



## New IRS Regulations Under Circular 230 Will Affect Tax Advice

by Mark Munro | Business & Tax Planning Groups

**O**n June 21, 2005 new Treasury Regulations ("Circular 230") became effective that have far-reaching consequences for tax-related communications. Circular 230 was originally intended by the IRS and the Treasury Department to serve as a weapon to combat abusive tax shelters. However, the new rules under Circular 230 affect tax advice given to clients in connection with many different types of matters, including apparently routine tax and estate planning advice.

Under Circular 230, written communications (including e-mails) that lawyers and other tax professionals provide to clients may be in violation of Treasury Department standards if such communications contain federal tax advice without providing a full discussion of all relevant facts, and an evaluation of each significant federal tax issue raised by a plan, entity or arrangement (regardless of whether a client has requested such advice and even if a client has specifically requested that such advice not be rendered).

In many cases, however, a written communication will be exempt from the requirements of Circular 230 if 1) it expressly provides that it is not intended or written to be used, and that it cannot be used, for the purpose of

avoiding penalties under the Internal Revenue Code; and 2) it is not used in promoting, marketing or recommending to another party any transaction or matter addressed in the communication. Tax practitioners will often need to include this language in written advice in order to avoid Circular 230 sanctions (which include censure, suspension and disbarment from practice before the IRS), whether or not the technique discussed in the written advice could give rise to IRS penalties.

Accordingly, written communications (including e-mails) from Foster Pepper that may potentially contain federal tax advice will generally include disclosure language similar to that described in the previous paragraph. In order to ensure that the required language is not inadvertently omitted from communications where it should appear, certain attorneys that regularly provide federal tax advice have elected to automatically include this language on all e-mails. As a result, you may see the disclosure language in e-mails from us that do not discuss tax issues.

In those cases where a client does not want written advice to state that it cannot be used for the purpose of avoiding

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# Landlord and Tenant: Apportionment of Condemnation Proceeds

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by Roger D. Mellem and Sharon E. Cates

Litigation and Alternative Dispute Resolution Group

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**T**his article addresses an issue of particular importance to parties to a commercial lease as well as to the governmental entities that condemn leased premises. The question is: How is the payment made by the government for the taking of private property to be apportioned between the landlord and the tenant?

The United States Supreme Court's recent decision in *Kelo v. City of New London*<sup>1</sup> has forced the issue of governmental property takings into the public consciousness. In that decision, the Supreme Court upheld the taking of private land for economic redevelopment, which in some instances involved transferring title from one private party to another. The Washington State Constitution and state eminent domain law, however, provide more protection to businesses and individuals here than that provided by the U.S. Constitution. In this state, condemnation for economic redevelopment is prohibited, except for blighted areas, and private property cannot be taken for private use, unless that use is merely incidental to a public use. However, Washington governmental entities, businesses and individuals frequently must deal with issues of governmental takings for public use. We begin by discussing briefly the legal context in which the question of allocation of a condemnation award arises.

## Government's Powers of Eminent Domain

Government possesses, as an element of its sovereign powers, the right to take private property for public use without the owner's consent. This power, known as eminent domain, is derived from the common law of necessity. Because certain services are required for the public good - schools, parks, sewers, roads and mass transit systems, for example - the government is allowed to condemn private property or interests therein, when necessary, to provide for these public services. The State of Washington and its subdivisions exercise the power of eminent domain as an inherent attribute of government, but under substantive and procedural restrictions placed on them by the Washington State Constitution and state eminent domain statutes.

The most important limitation on the government's power of eminent domain is the requirement that government pay "just compensation" to the owner

(condemnee) for the condemned property, i.e., to reimburse the condemnee for the property interests taken.

## Eminent Domain Procedures in Washington

Washington's condemnation actions take place in three parts. The trial court must enter 1) a judicial decree of public use and necessity; 2) a judgment fixing the amount of the award of just compensation; and 3) the final decree of appropriation that transfers title to the condemning authority.<sup>2</sup> In the second step of this process, the court reaches a decision on the just compensation award by determining the undivided fair market value for all interests in the property as a whole.<sup>3</sup>

Put more simply, the condemnation proceeding is conducted at its beginning as though there were only one party having ownership and possession of all of the interests being taken. Washington condemnation law does not require a condemning authority to separately compensate different parties for their respective interests in the property being taken. Accordingly, after the award of just compensation has been deposited in the court's registry, the governmental entity (condemnor) is released from the action.<sup>4</sup>

## Apportionment Hearing

If more than one party asserts a claim to the just compensation award, and those claimants cannot agree among themselves as to the division of the award, then the court must conduct an "apportionment hearing" to allocate the award between the various claimants, e.g., landlord and tenant. Apportionment of the award takes place in two steps 1) the court determines a lump-sum condemnation award for the value of the premises taken and then 2) the award is distributed to the claimants according to their interests.<sup>5</sup> Both a landlord's fee interest and a tenant's leasehold interest are property interests afforded constitutional protection.

