

Corporate Articles

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Wetland Mitigation Banking by Brian Abergel and Tatum Blacher

Let us first address the question: What exactly is Wetland Mitigation Banking? The process of mitigation banking involves restoring, preserving, and providing compensation for the negative impacts occurring to wetlands, streams, or other aquatic areas caused by developing.¹ There is a system of credits and debits in place that was devised to ensure that ecological loss would be compensated for by preservation, so as to avoid net loss to the environment. Mitigation banks consist of four components: bank sites, bank instruments, interagency review teams, and the service area. The bank site is the physical property that is being preserved and the bank instrument is the agreement between the owners of that preserved plot of land and the regulators who make sure that everything is being managed accordingly.² The service area is the plot of land that is to be developed so long as the bank site is compensating for all impacts. These impacts are authorized by Section 404 of the

Clean Water Act, which establishes the parameters for the discharge of dredged or fill material into waters of the U.S. In other words, developers require credits to continue building outside of wetland areas, which accordingly are considered debits.

The following question becomes: Who runs or operates these banks? Bank sponsors are individuals or entities who work to develop the wetlands that will be used for mitigation banking and they are responsible for the cost of development and the ongoing maintenance of the wetland. The sponsors must go through the process of developing a mitigation plan, making a formal proposal, and then waiting for the determination of whether or not the plan can provide appropriate compensatory mitigation. As with any business, mitigation banks deal with product and service. In their specific case, the products are the credits and the service is the transference of liability for mitigation compliance. With a traditional bank,

Message from the Chair by David Greene

As we start a new year for the FBA's Corporate and Association Counsel Division, I am excited to begin my term as Chair of the Division. I would like to start by thanking Diana Lai for her years of service as Division Chair. She has been an inspiring leader and has successfully guided CACD to new heights. The Board has a great mix of returning and new members to lead the Division. We start the year off with an exciting event in Fort Lauderdale on December 4: "Cyber Security and Data Breaches: Prevention, Detection, and Protection." This program is free for all FBA members, but you'll need to register in advance. It will be a great opportunity to hear from the National Director of Computer Forensic Services, LLC, a Supervisory Special Agent of the Miami Division of Cyber Crime for the FBI, and an Assistant General Counsel of Raymond James Financial. Plus, you'll get to meet and network with other CACD and FBA members. If you're in the South Florida area, we hope to see you there! For the upcoming year, we are also planning webinars on election law compliance and ways that in-house counsel can bring value to their business organizations. We also plan to publish regular issues of Corporate Articles and would welcome contributions from our members. This issue includes interesting pieces about Blockchain Technology in Real Estate and Wetlands Mitigation

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cash is the asset to be loaned to customers but in the case of a mitigation bank the credits are the assets that can be sold to those who are seeking mitigation debits.

The Southern United States, especially Florida due to the Everglades and similar types of land, has had a lot of Mitigation Bank activity in the last ten years. In more recent years, there has been a significant and rapid loss of existing wetlands in Florida due to development. Chapter 373.4135, Florida Statutes states: "Mitigation banks and offsite regional mitigation should emphasize the restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems rather than alteration of landscapes to create wetlands. This is best accomplished through restoration of ecological communities that were historically present."³ Florida has an aggressive state level permitting program that requires a state and §404 permit. The Florida specific program regulates dredging and filling in wetlands and is broader than the federal program. It regulates the alteration of uplands as well, which can affect surface water flows and isolated wetlands that fall outside of federal jurisdiction.⁴

Since former President George HW Bush pledged "no net loss" of U.S. Wetlands, most republicans and democrats have supported this fusion of conservation and capitalism. Each Party has had the general understanding that if a company damages the natural environment, it shall be responsible for offsetting negative impacts. While mitigation banks are not a cure-all, they have in the past served as the preferred governmental method to protect wetlands from developmental damages and give people the opportunity to turn their green land into potential goldmines.



Brian Abergel is a civil litigator with experience in Commercial litigation, Real Estate law and Construction litigation. Prior to opening Weinkle Abergel Law Group, Mr. Abergel gained invaluable experience at several large law firms in both Miami and Fort Lauderdale.

