

Corporate and Construction Update

June 2009

INSIDE THIS ISSUE:

Recession: An Opportunity To Enhance Your Real Estate Assets, Lower Expenses, and Increase Your Flexibility 1

Construction and Demolition Waste Diversion Ordinance 2

Subcontractor Beware – Public Funds Lien 3

Ensuring Payments In Tough Times 3

**Save The Date:
Construction
Development Survival**

Workshop with Experts

Where's the Work, Money and Profit?

July 29, 2009
200 N. LaSalle Street
Chicago, IL 60601
8:00 a.m. - Noon

Check our website in June for the agenda and registration.

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Our firm's corporate and construction clients are dealing with the challenging events of the recession. In an effort to assist our clients, analyze strategic issues and manage daily operations, we address various topics in our newsletters. If you have questions about these or other topics, then please let us know.

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Recession: An Opportunity To Enhance Your Real Estate Assets, Lower Expenses, And Increase Your Flexibility

Every business is being forced to deal with the recession. With revenues for most companies decreasing, there is increased pressure to manage every expense meticulously. One of the most significant company assets is the real estate that it owns or controls. For those companies that lease space, rent is usually a very substantial expense. Whether you are leasing: retail space in a Mall, Strip Center, or free standing location; office space; or commercial or industrial space; credit-worthy tenants are now in a position to negotiate favorable terms. In many major metropolitan markets, vacancy rates are increasing, and landlords are desperate to find and keep credit-worthy tenants that will continue to make rent payments in a timely fashion.

Businesses must be extremely careful with short and long term planning since economists are debating over the estimated length and intensity of the recession. Fortunes can be lost and made in these types of economic climates. For shrewd managers, this may be an opportunity to: acquire a prime location or additional space; relocate to a more favorable location; or extend your lease under very favorable terms. The current economy may present a "once in a lifetime" opportunity for a company to materially improve or increase the real estate that it controls at reduced lease expenses. The risks may be minimized by having the flexibility to assign or sublet the space in the future without stringent landlord requirements. Also, options for additional space may provide opportunity for future growth at recession prices or provide a "windfall profit" in the event that the landlord wants to "buy back" the space as our economy improves and attractive space becomes in high demand.

Every provision in a lease should be analyzed, and managers should consult with attorneys and real estate counselors with respect to real estate opportunities. The following are a few points to consider in lease negotiations:

- lower per square foot payment
- restructure percentage rent payments

Have a right to terminate or “kickout” provision or reduce rent in various events.

- anchor tenant vacates
- specific percentage of the Mall or Center “goes dark”
- your business does not reach a minimum level of sales
- amenities of the office building are discontinued
- eliminate early termination penalties

Have the right to assign or sublease.

- negotiate a broad Use clause
- limit the items for which landlord consent must be obtained
- exclude provisions that trigger landlord’s consent in the event of a change in control of the tenant

Obtain option to extend the term at specified rent, etc.

Obtain option to obtain additional space at specified rent, etc.

- consider the option in the existing facility or another facility controlled by the landlord

Obtain Tenant Improvement Allowance.

- if there is concern about the landlord’s ability fund the allowance, then have the landlord provide the improvements or pay the money into an escrow and use the funds soon.
- obtain the right to use the allowance as rent.

Common Area Maintenance Charges.

- insert floor amount that is to be paid by landlord
- annual cap on increases
- exclude various operating expenses
- obtain audit rights

Make certain that HVAC units are in good operating condition.

- cap the amount of maintenance, repairs, and replacement expense to be paid by tenant
- require landlord to provide periodic maintenance
- require landlord to replace when necessary

Obtain the right to cure landlord defaults (e.g., failure to maintain and repair parking lot, HVAC, etc.) and have the right to setoff against rent

- obtain the right to reduce rent if amenities are eliminated

Obtain more favorable signage.

Legal

- obtain favorable jurisdiction for disputes
- eliminate provision that tenant pays landlord legal fees

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Construction and Demolition Waste Diversion Ordinances

As part of the growing “green” movement, the proliferation of rules, regulations and ordinances governing the diversion of construction and demolition (“C & D”) waste from landfills can be expected. According to some studies, construction and demolition materials can account for almost 30% of the solid waste stream in some areas of the country.

Locally, the City of Chicago has had a C & D recycling ordinance in place since late 2005, with maximum effective dates having kicked in on January 1, 2007, based upon permit application dates. The Chicago ordinance, Municipal Code Section 11-4-1905, requires certain projects to recycle or reuse 50% of C & D debris produced on site. Projects subject to this ordinance include (a) new residential buildings with four or more units; (b) new non-residential buildings in excess of 4,000 square feet; (c) any rehabilitation of a building that will require a certificate of occupancy to issue; (d) demolition of a residential building with four or more units, including demolition of at least one outside wall; and (e) demolition of a non-residential building in excess of 4,000 square feet.

Compliance is achieved by submitting a prescribed form and affidavits from the contractor and waste recycler certifying the extent to which the project complies. Certificates of occupancy can be withheld and/or fines issued up to \$1,000 for each percentage point by which the project misses the 50% target. C & D waste does not include hazardous materials, such as lead or asbestos, which cannot be recycled.

Although California qualifies as the leader in this area, in terms of the number of municipalities having adopted such ordinances, it is anticipated that Illinois will not be far behind. There are several bills now pending in the State Legislature dealing with this issue. Among them are House Bill 266 pertaining to recycling and wood combustion, specifying that recycling includes the combustion of clean, recycled wood that is segregated from general construction or demolition debris and then processed for use as fuel. Senate Bill 125, amending the Illinois Environmental Protection Act, allows for C & D debris recycling facilities to be sited in counties with over 500,000 residents without requiring compliance with the burdensome regulations attached to pollution control facilities. Once C & D waste recycling facilities are in place, making it easier for contractors to divert such materials from area landfills, it is anticipated that many more municipalities will require compliance with an ordinance somewhat similar to that now in effect in Chicago.

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Sub-Contractor Beware – Public Funds Liens

The procedures for perfection of a mechanics lien for work performed, directly or indirectly, for a municipal corporation are different than lien procedures for private projects and contain time-based traps which could terminate your lien rights. In *Speedy Gonzalez Landscaping v. Public Building Commission of Chicago*, No. 1-07-2370 (1st Dist. 2008), the Court held that a landscaping sub-contractor's mechanics lien claim was terminated because, under the old law, the sub failed to deliver a copy of its lawsuit to the municipal corporation within 90 days of having provided it with notice of its lien.

Section 23 of the Illinois Mechanics Lien Act, which governs liens against public funds, was amended in late 2007 by Pub. Act 095-0274. Now, in order to perfect a lien against a unit of local government (not the state), a sub-contractor must do three things. First, provide "written notice of the claim for lien containing a sworn statement identifying the claimant's contract, describing the work done by the claimant, and stating the total amount due and unpaid as of the date of the notice for the work" to the unit of local government, and furnish a copy to the general or other contractor. Second, "within 90 days after serving such notice commence proceedings by complaint for an accounting," making the general or other contractor a defendant along with the unit of local government (in other words, file a lawsuit to protect your rights). Finally, "a copy of the complaint filed" must be delivered to the unit of local government "within 10 days after filing the complaint," changing the rule in *Speedy Gonzalez*.

The failure to commence proceedings by complaint for accounting within 90 days after serving notice of the lien will terminate the lien. Likewise, the failure to deliver a copy of the complaint within 10 days after its filing will terminate the lien. Following receipt of a notice of lien, the local government unit will hold any funds subject to the lien for 100 days, consisting of the filing period of 90 days plus the notice period of 10 days, after which time it will release the monies to the general or other contractor unless suit has been filed *and* a copy of the complaint has been provided to it.