For example, it is a long-established rule that the holder of an unexpired leasehold interest in land is entitled to just compensation for the value of that interest. Therefore, in cases in which a landlord and tenant hold interest in land taken by eminent domain, the value of each interest must be determined before the just compensation award can be apportioned between them.



## Allocation of Just Compensation if the Parties Have Not Previously Agreed

If the parties have not provided for the possibility of condemnation in their lease, then the law provides the rules that apply to dividing up the award paid by the government. And, different rules apply if the leased premises are condemned in their entirety or if only a portion of the premises is condemned.

In the event that all of the leased premises are condemned, the lease will terminate and the leasehold interest will be extinguished as of the effective date of the condemnation. The leasehold estate ends because of the doctrine of merger: when both the leasehold and the landlord's reversion have been acquired by the governmental entity, the interests merge into one. Therefore, all duties under the lease end at that time, including the tenant's duty to pay rent. The condemning authority pays one award, measured by the fair market value of the fee simple; the court then apportions that award between the landlord and tenant.

If the rent the tenant would have owed for the balance of the term of the lease is equal to or more than the fair market rent for the balance of the term, then the landlord receives the entire just compensation award. But if the fair market rent is more than the rent that would have been due under the lease (i.e., to the extent that the tenant had "bonus value" in the lease), the tenant has lost something of value and is entitled to a portion of the just compensation award. In such a case, the tenant is awarded the amount that, if invested at an assumed rate of return for the balance of the term, would produce the bonus value.

When only a portion of the leased premises are condemned, the expected result (that the tenant's duty to pay rent is extinguished proportionately for that part) does not occur in Washington. Rather, the tenant's duty to pay the full contract rent continues and the tenant is awarded a share of the condemnation award.

There is no set formula under the law for the calculation of the tenant's share, but there are some generally accepted rules. The tenant generally receives that amount which, if invested at an assumed rate of return over the remaining life of the leasehold, will produce that portion of rent allocable to the part of the premises that were condemned. Additionally, in cases where the tenant has a bonus value in the lease, as defined above, they will receive a further amount. If invested at an assumed rate of return over the remaining life of the leasehold, this will produce the portion of the bonus value that is allocable to the part of the premises condemned.

Landlords and tenants need not, however, risk potentially unfavorable allocations by the courts. Instead, they can anticipate a possible condemnation and set forth their respective rights in a specific condemnation clause in their lease.

## Allocation of Just Compensation Award by Contract

When a lease contains a condemnation clause spelling out the basis for dividing a condemnation award, that clause governs. Parties are free to contract away any rights they may have under general law<sup>6</sup> - and, in commercial leases, they frequently do so.

It should be noted that apportionment of a condemnation award generally only is an issue in the world of long-term commercial leases. Tenants holding short-term leases rarely press takings claims, and when they do, such claims are generally denied. Take for example, Tenant, who leases an apartment for a term of one year at a rental rate of \$1,000 per month. Six months into the term, the state condemns her apartment building. Although Tenant holds a property right for which she is entitled to compensation, under modern landlord-tenant law, the condemnation of the entire leased premises is regarded as an event terminating the lease. In effect, the condemnation excuses Tenant from paying what would otherwise be a binding obligation to pay her Landlord \$6,000 over the next six months.

If it is assumed that the fair market value of the six months' lost possession is roughly equal to the lease rent (as it generally would be for a short-term lease), then the release of the \$6,000 debt exactly offsets the value of the lost possession. Therefore, rather than enter into a three-way transaction in which Tenant seeks \$6,000 from the state, and then turns that amount over to Landlord in satisfaction of the debt created by her lease, the law simply forgives Tenant's \$6,000 debt to Landlord.

Thus, the difficult issues surrounding the condemnation of leased property are almost exclusively experienced in relation to long-term leases. Only with long-term leases are parties likely to see a substantial divergence between market rent and lease rent, or substantial capital improvements by the tenant, or other circumstances generating out-of-pocket losses for the tenant beyond the loss experienced by the cancellation of the lease.

Typically, long-term leases are commercial leases with high economic stakes that are drafted by counsel who specialize in such matters (as a number of our Foster Pepper colleagues do). Such leases are often negotiated

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# Supreme Court Affirms Economic Redevelopment as "Public Use": *Kelo v. City of New London*

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by Sharon E. Cates

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**T**he United States Supreme Court recently handed down a landmark opinion in the arena of eminent domain law in the case of *Kelo v. City of New London*.<sup>1</sup> The question before the Court was whether the City of New London, Connecticut's proposed condemnation of an economically distressed area of the City for redevelopment, qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the United States Constitution<sup>2</sup> justifying condemnation of that area by eminent domain. The Court held that the City's proposed use does constitute a public use under the Constitution. So, what effect will the Supreme Court's opinion likely have on the residents, businesses and municipalities of Washington State? The short answer is "probably not much." For half a century, the Washington State Supreme Court has denied local governments the authority to condemn private property for purely economic development purposes. A more complete explanation of the details of the *Kelo* case is helpful in understanding the differences between the Supreme Court's opinion and Washington's views on public use.

## City of New London's Redevelopment Plan

The City of New London, Connecticut had been experiencing a decades-long economic decline by the beginning of the 2000s. The City's population and tax base had been continually decreasing and, in 1990, a state agency designated the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed more than 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State of Connecticut, and its population was at its lowest point since 1920. City leaders were looking for ways to boost the economy, and both state and local officials began to target the City, and particularly its Fort Trumbull area, for economic revitalization. The City reactivated the New London Development Corporation (NLDC), a private nonprofit entity that had been established some years earlier, to assist the City in planning economic development. In January 1998, the State authorized more than \$15 million in bond funds to assist the NLDC in planning and developing a Fort Trumbull State Park. In February 1998, the pharmaceutical company Pfizer, Inc. announced

that it would build a \$300 million research facility on the site immediately adjacent to Fort Trumbull, an event that served as a further catalyst to the revitalization of the Fort Trumbull area of the City.

After receiving the necessary City and State approvals, the NLDC finalized an integrated development plan focused on the 90 acres of the Fort Trumbull area. This area, located on a peninsula jutting into the Thames River, comprises approximately 115 privately owned properties, as well as 32 acres of land formerly occupied by the naval facility. The redevelopment plan includes a waterfront conference hotel at the center of a "small urban village" that will include restaurants and shopping; marinas for recreational and commercial use; a pedestrian "riverwalk"; 80 new residences organized into an urban neighborhood; a new U.S. Coast Guard Museum; approximately 90,000 square feet of office space; the Fort Trumbull State Park; and land for parking and other related purposes. While most of the 90 acres were earmarked for specific uses, a 2.4 acre site was set aside for support of either the adjacent state park or the nearby marina (e.g., for parking and/or retail services).

## The Case in Connecticut Courts

The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre redevelopment area, but failed in its negotiations with the owners of 15 of the privately held properties. Because the City had authorized the NLDC to acquire necessary properties by exercising eminent domain in the City's name, the NLDC filed a condemnation action to acquire these properties by condemnation. No allegation was made that any of these properties were blighted or otherwise in poor condition. They were condemned only because they are located in the redevelopment area.

The property owners, including primary plaintiff Susette Kelo, filed suit in the New London Superior Court, arguing that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. The Superior Court granted a permanent restraining order prohibiting the taking of the properties located in the 2.4 acre park- or marina-support area, and denying relief as to the properties located in the area set aside for office space. Both sides appealed these rulings to the Supreme Court of



Connecticut, which held that all of the City's proposed takings were valid. That Court reasoned in part that the State's municipal development statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest."<sup>3</sup>

### The Case in the U.S. Supreme Court

The U.S. Supreme Court granted certiorari in the *Kelo et al. v. City of New London* case to determine whether the City's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment. Kelo was the first eminent domain case to be heard in the U.S. Supreme Court since 1984. In the intervening years, states and municipalities had slowly extended the use of their eminent domain powers, often including economic development purposes. The twist in Kelo was that the NLDC is ostensibly a private entity, and the plaintiffs argued that it is unconstitutional for the government to take private property from one private party and give it to another private party, simply because the other might put the property to a use that would generate more tax revenue.

