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An electronic newsletter for real estate professionals

From the desk of:
The Real e-ditor

How To Protect Your Commission In An Uncertain Economy

By: Steven D. Sallen

Recession! Credit crunch! Stock market crash! Sub-prime crisis! Bailouts! The news over the past six months has been devastating for the commercial real estate industry, generally, and especially here in southeast Michigan. Commercial property owners are under more stress than ever before. Falling property values, plummeting lease rates, bankrupt tenants, tenants demanding concessions and withering cash flows are affecting property owners. Most are concerned and, unfortunately, some are in trouble. All are looking for ways to cut costs on virtually every ancillary transaction they engage in, from property management to brokerage services. Even commission obligations due from clients with the best of intentions can be at risk.

For example, you've been working on a lease deal for months. You have a commission agreement in writing with the owner. But the project is in financial distress, and the owner agrees to tender a deed to its mortgagee, in lieu of foreclosure, just days before your efforts to procure a great lease deal for the property finally pay off. So you bring the deal to the lender instead, and ask them to pay the commission that the owner would have paid. The bank says thanks for bringing us the deal, but we have no commission agreement with you, so no commission! What can you do? What should you have done to protect yourself, and when should you have done it? Could you have avoided the situation altogether?

Today's economic reality is a "game changing" event. Real estate brokers need to think and act in new ways, to protect their right to be paid a fee. That is why I developed a training program for commercial real estate brokers, entitled ***Protecting Your Right To Be Paid A Commission In An Uncertain Economy.*** This one-hour long presentation and discussion was designed with commercial real estate brokers in mind, to help give them the tools they need to protect their right to be paid a commission for the important work that they do in this uncertain time.

For more information, or to schedule a presentation of this program in your office, please contact me.

Steve Sallen

Granholm Seeks To Trim Budget By Dismantling State Wetland Program

By: Kasturi Bagchi

During her State of the State address on February 3, 2009, Governor Jennifer Granholm proposed to relinquish the role of the State of Michigan in wetlands management to the federal government. Currently, Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act ("NREPA"), requires permits for certain construction activities which alter regulated wetlands. Permits issued by the State under Part 303 of NREPA also authorize construction activities under Section 404 of the Federal Clean Water Act administered by the United States Army Corps of Engineers ("CORPS") and the United States Environmental Protection Agency ("USEPA").1 This means that a separate permit is not required from the CORPS for construction activities in regulated wetlands in Michigan.

By eliminating Part 303 of NREPA and transferring wetland regulation back to the CORPS and USEPA, Granholm advises that $2.1 million dollars would be saved from the 2010 State budget without harming Michigan's natural resources because the USEPA has the capability to handle the program. Former Governor William Milliken, the Michigan Department of Environmental Quality Land and Water Management Division ("MDEQ"), and other critics, however, deem any savings to be illusory. Moreover, the MDEQ issued a *Wetland Program Question & Answer Document* in March 2009, available at www.michigan.gov/deq, raising concerns over the deletion of Part 303. First, the MDEQ notes that the federal Section 404 program generally asserts jurisdiction only over wetlands contiguous to traditional navigable waters. As a result, the MDEQ argues that the federal program would not protect isolated wetlands which are not linked to any navigable lakes or streams. The MDEQ cites that almost one million acres of wetlands fall into that category. Secondly, unlike Part 303 of NREPA which has statutory timeframes within which action for a permit application must be taken, the MDEQ notes that there

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New Stimulus Legislation Includes Benefits To Commercial Real Estate

BY: DANIELLE M. SPEHAR

H.R. 1, the "American Recovery and Reinvestment Act of 2009" (the "Act"), was signed into law by President Obama on February 17, 2009. The Act is a $780 billion package, with roughly 35% of the package devoted to tax cuts and the rest devoted to spending intended to occur in 2009 and 2010. The new law contains three provisions that are anticipated to have varying degrees of impact on the commercial real estate industry: bonus depreciation, cancellation of debt income, and net operating loss carry back relief.

The Act extends a provision enacted in the 2008 stimulus legislation that allowed taxpayers to immediately write-off 50% of the cost of an asset acquired and placed in service during the year, including qualified leasehold improvements. The Act extends the placed-in-service deadline for purchased assets by one year, through the end of calendar year 2009.

The cancellation of debt provision provides significant tax relief for businesses that reacquire, satisfy, or otherwise discharge debt obligations at a discount in 2009 and 2010. The Act permits certain taxpayers to spread recognition of cancellation of indebtedness ("COD") income over five years for certain types of business debts reacquired between January 1, 2009 and December 31, 2010. Such COD income would be included ratably over a five-year period (2014-2018), with recognition beginning in the fifth or fourth taxable year after reacquisition of the debt (fifth year for debt acquired in 2009, fourth year for debt reacquired in 2010). The new provision applies to the reacquisition of a "debt instrument," which means a bond, debenture, note, certificate, or any other instrument or contractual arrangement constituting indebtedness within the meaning of Section 1275(a)(1) of the Internal Revenue Code. The provision applies to a debtor's or related party's reacquisition of debt by cash purchases, debt-for-debt exchanges, stock-for-debt exchanges, contributions of the debt to an entity's capital, as well as complete forgiveness of a debt by its holder. In the case of a debt-for-debt exchange covered by this new provision, any deduction for original issue discount is deferred to the same taxable periods described above. Before this change, COD income was recognized the same year it was claimed and based on the total amount of the discount.

