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Legal Alert

February 11, 2011

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Fixtures and Real Property

QUESTION: IF MANURE CAN BE REAL PROPERTY, HOW CAN AN ELECTRICAL POWER PLANT NOT BE REALTY?

ANSWER: JUST ATTACHING SOMETHING TO PROPERTY MAY OR MAY NOT MAKE IT A FIXTURE.

Whether or not personal property becomes a fixture and, therefore, part of the real property, may be important in numerous contexts. Typically, we think of fixtures when a tenant takes property when leaving the leased property. The issue of whether something has become part of the real property may arise in disputes about secured transactions under the Uniform Commercial Code, construction disputes, tax issues, and other contexts, however. The results are not always predictable or obvious.

For example, in a construction dispute between the developer of a commercial building and the general contractor, carpeting and landscaping were predictably decided to be part of the premises. The court noted, "carpeting and landscaping are not considered personal property separate from the property." In the case of Hayden Business Center Condominiums Association v. Pegasus Development Corporation, 105 P.3d 157 (Ariz.App. 2005), the developer did not have a tort claim against the contractor because the defective work was part of the structure. The owner's only remedy was under the contract.

But what about a building? In Maricopa County v. Novasic, 473 P.2d 476 (Ariz.App. 1970), the court decided that a building was real property that belonged to the owner of the land. A permanent structure placed by a tenant upon leased premises and attached to the realty is usually real property belonging to the landlord. In that case, no tax was due on the building, because the building actually belonged to the landlord, the City of Phoenix.

On the other hand, what about an electrical power plant? How could a $122,876,000.00 electric power generating plant not be real property belonging to the owner of the land?

Calpine Construction Finance Company built an entire electric power generating plant on land leased from the Fort Mojave Indian Tribe under a 50 year lease with an option to extend. Calpine v. Arizona Department of Revenue, 211 P.3d 1228 (Ariz.App. 2009). Whether the Department of Revenue could tax the power plant depended upon whether Calpine or the Tribe owned it. (States generally cannot tax property of Indian Tribes or individual Indians on reservations. Property owned by non-Indians, is taxable, however.) The court noted that generally "a permanent structure placed upon and attached to the realty by a tenant is real property belonging to the lessor." So, how could the power plant not belong to the Tribe?

Personal property becomes a fixture if it is: (1) attached to the realty; (2) is adapted to the use of the real estate; and (3) was intended by the parties to become a permanent part of the real property. The most important of these three factors is the intent of the parties as to whether the items of personalty would become part of the realty. Express agreements between the parties as to whether something becomes part of the realty will usually be given effect. After all, what could be more persuasive as to the intent of the parties as to whether the tenant can take the property when it leaves?

In the Calpine case, the lease said that the power plant belonged to Calpine. Moreover, if there were any condemnation of the property, Calpine was to receive the portion of the condemnation award attributed to the value of the electric plant. The lease only covered the land and the rental charges did not include the buildings. Calpine was allowed to remove or replace any improvements on the land without the consent of the Tribe or Secretary of the Interior. So, even though the lease said that the improvements in existence at the end of the lease must stay with the property, the court decided that Calpine owned the power plant. Thus, Calpine had to pay the taxes on the power plant.

So, if the power plant is not part of the realty, can the landlord keep the cuckoo clock built into the wall? How about the bookshelves from IKEA that are anchored to the wall? You could have different results as to whether these items are fixtures depending upon the circumstances and the intent of the parties.

By way of example, a trailer house attached to a permanent house was not a fixture in Gomez v. Dykes, 359 P.2d 760 (Ariz. S.Ct. 1961). But some of the manure on the property was determined to be fixtures, while some of the manure was determined to be unattached personal property which could be removed. "[M]anure produced by animals fed upon the products of the farm is part of the realty, . . ." but "manure from animals fed on products grown elsewhere than on the farm where the manure is dropped," is personalty. After all, "[M]anure made in livery stables, or in barns not connected with farms, or otherwise than in the usual course of husbandry, forms no part of the realty on which it may be piled, but is regarded as personal estate."

If you are trying to determine whether the manure or the power plant may be fixtures, and need some legal guidance, please let me know.