The Supreme Court considered this argument and held that, although a purely private taking could not withstand the scrutiny of the public use requirement, the taking at issue was to be executed pursuant to a "carefully considered" redevelopment plan that was not adopted "to benefit a particular class of identifiable individuals."<sup>4</sup> While noting that the City did not plan to open the entirety of the condemned land to use by the general public, the Court noted that it had "long ago rejected any literal requirement that condemned property be put into use for the general public" because such a requirement has proven impractical given the diverse and always evolving needs of society.<sup>5</sup> Therefore, when the Supreme Court began applying the Fifth Amendment to the States through the Fourteenth Amendment, it embraced a broader interpretation of "public use" as "public purpose."<sup>6</sup> The disposition of the Kelo case, therefore, turned on whether the City's redevelopment plan served a "public purpose." The Court noted that U.S. Supreme Court cases on this question have, without exception, "defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field."<sup>7</sup> The Court also noted that "promoting economic development is a traditional and long accepted function of government" and that "there is no basis for exempting economic development from our traditionally broad understanding of public purpose."<sup>8</sup> The Court also reiterated the long-accepted proposition that, "[w]hen the legislature's purpose is legitimate and its means are not

irrational, our cases make clear that empirical debates over the wisdom of takings - no less debates over the wisdom of other kinds of socioeconomic legislation - are not to be carried out in the federal courts."<sup>9</sup> The Court then affirmed the Connecticut Supreme Court's ruling, holding that the City's determination that the Fort Trumbull area is "sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference."

### Effects of Kelo in Washington State

The effect that Kelo will have on other states remains to be seen. *The Washington Times* claims that, as of July 4, 2005, the decision had spurred two new actions by officials in New Jersey and Missouri. However, as the Kelo Court pointed out, many states impose "public use" requirements that are stricter than the federal baseline. While some of these requirements are established as a matter of state constitutional law, others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. Therefore, it is generally agreed that Kelo is likely to have little effect on the eight states that specifically prohibit the use of eminent domain for economic development (except to eliminate blight), including Washington State.<sup>10</sup> For one thing, unlike Connecticut's statute, Washington's eminent domain statutes do not "express[] a legislative determination that the taking of land . . . as part of an economic development project is a 'public use'." And although Washington courts have held that the "words 'public use' are neither abstractly nor historically capable of complete definition," and that they "must be applied to the facts of each case in the light of current conditions,"<sup>11</sup> case law in Washington evidences this state's narrower definition of this term.

The Washington State Supreme Court's decision in the case of *In re City of Seattle*<sup>12</sup> helped to define "public use." In that case, the Court held that "[i]f a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked.... [W]here the purpose of a proposed acquisition is to acquire property and devote only a portion of it to truly public uses, the remainder to be rented or sold for private use, the project does not constitute public use." Washington courts have consistently defined this term narrowly. In 1959, the *Court in Hogue v. Port of Seattle*<sup>13</sup> ruled that a port district could not condemn a private farm for the purpose of converting it to a private industrial development.

Similarly, in 1981, the *In re Westlake*<sup>14</sup> case held that the City of Seattle could not condemn a hotel and office

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# Supreme Court Affirms Economic Redevelopment as "Public Use": Kelo v. City of New London

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buildings in order to hand the property over to a private retail developer.

This is not to say that Washington absolutely prohibits the condemnation of private property for other private uses. In *Miller v. City of Tacoma*<sup>15</sup>, the Washington Supreme Court upheld the condemnation of private property as part of a formal urban renewal program where the underlying purpose of the program was to eliminate blight. The Miller Court ruled that the City could condemn a private apartment building and resell the land as part of an overall program to clear an area of dilapidated housing, health and safety hazards, and crime and delinquency. And in *State ex rel. Washington State Convention and Trade Center*<sup>16</sup>, the Court held that, as

long as a property is condemned for a public use, it may also be put to a private use that is "merely incidental" to the public use. Nonetheless, with the above cases as precedent, it is unlikely that Washington, with its stricter private property protections, will embrace the much broader definition of "public use" as set forth in Kelo.

*Sharon E. Cates, Associate, is active in the firm's condemnation group and often represents Washington State municipalities in eminent domain actions.*

*For questions regarding this article, please contact Sharon at [cates@foster.com](mailto:cates@foster.com).*

#### Notes:

1. 125 S.Ct. 2655 (June 23, 2005).
2. This clause provides, in part, that "private property [shall not] be taken for public use, without just compensation." It is made applicable to the States by the Fourteenth Amendment.
3. See *Kelo et al. v. City of New London*, 268 Conn. 1, 18-28, 843 A.2d (2004) (citing Conn. Gen. Stat. §8-186 et seq. (2005)).
4. See *Kelo*, 125 S.Ct. 2655 (June 23 2005) (quoting *Kelo*, 268 Conn. at 54, and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984)).
5. *Id.* (quoting *Midkiff*, 467 U.S. at 245).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* (quoting *Midkiff*, 467 U.S. at 422).
10. The other seven states are Arkansas, Florida, Illinois, Kentucky, Maine, Montana and South Carolina.
11. *Dickgieser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005) (quoting *Miller v. City of Tacoma*, 61 Wn.2d 374, 384, 378 P.2d 464 (1963)).
12. 96 Wn.2d 616, 627-28, 638 P.2d 549 (1981).
13. 54 Wn.2d 799, 341 P.2d 171 (1959).
14. 96 Wn.2d 616, 638 P.2d 549 (1981).
15. 61 Wn.2d 374, 378 P.2d 464 (1963).
16. 136 Wn.2d 811, 823, 966 P.2d 1252 (1998).

