Real Estate Law & Practice

Shifts in the **Retail Industry** Have Changed Commercial Property Needs

BIGSTOCK, NYLJ

BY PHILIP ROSEN, ELLIOT GANCHROW AND ANNE CATHERINE PODOLSKY

In an ever increasing digital age that fosters a continued surge in e-commerce, traditional trips to brick and mortar store locations are falling to the wayside in favor of the conveniences offered by online shopping.

Beyond enabling consumers to peruse innumerable products with the click of a button, online retailers are continuing to shrink the waiting period between completing an order and receiving the product, bringing the instant gratification of in store purchases to the e-commerce sphere. Such changes in the retail market are resulting in changing commercial real estate needs, altering the face of both the real estate market and the legal counsel required by clients within it.

Amazon led the charge towards rapid-fire delivery when it began offering free two day shipping to customers who paid a fee for membership in the company's Amazon Prime service starting in 2005. Within the last year Amazon has stepped up their delivery speed offerings, expanding their Amazon Prime service to include Amazon Prime Now, which guarantees delivery of specific items in under an hour of ordering within certain Manhattan zip codes. While Amazon has lead the pack on the fast delivery front, the vast majority of online retailers guarantee delivery within a few days, and almost all offer next day delivery in exchange for increased shipping fees.

Effects of Rapid Delivery

An unavoidable consequence of these rapid delivery times is a growing need for accessible inventory. While traditionally online retailers have maintained warehouses with inventory in predominantly suburban locations, the advent of these speedier delivery guarantees necessitates the availability of warehouse space closer to major metropolises to ensure delivery within these ambitious timeframes. One area where this is particularly well demonstrated is the greater New York metroplex, attractive because of its accessibility to both Manhattan and major shipping ports. Owners of industrial sites in Queens saw their property values rise approximately 60 percent from 2013 to 2014. In the last year, owners of industrial space in the Bronx have inked deals with W.B. Mason, who leased 173,000 square feet for its first distribution center in New York City, and the online food and recipe delivery service Plated signed a deal for 84,000 square feet in Hunts Point. FreshDirect, the online grocer that delivers fresh groceries to your doorstep, is currently in the process of constructing a new 500,000 square foot distribution center in Harlem Yards.

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Increasing e-commerce has resulted not only in a higher demand for industrial sites adjacent to major metropolises, but also a decrease in demand for more "traditional" retail storefronts. E-commerce constituted 6.4 percent of all U.S. sales in the second quarter of 2014, with growth in this sector expected to increase to 10.3 percent of all U.S. sales by 2017. Increased preference for online shopping has resulted in a staggering decrease of more traditional storefronts—with traditional open air strip malls taking the hardest hit. Even more traditional shopping malls are seeing a decline, with the website deadmalls.com dedicated exclusively to reporting and documenting abandoned shopping centers. The malls taking the hardest hit are those anchored by "non-luxury" department stores, with companies like Sears closing over 300 locations since 2010. Of the roughly 1,000 malls in the United States, approximately 400 cater to "upper-income" shoppers, and it is these malls that are withstanding the growing pressure from online retailers. Those who study retail habits by consumers are unsurprised by this trend, finding that those making a higher price "luxury" purchase are more inclined to go into a physical store—as the consumer is paying for not just the item they're purchasing, but the experience associated with the purchase.

Even though a great deal of consumers still visit physical store locations, online shopping also influences the behaviors of consumers during in store shopping trips. Many consumers who continue to patronize brick and mortar locations are participating in the phenomenon known as "showrooming," a process by which customers go to physical retail locations to look at products and then go home and actually purchase the items from an online retailer. This phenomenon coupled with a steadily growing number of online retailers eliminating shipping costs is further increasing patronage of online retailers, driving the need for (and price of) industrial property sites up.

For those clients who own industrial sites and are looking to sell, the market is continuing to heat up. Beyond the opportunities to lease space to companies specializing in online retailing at positive rates, the opportunity to sell such property at a significant profit is also a very attractive one. Within just the last two months, Prologis signed a deal to buy KTR Capital Partners, owner of approximately 70 million square feet of industrial proper- » Page 11

PHILIP ROSEN *is a partner,* ELLIOT GANCHROW *is counsel and* ANNE CATHERINE PODOLSKY *is an associate at Weil, Gotshal & Manges.* TAYLOR DOUGHERTY, *a summer associate, assisted in the preparation of this article.*

The **EB-5 Program and Tax Credits:** An Alternative for Development

BY STEVEN POLIVY AND ROGELIO CARRASQUILLO

The necessary funding sources for the development of real estate projects are increasingly more difficult to obtain. As a result, developers are looking for alternative financing sources to bridge the gap between available funding and total project development costs, particularly when trying to develop affordable housing or other projects in low income communities.

The public sector is also interested in promoting the development of projects that stimulate economic growth, create jobs and take advantage of private capital in lieu of public funds.

As a result, developers working in these types of projects are looking at sources of additional financing, such as EB-5 financing, as an alternative source in the capital stack, as well as a creative solution for the development and construction of affordable housing projects using tax credits.