Bottom line: Do not rely upon the local Sheriff to serve a copy of your complaint upon the unit of local government within 10 days after filing. Make sure that you hand deliver a copy to the appropriate municipal official within 10 days after your lawsuit has been filed. Failure to do so could jeopardize your lien rights.

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Ensuring Payments in Tough Times

Being selected for a job in the current economy does not provide the same security it once used to. More and more, contractors are left holding the proverbial bag when the owner's credit dries up and the bank refuses to re-finance. Not only do contractors have to worry about getting new projects, but now they also have to worry about getting paid once the work is performed. Set forth below are steps a contractor can take before work has commenced to ensure successful collection for work performed.

Before commencing work on a project, there are two basic questions to consider: 1) is funding in place; and 2) does the "owner" or someone in your chain of contract actually own the property at issue. If the answer to either of these questions is "no," you will have an uphill battle trying to collect down the road. As we have learned from recent projects that have fallen upon hard times in the Loop and the Streeterville area, if you start work before financing is in place, there may be no one to

collect from. Similarly, if you start work on a project before anyone in your chain of contract has closed on the purchase of the property, you will not be able to assert a mechanics lien and lose one of your most valuable collection tools. Additionally, if you are starting work on a project that is already underway, you should check with the Recorder of Deeds to determine if other parties have already asserted liens or recorded judgments against the property. If the project is already in trouble, you may want to re-consider working on it.

As a contractor, you are, in essence, loaning your services to the owner with the agreement that you will be paid for that loan within 30 days. As such, you should look at the party that hires you in the same way that a bank would -- are they credit worthy? do they pay their bills on time? do they have a history of being sued? You can perform a simple credit check or retain a company to perform an asset search on your contracting parties to determine where all bank accounts and company property are located should you have to bring a lawsuit down the line. Once you have determined that you would like to proceed with a project, have your lawyer draft, or at the very least, review your contract. It is the lawyer's job in that situation to ensure that there are contractual provisions making your right to collect funds as easy as possible and to ensure that payments continue even if disputes arise on the project. Your lawyer can also ensure that the owner or contractor provides information to help with the collection process at the front end of the Project, including: 1) proper names and addresses of all parties in your chain of contract; 2) PIN and proper address for the property at issue, and specifically, the portion of the property that you will be performing work on; 3) lender information; and 4) a copy of the general contractor's contract with the owner. Obtaining all of this information in advance will provide for a smoother process should you need to record a mechanics lien on the property.

Once you have begun work on the project, document any issues that arise during construction. If another contractor or a late delivery delayed your performance, write a letter to the owner notifying the owner immediately. If a payment dispute arises at the end of the Project, owners are prone to use any excuse to avoid payment, including late completion of work. Contemporaneous documentation discussing the delays will help you collect down the line when the contractor/owner attempts to raise arguments that you are not due the funds.

If, despite best laid plans, you still are not paid on a timely basis, it is important for you to act quickly. Many of your available remedies are subject to strict statutory timelines. Contact your lawyer to advise them of the situation so that they can assist you in ensuring that you preserve all of your potential causes of action.

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Bryce Downey & Lenkov is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients' expectations while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Oak Brook, Merrillville, IN, Memphis and Atlanta and attorneys licensed in multiple states, Bryce Downey & Lenkov is able to serve its clients' needs with a regional concentration while maintaining a national practice. Our practice areas include:

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The attorneys at Bryce Downey & Lenkov constantly strive to keep you updated regarding the latest developments in Corporate and Construction law in Illinois, Indiana and other states. If you would like more information on any of the topics discussed above or have any questions regarding these issues, please contact Geoffrey A. Bryce at 312.377.1501 or gbryce@brycedowney.com or any member of our Corporate and Construction Law team. © Copyright 2009 by Bryce Downey & Lenkov LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.

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