## 24th Annual Civil Service Conference

Our 24th Annual Civil Service Conference will be held on September 22-23, 2005 at the Yakima Convention Center in Yakima. Our 2004 conference offered 9.25 CLE credits, and we expect to offer approximately the same number for this year's event.

#### Topics Include:

- ✓ Annual Legal Update
- ✓ Polygraph Testing
- ✓ Veterans' Preference
- ✓ Personnel Records and Public Disclosure
- ✓ Basic Law Enforcement Academy
- ✓ EEOC Test Guideline Update

Visit our website for registration at [www.foster.com](http://www.foster.com)  
or contact us at [events@foster.com](mailto:events@foster.com).



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## Farming for Wind: Local Wind-Surfing Mecca Leads the Way

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by Susan Elizabeth Drummond  
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Klickitat County Economic Development Director

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**A**s a national wind-surfing mecca, Klickitat County has long had a clean energy resource. Bordering the Columbia River and crisscrossed with high-voltage transmission lines, the county is prime wind-power territory. But, not many wind turbines have been built - yet.

To spark interest in its emission free energy resource, the county decided to plan for wind farm development. Starting with wind data from Northwest Sustainable Energy for Economic Development, an environmental group responsible for developing region-wide wind mapping, the county moved forward to identify ideal locations for projects and craft a comprehensive permitting strategy.

Borrowing the "planned action" idea encoded in the State Environmental Policy Act, the county drafted an environmental impact statement, assessed permitting alternatives, and elected to permit wind through an energy overlay. Once specified mitigation requirements are met, wind projects are allowed outright over about 1,000 square miles, approximately two-thirds of the county.

The county adopted the overlay this past spring. It took measures to address local concerns, such as excluding a portion of the county from the overlay zone at the request of local residents, and narrowing its scope to clean energy, but also prepared for litigation. Local groups did appeal the impact statement, but the county listened to the appellants' concerns and a settlement was reached by revising overlay mitigation requirements. Because of this cooperative approach, the appeal never went to hearing.

The county now hopes to add at least 1,000 megawatts (enough to power more than 300,000 homes) over the coming years. Benefits include an increased local tax base (for example, one small fire district will go from \$20,000 in annual revenue to \$130,000 per year) and support for farmers and ranchers. Windpower lease payments to landowners augment their more volatile farm income with annual payments ranging from about \$2,000-\$4,000 per turbine, with only a minimal amount of land taken out of production. One might not have expected a sophisticated planned action strategy for wind from a county with a population of 20,000 and a 10 percent jobless rate, but the least expected successes are sometimes the most rewarding.

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tax-related penalties, our attorneys and other practitioners will generally need to provide lengthy opinions that comply with the standards described above. Additionally, with respect to certain types of transactions, the disclosures described in the previous paragraph will not exempt written tax advice from the Circular 230 requirements. Unfortunately, we and other tax practitioners anticipate that providing such tax advice may increase costs to clients.

Over the past few months, bar associations and tax practitioners around the country have sent comment letters to the IRS and the Treasury Department, requesting that the rules be amended. However, at the moment, Circular 230 is effective in its current form. Accordingly, we, like other responsible tax advisors, intend to follow the current requirements of Circular 230.

*For questions regarding this article, please contact Mark Munro at [munrm@foster.com](mailto:munrm@foster.com).*



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# Waste Reduction Can Benefit Both the Environment and Your Business

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by J. Tayloe Washburn

Chair of the Executive Committee  
As published in the Daily Journal of Commerce

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**W**hile waste reduction practices have become commonplace in most industries, a small group of Puget Sound-area organizations have been working for more than a decade to raise the bar - and proving beyond a doubt that attention to environmental challenges is not only responsible, but can result in cost savings.