The EB-5 Program, which provides an opportunity for foreign nationals to invest in U.S. projects that create jobs in exchange for permanent residency in the United States, also promotes public-private partnerships and reduces the need for public capital, making it an ideal source of funding for tax credit projects such as low income housing tax credits (LIHTC) or new markets tax credits (NMTC). As developers become more familiar with the EB-5 Program, we expect to see an increased use of EB-5 financing by developers in combination with federal tax credit programs. EB-5 funding is an excellent source of gap financing to assist projects incorporating the use of tax credits within their capital stack, but in need of additional capital or financing to become financially viable. Since the LIHTC program was created, it has produced and financed over 2.5 million affordable apartments for low-income households and seniors.[1] Also, like the EB-5 program, the LIHTC and NMTC programs are job creators. According to the National Association of Home Builders, the LIHTC program has helped generate approximately 95,000 jobs per year. This article will give you a general overview of the tax credit programs and their interaction with EB-5 financing.

EB-5 Program Background

The U.S. Citizenship and Immigration Services (USCIS) is the government agency that administers the EB-5 Program (officially the Employment-Based Fifth Preference Immigrant Investor Program), which was created by Congress in 1990 to stimulate the American economy through job creation and capital investment by foreign investors. In 1992, Congress established an EB-5 pilot program under which certain EB-5 visas also are set aside for investors in Regional Centers designated by USCIS based on proposals for promoting economic growth (the Pilot Program). The EB-5 Program allows a foreign person—and qualifying immediate family members—to obtain permanent resident status in the United States by making an investment in a new commercial enterprise in America (e.g., real estate project, business) that creates or saves no less than 10 full-time U.S. jobs. The minimum investment is $1 million, or can be reduced to $500,000 if the investment is in a rural area or "targeted employment area" (TEA). A TEA is a designated geographic area with high unemployment (at least 150 percent of the national rate).

Regional Centers

USCIS designates qualified applicants (public or privately sponsored entities) as Regional Centers, which can accept EB-5 investments from foreign investors to generate job-creating economic development ventures within their geographic jurisdiction. As of June 1, 2015, USCIS had approved approximately 676 Regional Centers in multiple jurisdictions across the United States.[2] An advantage of an investor going through a Regional Center is the ability to count both the direct and indirect jobs produced by the job-creating activity toward the EB-5 program's minimum job requirement, which » Page 12

STEVEN POLIVY *is chair of the economic development and incentives practice at Akerman and managing partner of the New York office.* ROGELIO CARRASQUILLO *is a partner in the firm's corporate practice group.*

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Health Care Regulatory Compliance For **Landlords, Tenants**

BY KAREN L. RODGERS AND DAVID E. ZABELL

Urgent care clinics in shopping centers? Hospitals and ambulatory surgery centers in office buildings? As health care practices and hospital-based offsite extension clinics flourish in the real estate marketplace, do landlords and tenants have the knowledge necessary to negotiate legally protective arrangements that will keep them from running afoul of regulatory non-compliance?

In this article we explore certain health care regulations that govern the landlord-tenant relationship in this ever-changing arena. Specifically we will focus on the following: (1) Article 28 of the Public Health Law and its interplay with the occupancy of office space by a Hospital or ambulatory surgery center; (2) the implications of the Health Insurance Portability and Accountability Act of 1996 on both landlords and tenants; and (3) "Stark" and Anti-Kickback Law and their application to the landlord-tenant relationship. We will also discuss the emergence of the relatively unregulated "Urgent Care Clinics" and their recent migration from medical office buildings to traditional retail spaces.

Public Health Law Article 28

Article 28 of the Public Health Law broadly defines the term "hospital" to include acute care or general hospitals, nursing homes, diagnostic and treatment centers, and free-standing ambulatory surgery centers.[1] These facilities are often located in multi-tenanted office buildings, stand-alone buildings or pad facilities located within a larger office or retail complex. In order to obtain proper Department of Health licensing for the operation of these Article 28 facilities, the health care provider must comply with Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR), which proscribes regulations that govern the lease document and its contents, as well as certain site-specific conditions.

10 NYCRR 600.2(d) mandates that whenever any health care applicant proposes to lease premises in which the operation of a hospital (as defined in Article 28 of the Public Health Law) is to be conducted, the lease agreement shall include language (1) whereby the landlord acknowledges that the landlord's rights of re-entry into the premises, as reserved in the lease, do not confer on the landlord the authority to operate a hospital, and (2) requiring notification by certified mail of the landlord's intent to reenter the premises or to initiate dispossess proceedings or that the lease is due to expire, at least 30 days prior to the date on which the landlord intends to exercise a right of re-entry or to initiate such proceedings or at least 60 days before expiration of the lease. As one can imagine, landlords unfamiliar with this regulation often object to additional notice requirements for a potentially defaulting tenant and are often adverse to the notion that they need to notify the Department of Health several months in advance of a lease expiration. The negotiation of the lease with respect to this provision is essential. Absent its inclusion, the hospital will not be approved for its operating license (preventing it from taking occupancy of the proposed space).

The Department of Health also maintains a strong interest in the safety of those occupying and patronizing its regulated locations. NYCRR Parts 711, 712, 713, 715 and 716 set forth the architectural, engineering, equipment and construction and other physical environment standards for all health facilities subject to Department of Health oversight. