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DEVELOPERS EARNING GREEN FOR BUILDING "GREEN"

Despite a struggling real estate market, a relatively healthy demand for "green" buildings exists. Some interest stems from consumer's concern for being environmentally friendly, while other demand is attributable to rebate incentives, tax credits, and energy cost savings. For developers and builders, "green" building construction provides an opportunity to earn a premium on a relatively high demand product.

"GREEN" CERTIFICATION

There are three well-known organizations that certify "green" homes in Minnesota. They are: Minnesota GreenStar (www.mngreenstar.org), the U.S. Green Building Council's Leadership in Energy and Environmental Design (also known as "LEED") (www.usgbc.org), and the National Association of Home Builders' National Green Building Program ("NGBP") (www.nahbgreen.org).

Minnesota GreenStar, which is located in the Twin Cities, has developed a set of standards tailored to meet Minnesota's cold climate housing. NAHB's National Green Building Program applies a national standard recently approved by the American National Standards Institute ("ANSI"). LEED applies the standards developed by the U.S. Green Building Council.

Each of these organizations offer different levels (e.g., bronze, silver and gold) of certification based on an objective checklist. Areas of interest include: sustainable sites, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, and innovation and design process.

In addition to the green certification organizations, the federal government's Energy Star program provides helpful information on tax credits available to home owners and builders. More information can be found at www.energystar.gov.

PROTECT YOURSELF FROM "GREEN" BUILDING LAWSUITS

It is often difficult for home buyers and owners to ascertain the credibility and understand the implications of "green" building claims. The Federal Trade Commission ("FTC") has grappled with "green" claims as well. The FTC has held workshops examining "green" building claims, and is expected to issue "Green Guides" regarding green building.

Builders should avoid making general and unsubstantiated claims regarding the environmental benefits of green building. Such claims may violate federal and state laws. Instead, developers and builders should enhance their credibility and marketing efforts by obtaining certification through Minnesota GreenStar, LEED or the NAHB's National Green Building Program. These organizations provide builders and consumers with third party verification and a recognized set of standards against which to measure green building practices.

Green building offers benefits to both consumers and builders. As is true with any new venture, credibility is important. Consumers who seek green building for social and economic reasons may seek legal recourse if they later discover green building claims fall short of recognized standards.

For more information on the risks and rewards of "green" building, contact Timothy Hassett or Jon Farnsworth.

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WE NEED YOUR EMAIL ADDRESS

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CONFRONTING A TENANT DEFAULT

Commercial real estate is a barometer of the economy. When employment numbers drop, vacancy rates rise. When the economy slows, businesses struggle. A struggling business will allocate its cash where it is needed most to keep in operation. Such a business may perceive rent as a less urgent priority than other expenses. An inattentive landlord can find itself standing in a long line of unsecured creditors, with few practical options for getting paid. In economic times like these, a savvy landlord stays very close to its tenants.

The probability that a tenant will default is impacted by many factors, some of which are quite predictable. If a tenant has supplied personal guaranties of its principals or a letter of credit, it will strive hard to avoid a default. If a tenant has invested a substantial amount in improvements to its space, it will assign a high priority to keeping that space. If a tenant's business operation would be difficult and expensive to relocate, it will be likely to default only under the most extreme circumstances. However, no tenant is absolutely immune from default.

KEY LEASE TERMS

Since default is always a possibility, a landlord must anticipate how it will address that situation. The lease represents the contract between a landlord and a tenant, and its terms will be at the core of any default scenario. Those terms should be clear, internally consistent, and in compliance with applicable law. Sloppily drafted documents (or documents full of incomprehensible legalese) can provide a defaulting tenant with defenses to lease enforcement, as well as arguments for delay. A well-drafted lease will: (i) permit the clear calculation of the landlord's recovery amount; (ii) allow for acceleration of future rent as a remedy; (iii) allow for recovery of estimated future operating expenses; and (iv) provide for the recovery of the landlord's attorney's fees. Even a matter as simple as having the correct name of the tenant entity on the lease can have an effect on the landlord's ability to recover either its space or its damages.

SYMPTOMS OF A SHAKY TENANT

A landlord must be on the lookout for symptoms that a tenant is sliding toward default. Are there indications that vendors or contractors of the tenant are going unpaid? Are rent checks

arriving increasingly late in the month (or have checks been returned for "insufficient funds")? Has the tenant attempted to offset against rent or withhold payment based upon alleged repair issues or operating expense disputes? Have principals departed from the business? Has there been a significant drop-off in activity within the leased space? A landlord or property manager observing such signs would be well-advised to prepare for the worst.