The net operating loss carry back provision allows certain "small businesses" to receive a tax refund by using current losses to offset taxes paid in prior years. Qualifying small businesses may elect to carry back net operating losses incurred in 2008 for up to five years instead of the usual two years. A business is a small business for this purpose if its average annual gross receipts for the three-taxable-year period ending with such prior taxable year does not exceed $15,000,000. The initial proposal did not have the gross receipts limitation, which was inserted during the House-Senate conference negotiations.

In addition to the above tax incentives, commercial real estate is impacted through provisions of the Act focused on green building and energy efficiency. The Act provides significant funds for state energy programs, which could be used to support commercial property owners' investment in energy efficiency upgrades while commercial property owners seeking to invest in alternative energy systems for onsite power generation may benefit from the Department of Energy Renewable Energy Loan Guarantees Program.

Whether these incentives will help restore liquidity to troubled commercial real estate markets remains the subject of ongoing debate. We will monitor the impact of these incentives along with other developments in the Administration's continued efforts to kick-start frozen credit markets, and will continue to keep you apprised through the *Real E-state Newsletter*.

"The way to gain a good reputation is to endeavor to be what you desire to appear."

~Socrates~

Liquidated Damages Clause Held Enforceable Under Real Estate Purchase Agreement

BY: LINDSAY A. JERABEK

In a February 2009 case, the Michigan Court of Appeals held that the seller's exclusive remedy after the purchaser terminated a real estate purchase agreement was for the seller to retain the purchaser's earnest money deposit as liquidated damages. *Main Street Dining, L.L.C. v. Citizens First Savings Bank* (No. 282822)

In *Main Street Dining*, the seller and purchaser entered into a purchase agreement for real property, which provided that in the event of default, "Seller further expressly acknowledges and agrees that termination of their Agreement and retention of the Deposit shall be its sole and exclusive remedy for default by Purchaser." The parties amended the purchase agreement twice, each time extending the due diligence period. Both amendments provided that, except for the amendment, "all terms and conditions of the Purchase Agreement between the parties shall remain unchanged."

The purchaser then notified the seller that it was terminating the purchase agreement and releasing its $10,000 deposit to the seller. The seller filed a complaint seeking specific performance of the purchase agreement and noted that it had sustained approximately $60,000 in damages during the parties' negotiations, due in part to a probable drop in property value on account of the weakening real estate market. The seller argued that the above quoted remedial provision was void because its enforcement would be unreasonable or unconscionable in light of its actual damages. The trial court ruled that the language of the purchase agreement clearly and unambiguously provided that the seller's sole remedy was termination of the agreement and retention of the deposit.

The Court of Appeals affirmed the trial court's decision and addressed the seller's actual damages argument by ruling that:

> *"[T]he effects of a fluctuating real estate market would be difficult to ascertain at the time the agreement was signed and the parties' awareness of this uncertainty put them in a better position than a court or jury to compute probable damages after a breach. Certainly plaintiff could have bargained for a higher deposit if that were in its best interests. However, that retention of the deposit seems unfair to plaintiff now is not a basis to interpret the contract contrary to its plain meaning."*

What is the lesson? When negotiating the terms of real estate purchase agreements, including any amendments, consider the potential losses if the deal goes sour and make sure the agreement properly reflects the protections the parties need and desire. As illustrated in *Main Street Dining*, be sure to re-evaluate potential damages prior to entering into any amendment and, if necessary, tailor the terms of the amendment accordingly. Finally, add a provision which provides for the prevailing party, in any litigation to enforce the contract, to be awarded attorneys' fees. Quite likely, the parties in *Main Street Dining* spent more to litigate the question than the $10,000 at issue.

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are no mandatory time frames under Section 404 for the CORPS to make a determination as to an application. Accordingly, the MDEQ opposes Granholm's plan because less wetland will be regulated and the public may have to wait longer to have their permit applications considered. Finally, the MDEQ estimates that approximately thirty State employees would lose their jobs if Part 303 of NREPA is repealed.

MDEQ's position is not surprising given its desire to have a greater role in the State's environment as reported by us in *MDEQ Resolves to Replace the BEA with Beefed Up Due Care Requirements*, January 2009 *Real e-State Newsletter*. Given the demands of the State budget and the state of the economy, the *Real e-State Newsletter* will keep you posted on how this debate plays out in the coming months.

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1 In order to operate a Section 404 program, the states permitting program must be similar to the Section 404 requirements and then approved by the USEPA. Only Michigan and New Jersey wetland programs have received such approval.

BULLETIN:

Federal Brownfields Tax Deduction Period Extended

Owners of qualified contaminated properties who have been conducting cleanup activities may be able to take advantage of the recent extension of the Federal Brownfields Tax Incentive. Originally part of the Taxpayer Relief Act of 1997 (H.R. 1424, Section 318), the tax deduction applies to environmental cleanup costs as deductible business expenses in the year that costs were incurred. The DEQ will provide a letter to owners who submit an Eligibility Verification Form which includes information about the site in order to meet the Federal criteria.

Contact your Maddin Hauser attorney for more information.

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On This Date In Michigan History
April 16, 1996
General Motors Buys The Renaissance Center

Intended to demonstrate a dramatic renewal for downtown Detroit, the $350 million Renaissance Center opened in 1977. After acquiring the property in 1996 for $626 million, General Motors moved its headquarters on West Grand Boulevard to its new home in the RenCen. Prior to purchasing the property, and while still leasing it, GM also spent $500 million updating the facility.

Courtesy of Michigan History

"Change is the law of life. And those who look only to the past or present are certain to miss the future"

~John F. Kennedy~