One of the largest consumers of paper is the legal industry. In 1994, a group representing many of Seattle's largest law firms, representatives of what was then known as the BIRV (Business and Industry Recycling Venture) and Washington Citizens for Recycling, met to discuss how to implement waste reduction strategies within the legal industry. Renaming themselves the Law Firm Waste Reduction Roundtable, they started looking at waste not only in law firms, but also in the courts. The group tackled topics including developing model materials to help firms audit their waste stream, adopting waste reduction programs, buying materials with recycled content, developing outreach programs (creating "Green Teams"), moving to electronic court filings and converting documents to digital format, and cost savings associated with waste reduction.

Within a year, the group had a plan of action and applied for a grant from the Seattle Solid Waste Utility's "Less is More" program. With the money it developed *The Case for Waste Prevention, A How-To Guidebook By and For Legal Professionals*, a guidebook distributed to every law firm in King County. This reference tool has served as the basis for the environmental program developed and maintained at Foster Pepper & Shefelman. Recently awarded the 2005 BEST (Businesses for an Environmentally Sustainable Tomorrow) Award by the Resource Venture, in conjunction with the Greater Seattle Chamber of Commerce, Seattle Solid Waste and Seattle Public Utilities, the firm has a "Green Team" in place that closely follows waste practices and develops new strategies focusing on waste prevention, recycling and buying recycled materials.

Over the years Foster Pepper has implemented many programs to reduce consumption and increase recycling, resulting in a 45 percent recycling rate of its trash stream.

Technology has been a great aid in this process, as converting text to electronic format has had the single biggest impact on reduced consumption. Tremendous amounts of paper are saved as the courts converted to electronic filing and used pdf scanners on every copy machine to convert information to pdf format, which is then transferred by e-mail instead of paper. Also, converting transcripts for municipal projects and closing books for large real estate transactions to CD format has also had a huge impact on paper consumption.

Foster Pepper was at the forefront of establishing "extranets" for large clients, giving the client complete and 24/7 access to files and materials in an electronic format. Not only has this saved a huge amount of paper and time, it has allowed attorneys to keep a direct communicative link to their clients.

Some of the firm's more well-established practices include ensuring that all of its business papers are "tree free," with stock made from recycled cotton from cutting room floors. It also has a recycling program, which includes most paper, including glossy magazines, window envelopes, post-its, and NCR paper. The firm's copy paper contains 35 percent post-consumer content, and every computer is set with a printer choice to print two-sided to the nearest copy machine. If possible, only supplies containing recycled content are used, and as part of their orientation schedule, each new attorney and employee is introduced to the details and requirements of Foster Pepper's environmental program.

Other items the firm recycles include:

- ✓ Batteries: broken down and all parts properly disposed of or recycled
- ✓ Styrofoam Packing Peanuts: used in-house or taken to an industry that can reuse them
- ✓ Toner Cartridges: rebuilt and recycled by the vendor
- ✓ Holiday Cards: recycled to children's hospitals
- ✓ Cell Phones: recycled to centers for domestic violence
- ✓ Computer Hardware: if not leased, given to charity/school organizations or sold to employees



Even Foster Pepper's Research Center (law library) got into the act when conducting an analysis of its materials to convert to electronic format. The result was that following the conversion, more than 6000 hardbound books needed to be disposed of. Trying to avoid ending up in a landfill, the FP&S Librarian contacted used booksellers and reached out to the law library community to place the volumes. Roughly 2/3 of the volumes were sold or donated to law libraries all over the United States including a Tribal Court and several small county law libraries. The remaining volumes have gone to a company that uses a sheltered workshop to remove the bindings and recover the recyclable paper.

And, as the firm looks to the necessary destruction of old documents, it is doing so with an eye on recycling. Roughly 4,000 boxes of files are being considered for recycling.

With even a little attention any organization can attain waste reduction goals and be environmentally responsible without negatively impacting its bottom line. In fact, cost savings can be realized and customer service improved by implementing some simple processes that the advent of electronic communications makes easy. To learn more, contact Resource Venture at 206-389-7302 or at <http://www.resourceventure.org>.

## The Energy Policy Act 2005

The Energy Policy Act signed into law by President Bush on August 8, 2005 makes many significant changes that affect public and private sectors of the U.S. energy industry. Here are several provisions of the Energy Policy Act that you may find of interest:

### Renewable Energy:

- ✓ Changes to the hydropower licensing process of Federal Power Act.
- ✓ Incentives for increased production of hydropower.

