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Welcome to Insights,

a quarterly newsletter from Patton Martin & Sullivan designed to keep you up-to-date on legal issues that may impact your business.

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Businesses: Be wary of blogger support

By Kevin Martin

The rise in blogs and social networking sites like Facebook and Twitter provides a new channel of marketing for businesses. Reviews and tweets from consumers on their latest likes and dislikes, favorite pizza joints, video games, or other products and services can have real and lasting impact on business success. Some businesses have taken to using these social media outlets to more formally promote their products and services – but they should do so with caution.

The Federal Trade Commission recently released its revised Guides Concerning the Use of Endorsements and Testimonials in Advertising (16 CFR Part255). They set out the Commission's general principles for evaluating endorsements and testimonials and define whether they run afoul of federal protection laws, specifically Section 5 of the FTC Act (15 U.S.C. 45).

As suggested in the preliminary section, this guide provides the basis for voluntary compliance with the law by advertisers (businesses) and endorsers. In general, the guidelines require that any endorsements reflect the endorser's honest opinions, findings, beliefs or experiences. They also require that any material connection between the endorser and the seller of the advertised products be fully disclosed. (Cont. page 2)

Court has flexibility in boundary disputes

By John H. Patton

Sometimes neighbors get into disputes about rights along their boundaries. These can encompass all manner of issues, from determining the exact boundary (usually by survey); to quarrels about views, trees, and landscaping; to disagreement about access and easement rights; to debate over the use and ownership of encroaching structures.

The average landowner probably thinks the dispute begins and ends with determining which side of the line the contested issue is on, and if it's the landowner's side, that settles it. That answer may be a crucial starting point for legal analysis, but it also may not be the final word.

In California, such problems are often dealt with by a court exercising its equitable powers.

The hallmark of equity is fairness and minimizing harm to both sides. (Cont. page 2)

(Blogger, cont. from page 1)

In some instances, the breadth and application of these provisions is startling, and businesses and online promoters would do well to review them.

In an example from the guidelines, a skin care products advertiser participates in a blog advertising service that matches up advertisers with bloggers who will promote their products. In her review of a skin lotion product, the blogger writes unprompted that the lotion "cures eczema" and recommends it for blog readers suffering from that condition.

Under these circumstances, the guidelines say, the blogger AND the advertiser are subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement. To limit this liability, the guidelines recommend that the advertiser provide guidance and training to its bloggers on the need to ensure that statements they make are truthful and substantiated.

The advertiser also should monitor bloggers who are being paid or compensated in some way to take steps necessary to halt continued publication of deceptive representations once they are discovered.

Another FTC example involves an online message board designed for discussions of new music download technology that is frequented by MP3 player users. In this scenario, unbeknownst to the message board community, an employee of a leading playback device manufacturer posts messages promoting his employer's product.

Since knowledge of this poster's employment with the manufacturer would affect the weight or credibility of his endorsement, the poster should clearly and conspicuously disclose his relationship to the manufacturer to members and readers of the message board. The lesson for employers here is to instruct your employees regarding online promotion of company products and services. Make sure they are abiding by the guidelines and that proper disclosures are being made online. If you use bloggers and have some compensation or similar arrangement, that has to be disclosed as well.

Kevin Martin, a partner with Patton Martin & Sullivan, specializes in business and real estate issues ranging from intellectual property and commercial litigation to contract disputes and employment law.

(Boundary, cont. from page 1)

Boundary lines and deed descriptions usually mean something, but they aren't the only thing.

The courts occasionally use an "equitable easement" to address these situations. An easement is a legal right to use or do something on another owner's property. A common example is a utility easement that gives the water company the right to run its pipe through a property, and to access and maintain the pipe by entering that portion. These can be established in various ways.

An equitable easement is something the courts can fashion to solve a dispute involving an encroachment or use that has innocently occurred on another's property. But that resolution cannot create totally new rights and obligations.