Mr. Abergel litigated matters before the United States District Court for the Southern District of Florida as well as tried numerous cases at the state court level. Furthermore, Mr. Abergel has worked as in-house counsel for a world leader in digital printing and finishing equipment as it transitioned into a publicly traded company listed on the NYSE Alternext Paris.



Endnotes:

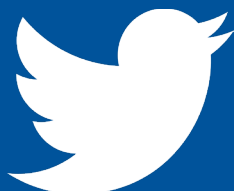
¹A mitigation bank is a wetland, stream, or other aquatic resource area that has been restored, established, enhanced, or (in certain circumstances) preserved for the purpose of providing compensation for unavoidable impacts to aquatic resources permitted under

Section 404 or a similar state or local wetland regulation. See <https://www.epa.gov/cwa-404/mitigation-banking-factsheet>

²The consolidation of resources associated with the economies of scale allows for a better quality of work in all aspects of bank development compared to numerous small mitigation sites. For example, a more thorough evaluation of bank site features, such as hydrology, can be conducted with the same amount of resources as needed for separate sites. This focusing of resources increases the chances of bank success. See <http://www.water.ncsu.edu/watershedss/info/wetlands/mitbank.html>

³Mitigation banks and offsite regional mitigation can enhance the certainty of mitigation and provide ecological value due to the improved likelihood of environmental success associated with their proper construction, maintenance, and management. See http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0300-0399/0373/Sections/0373.4135.html

⁴Florida regulates all land disturbances that could have an effect on state waters, whether or not the activity itself occurs in state waters. From a sea level rise adaptation perspective, this kind of scope could enable Florida to provide protection to dry, potentially inundatable lands, although there is no indication that they are doing so now. See <https://coastalresilience.tamu.edu/home/wetland-protection/policy-framework/state-law/florida-state-law-for-wetland-protection/>



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Blockchain Technology In Real Estate

by Brian Abergel and Tatum Blacher

A high-powered middleman has previously controlled the exchange of information or goods between individuals over the Internet. This centralized entity serves to establish trust between parties; making sure that whatever is being exchanged is legitimate. In the case of the transference of money, when one individual sends to another, the request is sent to a bank that ensures the money is being withdrawn from that account and rightfully deposited into the others. The bank is serving as the middleman. While this process establishes trust, it also leaves considerable room for the possibility of hacking. What if the need for a middleman, and thus the increased possibility for tampering, could be eliminated? This is where blockchain technology comes into the picture to potentially provide a solution that will alter everyday activities such as the purchase and sale of a house and the legal middleman required to make that happen.

What is Blockchain Technology?

In its earliest stages, blockchain technology was first recognized as the underlying technology of digital currencies, most notably Bitcoin.¹ With the financial industry crash of 2008,² Bitcoin emerged to enable transactions to be made without the need for a third party and without the exclusion of any one individual. With a couple of years of reliable service under its belt, the unique technology grows in appeal and in range of relevance. Blockchain allows for a direct transfer between individuals that is recorded on an open, shared ledger that is efficient and permanent. Access to the entire database is given to each party on the blockchain. Each node,³ a computer connected to the network, stores the information and shares it with all the other nodes.

How does it Work?

When a transfer takes place, the date and time stamp of that transaction is recorded and creates a block⁴ that is a collection of all of the transactions conducted in a span of ten minutes. That block is then attached to the block from the previous ten minutes, which was attached to the block from the ten minutes before that, and so on to create an everlasting chain. The reason why hacking is impossible with this technology is that it would require an individual to crack a very complex code encrypting that block, as well as all of the blocks that precede it, from every single computer on the database, at the exact same time. This complex code is created when miners⁵ compete to solve a mathematical problem based on a cryptographic hash algorithm. Because the log of communication is linked to all of those preceding it, information cannot be removed. Once it has been shared, it is not going anywhere. This transparency and indelibility is an essential component of all legal proceedings.