### Tax Incentives:

- ✓ Extension and modification of renewable electricity production credit (Section 45). Extends placed-in-service date by two years (December 31, 2007) for qualifying facilities: wind, closed-loop biomass, open-loop biomass, geothermal, small irrigation, landfill gas, and trash combustion. Hydropower and Indian coal are new qualifying energy resources.
- ✓ Eligible cooperatives may elect to pass any portion of the Section 45 credit to their patrons.
- ✓ New category of tax credit Clean Renewable Energy Bonds. Qualified issuers include governmental bodies (including Indian tribal governments) and mutual or cooperative electric companies.

### Indian Energy:

- ✓ Enactment of the Indian Tribal Energy Development and Self Determination Act of 2005 which provides for grants, low-interest loans, and loan guarantees so that outside parties have more incentives to partner with Tribes in developing energy resources.

### Ethanol and Motor Fuel:

- ✓ Incentives for production of renewable fuel from non-traditional sources.
- ✓ Authorizes loan guarantees and grants for the construction of facilities to process and convert municipal solid waste and cellulosic biomass into fuel ethanol and other commercial byproducts.

### Incentives for Innovative Technologies:

- ✓ Creates a unified, comprehensive loan guarantee program to encourage commercialization of a broad spectrum of new technologies that provide clean, renewable energy.

*For questions regarding the 2005 Energy Policy Act, please contact Lucas Schenck in Foster Pepper and Shefelman's Business Group at [schel@foster.com](mailto:schel@foster.com).*



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# Landlord and Tenant: Apportionment of Condemnation Proceeds

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clause-by-clause and are subjected to careful review. Even in the case of a small retail store operator dealing with a large shopping center, the tenant is likely to require financing, and the tenant's lender will generally take steps to ensure that its interests, and therefore the tenant's, are protected in the event of condemnation.

Condemnation clauses have very little effect on the use to which the property is put or the way it is maintained. Rather, the sole function of a condemnation clause is to determine the landlord's and the tenant's respective shares of a just compensation award in the event of condemnation. An example of such a clause might read as follows:

*If all or any part of the Premises is condemned for public use, or if Landlord agrees to execute a voluntary conveyance in lieu of condemnation, either party may terminate this Lease by giving the other prior notice. Landlord, and not Tenant, will be entitled to any condemnation award or payment in exchange for a voluntary conveyance. Tenant assigns to Landlord all of Tenant's right to or interest in any condemnation award or settlement. Nothing in this Lease, however, precludes Tenant from pursuing any claim Tenant may have directly against the condemning authority under applicable law to receive compensation for business relocation expenses. If this Lease is not terminated because less than all of the Premises is condemned, the condemnation will not affect the obligation of Tenant to pay the full rental value and to perform all of Tenant's obligations under this Lease.<sup>7</sup>*

As this example clause suggests, certain issues may arise for landlords and tenants if all of the leased property is condemned, while others may arise if only a portion of the property is condemned. Special attention should be paid to each possibility.

#### Notes:

1. 125 S.Ct. 2655 (June 23, 2005).
2. See RCW 8.04.070, .120 (Chapter 8.04 RCW governs eminent domain actions by the State).
3. See *State v. Wilson*, 6 Wn. App. 443, 447, 493 P.2d 1252 (1972).
4. See RCW 8.04.130.
5. See RCW 8.04.092, .110, .130, .140.
6. *Nichols on Eminent Domain* § 11.01 (rev. 3rd ed. 1995); see also

## Issues To Consider When Drafting a Condemnation Clause

If the entire leased premises are condemned, the lease should probably provide that the lease and leasehold terminate, and the landlord receives the entire award. If only a portion of the leased premises are condemned, then the common law rule that the lease continues is likely to be unrealistic. It may not be feasible for the tenant to continue to conduct business or to otherwise use the remaining part of the premises. In that case, the lease should probably provide that the tenant has the power to terminate the lease if a certain percentage of the premises is condemned, or if certain critical portions are condemned, or if it becomes infeasible for the tenant to continue to use the remaining portion of the premises.

If the tenant elects to continue in the lease, then a formula should be included for partial rent abatement, but the landlord should receive the entire condemnation award. In addition, if the tenant's successful use of the premises is dependent upon the presence of other nearby tenants or the use of nearby areas, such as other tenants in a shopping center or parking and other common areas, the lease should include a clause allowing the tenant to terminate the lease if a certain amount of other leased premises or the common areas is condemned. Drafting a condemnation clause to cover all of these contingencies can be a difficult task, and assistance from an experienced professional is advised.