For example, by innocent mistake, one owner might build a greenhouse that extends onto the neighbor's property. Years later, the parties discover that the true boundary runs beneath the greenhouse. The actual owner naturally wants to use the portion occupied by the greenhouse. The greenhouse builder wants to keep things the way they have been for many years, and doesn't want to tear it down.

The court can look at what is fair under the circumstances; what will create the least amount of harm. If the area is critical to enjoying the property, or if the greenhouse builder was negligent in not determining the real boundary, then fairness may dictate removal.

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Pleasanton poised for residential growth

By Martin Inderbitzen

Eastern Alameda County in the San Francisco Bay Area is one of the few bright spots in the current economy. Housing prices and rents are holding steady, new residential development is taking place and even new retail development is occurring.

The city of Pleasanton, at the intersection of Interstates 580 and 680, has consistently been one of the most desirable cities in the Bay Area in which to live and work.

Pleasanton is home to a regional mall, the Hacienda Business Park (854 acres of mixed-use development) and one of the state's top school districts. Parks are plentiful, downtown is quaint, and BART is on its doorstep for easy access to anywhere in the Bay Area. Yet Pleasanton has remained a small city of fewer than 80,000 people. This has been, at least in part, because of a residential growth management program capping residential building permits to no more than 350 per year and an overall voter-approved housing cap of 29,000 residences.

At least, that is the way it used to be until Alameda County Superior Court Judge Frank Roesch voided the cap as a result of a suit brought by housing advocates. He also imposed a court-ordered moratorium on virtually all building permits in Pleasanton until the city took corrective action.

The cap was voided because it prevented Pleasanton from complying with its obligation to provide its share of housing as required by the State of California. Under that requirement, every city in California must have a Housing Element in its General Plan that addresses its response to the statewide housing goal of providing housing for every California family. Each city is periodically provided with an obligation to address its fair share of the state housing need called the city's "Regional Housing Needs Analysis" (RHNA).

To avoid a complete shutdown in Pleasanton, the city entered into a settlement agreement with the housing advocates that brought the suit. The city agreed to revise its Housing Element; amend its General Plan; and rezone enough land to accommodate the city's unmet housing need for the planning period 2007-2014, or 1,992 new

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(Boundary, cont. from page 2)

On the other hand, if the greenhouse was expensive to build, and would be difficult or impossible to move or salvage, and if it imposes no real harm to the true landowner, then fairness may suggest that the greenhouse stays, so long as the innocent builder owns the adjoining property.

In this situation, the court can create an equitable easement, a legal right to maintain a greenhouse even though it is on another owner's property. Of course, fairness dictates that the court do no more than is necessary to protect the innocent party, and that may mean that the true owner receives compensation, and is allowed to use the greenhouse. It may mean that the greenhouse is limited in time, such that when the adjoining property is sold, the greenhouse must be removed.

The point is, the court can adjust the situation so it is fair to both parties, so long as it does not substantially alter their existing legal rights. This latter principle significantly limits the court's powers. It means that justice will be done, but justice does not give the court the power to totally alter the situation. This limitation ensures a fair and practical result, the real goal of equity.

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residential units. Under the settlement, the city had until January 2012 to identify and complete rezoning for enough land to accommodate that number of new residential units.

Throughout 2011 the city engaged in a collaborative process with landowners and residents to identify candidate sites for rezoning to accommodate these new units. In January 2012 the City Council rezoned nine sites for residential development. All the sites were rezoned high-density, averaging 30 units to the acre, which will allow construction of "for sale" and rental housing. The rezonings are to be "by right" which is to say unconditional, but for the city's ability to control design review.

With these rezonings in place, along with the adoption of a new climate action plan, an amended growth management plan and all environmental work under the California Environmental Quality Act (CEQA) completed, landowners and developers will be poised to work with Pleasanton for a wave of new residential development over the next few years.

Pleasanton has made significant progress over the past year and a half toward meeting its obligation. But some heavy lifting remains to be done to implement the rezoning before property owners and developers will be able to commence construction.

Chief among the implementation items listed by the city upon the adoption of the rezoning were:

- Updating its Growth Management Ordinance, which currently places an annual limit on the number of residences granted building permits each year
- Updating its Inclusionary Zoning Ordinance, which regulates the minimum number of affordable housing units to be included within each new development
- Adopting a set of Design Guidelines and Building Standards for the rezoned sites

Pleasanton has already started to plan for the next RHNA cycle, which begins in 2014. By mid-2012 the city will have initiated a Specific

Plan process for approximately 1,000 acres of former industrial and quarry lands at the city's eastern border.

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Landowner prevails in spot zoning case

By Randy Sullivan

The court of appeals recently considered whether spot zoning occurred in the City of San Clemente and thus entitled the property owner to compensation as a "constitutional taking" of property by the government.

The term spot zoning refers to a situation in which a small parcel is restricted more than surrounding properties. It is often described with the analogy that one property is an island surrounded by a sea of properties with greater property rights. In this case, the one property was being treated as an island that was restricted from developing properties with ocean views.

The subject property is in the City of San Clemente, where the topography consists of mountainous canyons and cliffs with views of the Pacific Ocean. The property owners acquired the subject parcel in the early 1980s and received approval to construct four residences on an undeveloped 2.85-acre parcel. At the time the approval was within the land-use restrictions, which permitted six dwellings per acre. The owners intended that certain residences would have views of the Pacific Ocean. But development was delayed, partly because of the cost of constructing an expensive driveway.

Later, after a landslide, the city created a zoning classification, "new residential, very low." This new land-use restriction limited development for these properties to one dwelling per 20 acres. The intent was to provide significant acreage for open space and canyons.

In 2006, the owners sought approval to proceed, and requested an amendment to the general plan. The City denied the request. After a trial, the judge found that the new zoning classification constituted spot zoning with respect to the subject parcel.

These decisions were upheld on appeal. First, the parcel was surrounded by properties where two to six houses per acre could be constructed. Second, the court rejected the alleged reason for treating the property differently.

The city claimed the zoning was necessary to protect neighboring properties, because the subject property was on a canyon and could cause a landslide. The court disagreed and found that the subject parcel was located on a slope and not on a canyon. And there had been no prior landslide on or affecting the subject parcel.

The court found that the alleged topographical reason was not enough to justify denying the application to proceed with the previously approved development plan. And the city had no evidence that the parcel's topography posed a risk. There was no negative geotechnical data, and the property's stability was demonstrated by a nearby cliff that faced a street without a retaining wall.

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(Zoning, cont. from page 5)

As a result, the court of appeals upheld the compensatory "taking" finding, because the economic effect was dramatic, the regulation undermined the investment expectations of the owners, and the city's motivation was to create open space – not safety.

The appeals court also found that the property did have some value. And even though there was less than a complete taking, the impact on the subject parcel was significant enough to constitute a partial taking that is compensable.

The appeals court then analyzed the trial court's damage analysis. In short, the trial court did not abide by a process designed to arrive at the fair market value impact of the city's downzoning of the subject parcel.

Instead of first arriving at the property's fair market value by taking its full, best use with four residences constructed, the court took the lowest appraised value and then subtracted the cost for constructing the access road.

The appeals court overturned this decision and remanded it to the trial court with instructions. On remand, the court was to first take the fair market value based on the construction of four residences, some with ocean views, and then deduct the value that the property would have if a single dwelling was constructed. The difference in value would constitute the damages to the property owner. The trial court likely did not perform this calculation, because it incorrectly found that nobody would be willing to develop a single house on 2.85 acres.

Lastly the appeals court upheld the award of prejudgment interest and attorney fees to the property owners. In an inverse condemnation action the prevailing party is entitled to reasonable attorney fees, expert fees, costs of suit, and prejudgment interest.

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