-Day Rule. Also, Jessica Small tells us about a recent Minnesota Supreme Court decision that spelled good news for a contractor seeking to enforce a mechanic's lien against property where the contractor had done work, but bad news for a bank with a late-filed mortgage against the property. ●

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PROPERTY TAX APPEAL DEADLINE IS APRIL 30, 2008.

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Rough Waters Ahead For The 60-Day Rule And County Plat Applications

By Tamara O'Neill Moreland

The 60-Day Rule (Minn. Stat. § 15.99) was enacted to limit the ability of government agencies to deny zoning requests by

simply failing to act. Under the rule, government agencies must approve or deny zoning requests within 60 days of application or the request is deemed approved. Although the 60-Day Rule is clearly applicable to county zoning decisions, as the statute defines "agency" to specifically include counties – there is an ongoing debate about whether the rule applies to county plat applications.

This issue arises due to one of the three exclusions provided in the statute:

- Minn. Stat. § 462.358, subd. 3b which requires municipalities to approve or deny plat applications within 120 days. Since a timeline under which a city must act is provided, the 60-Day Rule is not applicable.
- Minn. Stat. § 473.175 which provides a 120-day deadline for the Metropolitan Council to review comprehensive plans. Again, the 60-Day Rule is not applicable due to the timeline provided.
- Chapter 505, is a statutory chapter that provides rules for the preparation and recording of plats. It states that county boards have the power to control and regulate platting in areas outside the boundaries of municipalities, but does not contain any timeline in which a county must approve or deny a plat application.

clarified any uncertainty in its 2002 decision *Kramer v. Otter Tail Bd. of Comm'rs*. In *Kramer*, the Court of Appeals held that the 60-Day Rule was not extended by the 30-day appeal period for a county's decision on the necessity of an environmental impact statement. Since the county failed to act on Kramer's request for a conditional use permit and plat application within 60 days of the application, the Court of Appeals determined that Kramer's request was deemed approved.

Despite the statutory language and the *Kramer* decision, some district courts have refused to apply the 60-Day Rule to county plat applications. These decisions generally rely heavily on legislative history instead of the plain language of the statutes. These decisions also tend to disregard the decision in *Kramer*, finding that the Court of Appeals did not specifically decide the issue of whether the 60-Day Rule applied to county plat applications.

In October 2007, the Minnesota Court of Appeals revisited the issue in *Calm Waters v. Kanabec County*, in which it specifically determined that the 60-Day Rule applies to county plat applications. In that case, the county argued that the 60-Day Rule did not apply because plat applications arise under Chapter 505. The Court of Appeals disagreed, determining that the county had a duty to approve a plat application unless it adopted written findings as to why it was denied under Minn. Stat. § 394.25, subd. 7(b). The Court of Appeals further specifically held that the 60-Day Rule applied to this duty. The Court of Appeals relied on its decision in *Kramer* and specifically held that since the plain language of the 60-Day Rule is unambiguous, it was unnecessary to review legislative history.

The Minnesota Supreme Court has now accepted review of *Calm Waters v. Kanabec County* and will be the ultimate arbitrator of the debate. The Supreme Court has only issued three previous 60-Day Rule decisions,

each of which provided some limitation to the rule.

- In *American Tower v. Grant* (December 2001), the Supreme Court denied the ability of a governmental agency to automatically extend the 60-day deadline by putting notice of the extension in the application form. The Court determined, however, that when properly extended, the legitimacy of the stated reason for the extension will not be examined.
- In *Breza v. Minnetrista* (December 2006), the Supreme Court refused to apply the 60-Day Rule to a request that violated other substantive law.
- In *Hans Hagen Homes v. Minnetrista* (March 2007), the Supreme Court held an applicant's failure to receive notice of a denial made within 60 days does not invoke the 60-Day Rule.

If the Supreme Court overrules *Calm Waters*, the decision would place a far greater limitation on the 60-Day Rule than ever imposed by the Court. In fact, such a decision would result in no time limitation for county plat applications. This raises the precise issue that served as the impetus for the 60-Day Rule itself – the abuse of denial through attrition. ●



Tamara O'Neill Moreland is a shareholder in the Real Estate Litigation practice group who focuses on litigation involving both commercial and residential construction matters as well as fraudulent real estate transactions. She has experience with environmental and mold issues and extensive experience in telecommunications law.