How Does this Apply to Real Estate Law?

Blockchain technology is an ideal application for legal proceedings because of the transparency it provides. It is of the utmost importance in the law to be dealing with documents that are legitimate and have not been tampered with. Such is the case with “smart contracts.”⁶ They aid in the exchange of anything of value in a way that is not subject to conflict and is devoid of an intermediary. Blockchain technology is not exclusive—any individual can put their information onto the ledger and the technology will automatically apply and enforce all of the applicable rules and penalties. If the reach of blockchain continues to expand, lawyers will eventually move on from traditional written documents to producing standardized smart contracts. Blockchain would allow for the creation of tools that can draft legal agreements, verify documents, and secure real estate transactions. Some law firms have already begun the process of creating an internal blockchain that would be used for time keeping, deed filing, and handling mergers and acquisitions.

Using this blockchain technology can be extremely beneficial in real estate by making it more decentralized and accessible. Real estate currently requires the use of copious amounts of paper and can often lack transparency during the transaction process. With blockchain technology, the recording, tracking, and transferring of deeds would be secured, with clean records of ownership. Every real estate transaction goes through the MLS and this process can be very inefficient due to the fact that information is not always current or updated on a daily basis. On the other hand, Blockchain technology would provide information about properties in real time that would become available to everyone. Title records are difficult and costly to access and require agents and attorneys to help consumers access the necessary information. Blockchain technology’s ability to ease access to that type of information could significantly reduce the closing costs associated with purchasing real estate.

Furthermore, tests have been conducted to assess how blockchain technology might alter the tracking and transference of actual property titles. In practice, an individual would buy property and receive a digital token with a traditional deed. Eventually, the tokens could take place of a paper deed entirely and all of the information of the transfer would be made public record instantly. In January 2018, Deedcoin⁷ was developed, which is the first token to apply to the entire real estate industry. Globally, this concept of a publicly available title can save many individuals who frequently have the validity of their title disproved. Since the legitimate records are made public and are approved through the decentralized blockchain process, there can be no dispute.

In addition to blockchain technology, Cryptocurrencies

themselves, such as Bitcoin, are allowing for major changes in the Real Estate industry. Following the rise of Bitcoin and blockchain technology, multiple homes in South Florida were listed for sale with the ability to use Bitcoin as currency, and several have sold. Ultimately, one house in Miami was purchased using Bitcoin.⁸ Skeptics wonder how the purchase of a home, which is so heavily reliant upon physical assets, can be purchased with a non-physical currency. Specifically, people are concerned about the volatility of the value of Bitcoin when purchasing a home, due to the fact that a closing may take weeks to be processed, allowing for the value of Bitcoin to change from the point of offer and acceptance of the contract until closing day. Conversely, many believe that with high risk, there is high reward, and these individuals who are taking part in Bitcoin and blockchain transactions are leading the way into the future of Real Estate. These individuals believe that not only can the use of cryptocurrency prove useful for international buyers who wish to retain the value of their money, but also as previously mentioned the use of blockchain is undeniably secure, and efficient.

Overall, the benefits of blockchain technology exceed just the prevention of hacking and the removal of the middleman, but can significantly impact costs associated with routine activities and guarantee consumers are receiving what they paid for without intervention of attorneys or title agents. And while the technology's worldwide implementation will not be a swift one, this technology is here for the long haul and there is no doubt that it will remain relevant in the years to come and will spread in its applicability.

Endotes:

¹Blockchain—a peer-to-peer network that sits on top of the internet—was introduced in October 2008 as part of a proposal for bitcoin, a virtual currency system that eschewed a central authority for issuing currency, transferring ownership, and confirming transactions. Bitcoin is the first application of blockchain technology.