*Roger D. Mellem, Member, and Sharon E. Cates, Associate, are active on Foster Pepper's condemnation team, regularly representing Washington municipal corporations in condemnation actions. For questions regarding this issue, please contact Roger Mellem at [mellr@foster.com](mailto:mellr@foster.com) or Sharon Cates at [cates@foster.com](mailto:cates@foster.com).*

*State v. Spencer*, 90 Wn.2d 415, 420, 583 P.2d 1201 (1978) (citing with approval Restatement (Second) of Property § 8.2 (1977), which declares that a tenant is entitled to a share in the lump-sum award unless the parties to the lease agree otherwise).

*7. This example clause is included for illustrative purposes only. We recommend that all condemnation clauses be drafted by an experienced attorney who will take into account the requesting entity's specific circumstances.*



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## Employee Benefits Update

by J. Scott Galloway | Employment Group

**F**iduciary Duties and Third Party Consultants -- Employees who serve as fiduciaries of their employer's employee benefit plan often rely on the services of consultants to perform tasks related to plan administration (such as eligibility, participation and benefit distribution functions) and the choice and monitoring of investment options. In addition to engaging the consultants to provide their expertise and resources to the operation of the plan, fiduciaries often intend that the use of the consultants will reduce the fiduciaries potential exposure to fiduciary liability.

However, the U.S. Department of Labor ("DOL") and the U.S. Securities and Exchange Commission ("SEC") recently reminded fiduciaries that they have an obligation to closely monitor the actions of third party investment consultants. The principal focus of the joint DOL-SEC guidance is the potential conflicts of interest that third party consultants may have. In order to assess the potential for such conflicts, the DOL and SEC suggest that plan fiduciaries ask the following questions of their current or prospective third party consultants:

- ✓ Do you or a related company have relationships with money managers that you recommend, consider for recommendation, or otherwise mention to the plan? If so, describe those relationships.
- ✓ Do you or a related company receive any payments from money managers you recommend, consider for recommendation, or otherwise mention to the plan for our consideration? If so, what is the extent of these payments in relation to your other income or revenue?
- ✓ If you allow plans to pay your consulting fees using the plan's brokerage commissions, do you monitor the amount of commissions paid and alert plans when consulting fees have been paid in full? If not, how can a plan make sure it does not over-pay its consulting fees?
- ✓ Do you have any arrangements with broker-dealers under which you or a related company will benefit if money managers place trades for their clients with such broker-dealers?
- ✓ If you are hired, will you acknowledge in writing that you have a fiduciary obligation as an investment advisor to the plan while providing the consulting services we are seeking?
- ✓ What percentage of your plan clients utilize money managers, investment funds, brokerage services or other service providers from whom you receive fees?

As a plan fiduciary, it is important to remember that asking the right questions and following the appropriate procedures can protect against large potential liability and time-consuming litigation at a later date.

*For questions regarding this article, please contact Scott Galloway in Foster Pepper and Shefelman's Employment, Labor & Immigration Group at [gallj@foster.com](mailto:gallj@foster.com).*





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## New Attorney Announcements

*We are pleased to welcome the following new attorneys:*

### Alicia Danielson

*Associate | Business*

A recent graduate of the New York University School of Law, where she received her LL.M. in Taxation, Alicia's practice will focus on tax law.

### Derek de Bakker

*Associate | Business*

With several years practicing law in New York and Seattle, Derek's practice involves mergers and acquisitions, general corporate matters, venture capital investments, and pension fund investments.

### Kathy Gerla

*Member | Environmental*

Kathy joins Foster Pepper on October 1 after many years of leading various sections in Washington's Department of Ecology and more recently, its Department of Natural Resources. She brings top notch experience in water, natural resource, and land use areas.

### Jamie Goodwin

*Associate | Real Estate*

Jamie brings to Foster Pepper several years of experience practicing in New York and Seattle. Her work will focus on real estate, with an emphasis on condominium and homeowner association law and commercial leasing.

### Marc Greenough

*Member | Municipal & Public Finance*

With 10+ years in the Seattle legal market, Marc will serve Foster Pepper's clients as bond counsel, underwriters' counsel, and disclosure counsel on general obligation, revenue, and special obligation financings by state and local governments.

### Laura Karassik

*Associate | Real Estate*

Laura brings legal experience from the Chicago market and will focus on real estate law.

### William Patton

*Member | Municipal Government*

Will brings to the firm more than two decades of experience in the utilities industry, most recently with the Seattle City Attorney's Office as Director of the Utility Section where he provided litigation and advisory legal services to Seattle's two utility departments. His practice will focus on municipal law and litigation.

### Gillis Reavis

*Member | Litigation*

Gil joins Foster Pepper with 20+ years experience including his own firm. His practice is focused on environmental litigation, including hazardous waste cleanup, water quality, insurance coverage for policyholders, toxic torts, and class action litigation.

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