Security For The Gap: New Mechanic's Lien Law

By Jessica Small

As anyone in the real estate field knows, there are often gaps in discovering recorded interests against property. These

gaps pose a challenge to a mechanic's lienholder who initiates a foreclosure action and has to include all parties in the action who have an interest in the property. Ensuring that all proper parties are joined in the action becomes especially difficult when parties have executed a mortgage or mechanic's lien, but have not yet recorded it by the time the mechanic's lienholder initiates the action. This very problem was addressed recently by the Minnesota Supreme Court, who issued a decision that dramatically impacts Minnesota mechanic's lien law.

In *Mavco, Inc. v. Eggink*, the Egginks retained Mavco Construction to provide labor and material to improve their real property. Mavco filed a mechanic's lien on the Egginks property after the Egginks failed to pay Mavco for part of the work they performed. It was undisputed in this case that Mavco properly filed, served, and recorded its mechanic's lien statement in November of 2003. In May of 2004, Mavco commenced a mechanic's lien foreclosure action naming the Egginks and four other entities whose interests in the property were then of record. Unbeknownst to Mavco, three days before Mavco commenced its foreclosure action, the Egginks refinanced the debt on their property and granted a mortgage to Wells Fargo Bank. Wells Fargo, however, did not immediately record its mortgage. Accordingly, Wells Fargo was not among the parties named in Mavco's foreclosure action.

The Egginks were the only party who answered Mavco's complaint, and in their answer the Egginks alleged that Wells Fargo had a mortgage on the property. Mavco did not join Wells Fargo before the one-year anniversary of Mavco's last day of work on the Egginks' property. In January 2005, the Egginks and Mavco entered into a settlement that required the Egginks to pay Mavco's lien by March 2005. After the Egginks failed to make the agreed upon payments, Mavco asked the district court for an order allowing Mavco to file a supplemental complaint joining Wells Fargo as a party. Mavco also asked that it be granted priority over all other liens on the property, including Wells Fargo's mortgage interest.

The district court ruled that Wells Fargo's mortgage interest – which was recorded after Mavco's lien – took priority over Mavco's mechanic's lien because Mavco failed to join Wells Fargo as a party to the action within one year after the lienholder's last day of work. For its ruling, the district court relied

upon mechanic's lien statute, Minn. Stat. § 51.12, Subd. 3, which provides:

ONE-YEAR LIMITATION

No lien shall be enforced in any case unless the holder thereof shall assert the same, either by filing a complaint within one year after the date of the last item of the claim as set forth in the recorded lien statement; and, no person shall be bound by any judgment in such action unless made a party there to with in the year;

The Minnesota Supreme Court ruled that with respect to joining necessary parties to a mechanic's lien foreclosure, the one-year time limit applies only to other mechanic's lienholders.

Mavco appealed to the Minnesota Court of Appeals who affirmed the district court's rulings on lien priority. The Minnesota Supreme Court granted Mavco's petition for further review and addressed whether Minn. Stat. § 514.12, subd. 3 operates to subordinate Mavco's lien to Wells Fargo's mortgage. Specifically, the court analyzed whether Mavco was required to name mortgagees with an interest in the property as defendants within the one-year time period under Minn. Stat. § 514.12, subd. 3.

The Minnesota Supreme Court ruled that with respect to joining necessary parties to a mechanic's lien foreclosure, the one-year time limit applies only to other mechanic's

lienholders. When viewing the statute as a whole, the court held that the underlying purpose of the statute was to ensure that all mechanic's lien claims arising from an improvement to real property are joined in one action within the last day of work. Thus, Mavco's failure to name Wells Fargo as a defendant did not operate to give Wells Fargo a superior interest to Mavco's previously recorded mechanic's lien. The Minnesota Supreme Court recognized that its ruling was a departure and contrary to prior opinions and expressly overruled those prior opinions.

Mavco is a positive change in the law for mechanic's lienholders. Minnesota mechanic's lien law is extremely technical. It is always best to consult a lawyer to ensure that the mechanic's lien statement is properly filed, served and recorded so that one's lien rights are properly preserved. Once that it is accomplished, and a lienholder moves to foreclose its lien, it is essential to continue to obtain updated title work so that all proper parties are joined. If, however, there is a gap in title work or an unrecorded interest on the property, *Mavco* has provided security for the gap by holding that Minn. Stat. § 514.12, subd. 3 will no longer serve as a barrier from allowing a mechanic's lienholder to enforce its lien against a mortgagee who is not named as a party within the one-year time period. ●



Jessica Small is an associate with the Real Estate Litigation practice group. Her practice is concentrated in real estate, construction and land use litigation as well as appellate advocacy.