See <https://hbr.org/2017/01/the-truth-about-blockchain>

²Nakamoto was very clearly motivated in this effort by the fallout from the 2008 financial crisis. *See <https://www.newyorker.com/tech/elements/the-bitcoin-boom>*

³This program produced each one of the nearly eleven million bitcoins in circulation (with a total value just over a billion dollars at the current rate of exchange), and it runs on a massive peer-to-peer network of some twenty thousand independent nodes, which are generally very powerful (and expensive) G.P.U. or ASIC computer systems optimized to compete for new bitcoins. *See <https://www.newyorker.com/tech/elements/the-bitcoin-boom>*

⁴And that proof of work and the chain aspect of the block—a block is a transaction—is chained to all prior blocks, is what makes this the interesting technological innovation that the Blockchain is. *See <https://hbr.org/ideacast/2017/06/blockchain-what-you-need-to-know>*

⁵Miners validate new transactions and record them on the global ledger (blockchain). On average, a block (the structure containing transactions) is mined every 10 minutes. *See <https://dev.to/damcosset/blockchain-what-is-mining-2eod>*

⁶What further expanded its use has been the introduction of smart contracts - code that can keep track of terms of agreements and automate the steps towards each term's fulfillments - in new platforms. There is also the ability to create cryptocurrencies. *See <https://www.forbes.com/sites/rogeraitken/2017/11/21/smart-contracts-on-the-blockchain-can-businesses-reap-the-benefits/#3b777c941074>*

⁷Deedcoin streamlines the real estate industry and reduces costs. *See <https://cryptoslate.com/coins/deedcoin/>*

⁸"...local gentleman who agreed to accept Bitcoin for his Coral Gables house, which he had put on the market for \$6.4 million." *See <https://www.miamiherald.com/news/business/biz-monday/article173457236.html>*

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Banking from Brian Abergel and Tatum Blacher. There are always opportunities for members to get involved in the Division. If you'd like to participate in any way, whether it be by writing an article, presenting at a webinar or at an in-person CLE event, helping out with social media, or otherwise, please don't hesitate to contact me or any of our other division leaders. Also, if there are any issues that you would like to see addressed or any activities or benefits that you'd like to see planned or implemented, please reach out to me and let me know. Finally, please make sure to follow us on Twitter at @FedBarCADC. As we head into the holiday season, we'd like to thank each of you for being a member of and contributing to the FBA and the Corporate and Association Counsel Division.

CYBER SECURITY AND DATA BREACHES: PREVENTION, DETECTION, AND PROTECTION

Wednesday, December 4, 2019 5:00 - 7:00 PM: Presentation on Cyber Security and Potential Data Breach Issues
5:00 PM - 8:30 PM
Greenspoon Marder LLP
200 E. Broward Blvd. #1800
Ft. Lauderdale, FL 33301
7:00 - 8:30 PM: Cocktail Reception

The CACD, together with Greenspoon Marder and our colleagues from the Broward County, South Florida, and Palm Beach Chapters of the FBA, are honored to present a talk by experts and practitioners at the front lines of cyber security to help guide the modern lawyer through the looming threat of data breaches. The learned presenters will ultimately show the extent of the threat faced, and how best you as counsel can better prepare to prevent, detect, and protect from the aftermath of data breaches. This presentation should help you better protect your clients, your firms, and keep everything in the context of striking a balance between the legal ramifications and business interests of your clients.

Jason Manar, Supervisory Special Agent, Miami Division-Cyber Crime, Federal Bureau of Investigation

Kyle Loven, National Director, Computer Forensic Services

Lauren Pilkington-Rich, Assistant General Counsel for Raymond James Financial, Inc.

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Webinar: Is it 2020 Already? Understanding Election Law Compliance

December 18, 2019
2:00 pm EST

Ready or not, the 2020 election season is upon us. Not only does this present substantial questions of politics and policy, it also raises questions of compliance with election law that are essential for your organizations and clients to understand. Join election law experts [Rachel Jacobs](#) and [Tyler Hagenbuch](#) for a primer on what you need to know when the calendar turns. Rachel regularly advises clients on compliance with the requirements of the Federal Election Commission (FEC) and state campaign laws. Tyler is a veteran of President Obama's 2008 and 2012 campaigns and was a member of the team advising Secretary Hillary Clinton's 2016 campaign.

Registration Fees:

Member: Free

Non-member: \$75

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