NOTICE OF DEFAULT

Letting any rent delinquency go unaddressed is a grave mistake. If rent is not paid on time, the landlord should follow the terms of the lease concerning delivery of a notice of default and do so promptly. The notice should be delivered to the address specified in the lease and in the manner the lease requires, with documentation of proof of delivery (i.e. certified or registered mail receipt, personal delivery receipt, etc.). The notice should clearly identify the default and any cure rights. It is also advisable to indicate in the notice that the landlord reserves the right to exercise any and all remedies for default under the lease, if the tenant does not accomplish a timely cure. There is **nothing** to be gained from letting a tenant get two or three months behind in the payment

of rent (or operating expenses), no matter what excuse the tenant may supply. The landlord's leverage is greatest when the delinquency amount is small. A cure may still be financially feasible for the tenant and it is less likely that the tenant will have already made arrangements to relocate its business.

WORKOUT STRATEGIES

It is not inevitable that the delivery of a notice of default will result in a tenant's eviction. A tenant may agree to provide a promissory note and confession of judgment, personal guaranties of its principals, a security deposit or some other form of protection for the landlord to avoid an eviction. The landlord may also be willing to adjust the rent payment terms on an interim basis to preclude the tenant's eviction. Even a tenant paying reduced rent may be preferable to vacant space, depending upon the market conditions. By acting quickly when a default occurs, the landlord will preserve access to its full range of legal and business options in addressing the situation.



CONCLUSION

A landlord cannot change the economy or the state of the real estate market. However, it can manage its leasing process and its tenants. How well it does those things may well dictate whether it successfully rides out the current storm.

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BIM: LEGAL IMPLICATIONS OF BUILDING INFORMATION MODELING

Building Information Modeling (“BIM”) holds the promise of generating real and lasting productivity gains through the collective effort of all parties to the construction process. However, the construction industry has historically lagged behind other industries in incorporating new technologies into the construction process. The required interoperability and architect/engineer/constructor cooperation needed to create a “virtual model” of a project has only recently matured to the point where a true computer generated design of a building, including all of its components, can be shared among all participants in the construction process.



This article will not focus on the technical aspects of BIM, but rather will analyze the legal implications and challenges facing projects using BIM.

BIM MANAGEMENT/CONFLICTS

Great effort is expended in our legal system determining who is the “responsible” party when a problem occurs during construction. In contrast, BIM focuses on collective effort and responsibility. This creates a tension between the need to define responsibilities and the need to promote collaboration among the parties involved.

BIM’s fundamentally different philosophical approach impacts

who ultimately will administer future BIM projects. Most major construction projects rely heavily on the project’s professional architects and engineers of record. Traditionally, architects have been loath to assume the risk of other parties making changes to their designs. This is appropriate because most states require the architects or engineers to be the “responsible” party. Contractors have increasingly followed a design-build model, where they play a role in contract management, design, and construction.

An architect’s desire to limit liability while playing an integral role in BIM has created tension regarding who will be the central figure in BIM in the future. It remains unclear whether the architect or the contractor (or both) will come to dominate BIM as its central figure and standard form contracts (i.e., AIA and ConsensusDOCS) have done little to settle this apparent quagmire.

Given the evolving nature of the controlling construction forms and their relative incompleteness, it is crucial that parties, to the maximum extent possible, identify the key issues in managing a project. A collaborative approach that addresses key issues may forestall problems caused by existing gaps in the current standard form contracts. Even if the industry has not reached agreement on all the issues above, it is crucial that parties engaging in BIM address and reach agreement on these issues before problems occur.

INDEMNIFICATION AND LIABILITY

As previously discussed, American jurisprudence, and construction law in particular, places an emphasis upon assessing individual liability and then minimizes “collaborative” imposition of responsibility. To further emphasize this presumption, architects often rely upon draconian disclaimer notices to insure their drawings and documents are not infringed upon or misused.

The desire of designers and architects to limit liability through disclaimers is neither unreasonable nor irrational. A party supplying plans and specifications is making an implied warranty the design was adequate for the work intended.

As a practical matter, regardless of the final forms of BIM contracts, parties will continue to be held accountable to a basic standard of care. That is, if a party provides negligent or defective work, there will likely be legal consequences. The extent to which parties may rely on others, or must “double check” work, has not yet been definitively resolved.

COPYRIGHT/INTELLECTUAL PROPERTY

Under architectural copyright law, the “author” is presumed to own the copyright of the plans. Unless the agreement between the owner and architect provides otherwise (i.e., “work for hire” provision), the architect is the presumed author and owner of the copyright.

Under BIM, multiple parties are submitting plans and specifications which may (or may not) be subject to copyright protection. That is, while standardized documents and functional specifications are not subject to copyright protection, the combination of standard and individualized features may permit a party to claim copyright. Put another way, while the components of a HVAC system may not be subject to copyright protection, their unique and “original” arrangement **may** entitle a party to claim copyright protection of those plans.

CONCLUSION

The operational aspects of BIM have increasingly been addressed and are being worked out through practical experience. Unfortunately, the legal issues have not been fleshed out in as great a detail. Thus, unless revisers of the standard form construction documents provide greater guidance, the likely venue for addressing the issues identified above will be the courts or arbitration panels. Consequently, in order to minimize exposure to litigation, parties should endeavor to ensure their documents adequately address these legal issues.

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