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Real Estate Cases To Watch In 2015

By **Natalie Rodriguez**

Law360, New York (January 2, 2015, 3:37 PM ET) -- As the real estate deals market has heated up, so have litigation dockets. And several cases with national or regional importance for developers and lenders on foreclosure practices, land use rights and housing finance reform are primed to see major developments in 2015, experts say.

A number of real estate cases wending their way through the court system — from state appeals courts to the U.S. Supreme Court — could affect how apartment owners, developers and lenders do business. And with the real estate market heating up, experts are also expecting a new wave of litigation to pop up in connection with an increasing pipeline of public-private partnership projects.

The cases are as varied as a high court suit that could throw open an avenue of Fair Housing Act litigation and a New Jersey matter that could give developers leverage to push forward on blocked projects. Here are a few cases and trends to watch in 2015:

A High Court Challenge on Fair Housing

After ducking out on several similar cases over the years, the U.S. Supreme Court has agreed to hear arguments in January over whether the Fair Housing Act allows landlords and other property owners to be sued over practices that have a disparate impact even when there is no evidence of racial bias. With affordable housing issues mounting across the country, the suit could have far-reaching implications, according to experts.

“Its impact on ... the entire world of multifamily and low-income housing — and ultimately probably other real estate — is going to be huge,” said Paul Kiernan of Holland & Knight LLP. “We do a lot of work for multifamily housing and other housing providers, so that's something everybody is watching nervously.”

Courts across the country have been split as to whether a discriminatory impact analysis applies in a Fair Housing Act context, experts say. And last year, the U.S. Department of Housing and Urban Development established a rule implementing a discriminatory effects standard.

But a District of Columbia federal court rejected that rule in late 2014 and found that disparate impact liability is not cognizable under the FHA. Although that case will likely be appealed, the disparate impact case before the Supreme Court could put an end to the debate soon, according to Bonnie Y. Hochman Rothell, a partner with Morris Manning & Martin LLP.

However, that will depend on whether history repeats itself. Two similar cases have been granted certiorari before, and both cases settled before a decision could be reached, Rothell said.

“I will be following the Supreme Court on this issue as well as the results of the various appeals in the D.C. and other circuit cases, as the resolution of this issue has a tremendous impact on how apartment owners and operators need to look at their rental policies as well as the legal standards that will be applied in future legal proceedings,” Rothell said.

The suit is Texas Department of Housing and Community Affairs v. The Inclusive Communities Project Inc., case number 13-1371, in the U.S. Supreme Court.

PPPs and Eminent Domain

Across the country, real estate litigators are girding for a wave of suits related to public-private partnerships and eminent domain takings.

“There's a lot of projects in the works. There's a lot of money that has been pushed out. ... Real estate owners and companies who have not done a lot of work with governments [until now] are finding that there's a whole new set of rules and procedures," Kiernan said. "Whenever there's that kind of tension, that's where I think you're going to see some litigation and disputes."

He expects to see suits not only about the structuring of these complicated partnerships but also on the various requirements that come with working with a government entity, such as reporting requirements, hiring obligations and disclosure requirements.

With many of these large-scale projects, eminent domain proceedings are almost inevitable.

Especially in crowded metropolitan markets, “it's just getting harder to put projects together without using eminent domain,” Kiernan said.

And with projects being pushed forward as the economy picks up, experts see more eminent domain litigation on the horizon.

“I think real estate litigation will generally improve over the next three to five years, but the condemnation practice will likely grow even more robustly and rapidly because the tax coffers are finally growing,” said Robert Henry, co-chair of Snell & Wilmer LLP's real estate litigation practice. “Government officials are sitting there [who] have promised various improvement efforts. They are now starting to get the money for those projects.”

Who's on the Hook for Sewer Capacity?

On appeal to the New Jersey Superior Court **is a suit** attempting to force a local township to buy back sewer capacity from an entitled project if the project does not move forward in a timely fashion in order to allow other developers to move forward on their plans. The case could have major implications for New Jersey, where several municipalities are low on sewer capacity, according to Thomas J. Trautner Jr. of Wolff & Samson PC.

“What I think the court is going to do is it's going to set forth a standard for what is good cause for a

township to evaluate buying back sewer capacity," Trautner said,

He added that the court may also address how exactly the bill for those buybacks will be footed, whether through an auction involving developers or through a bond issuance.

"That procedure will become important because this will become the groundwork for developers who want to come into a town ... being able to challenge inaction by townships in making sewer capacity available where other developers haven't moved forward with their projects," Trautner said.

Of course, the issue gets complicated when the developers whose entitled projects are threatened have been delayed by the economic downturn, he noted.

The case is 388 Route 22, Readington Realty Holdings LLC v. Township of Readington, case numbers A-0352-11T4 to A-1384-11T4, filed in the Superior Court of New Jersey, Appellate Division.

Fannie, Freddie Shareholder Challenge

Hedge fund Fairholme Capital Management LLC's challenge to the government's directing all the profits from Fannie Mae and Freddie Mac toward the U.S. Department of the Treasury has been closely watched for more than a year, and it is expected to come to a head in 2015.

The company alleges the government acted unconstitutionally when it altered its bailout deal for the government-sponsored enterprises to keep the companies' profits for itself.

"If the plaintiffs win, it could have a dramatic impact on how housing finance reform plays out," said David Reiss, a professor at Brooklyn Law School. "And even if they don't win, the case can have a negative impact on housing finance reform if it casts a cloud over the whole project."

Shareholders lost a related case in the D.C. district court, "but if they win the Fairholme case, things will get complicated," Reiss said.

The case is Fairholme Funds Inc. v. U.S., case number 13-cv-00465, in the U.S. Court of Federal Claims.

California Suits That Have Lenders Nervous

Among a battery of recession-related suits making their way through the court system are two that threaten to handcuff the rights of lenders to foreclose on a property or get back loan proceeds after a short sale.

One of them, Yvanova v. New Century Bank, is primed to settle a conflict on whether a homeowner can attack a lender's standing to foreclose on a property after a maze of loan assignments allegedly had deficiencies.

"If the court says the borrower has no standing, that's going to put an end to that," said Wayne Grajewski of Liner LLP. "But if it doesn't, you're going to get all sorts of new litigation."

The case is one of several that the California Supreme Court has taken recently to iron out potential conflcts caused by another case that gave a borrower standing.

"I think more likely than not, the California Supreme Court is going to confirm the majority of cases that say a borrower cannot challenge the assignment between lenders as a basis for a claim for wrongful disclosure. I think the court is going to say the borrower cannot do that, but also carve out a clear exception for fraud or prejudice," said Ken Styles, a litigation shareholder with Miller Starr Regalia.

In another, Coker v. JPMorgan Chase, the court will weigh in on whether a bank can continue to require the full payment of an outstanding loan after an agreed-upon short sale leaves the homeowner with a deficiency. The homeowner in this case contends that the loan is protected by state anti-deficiency statutes, but the bank disagrees.

The case is being closely watched by lenders, which could suddenly be forced to say goodbye to those proceeds, according to Grajewski.

The cases are Yvanova v. New Century Mortgage Corp., case number B247188, in the Court of Appeal of California, Second Appellate District, Division One, and Coker v. JPMorgan Chase Bank N.A., case number D061720, in the Court of Appeal of California, Fourth Appellate District, Division One.

--Editing by Jeremy Barker and Brian Baresch.
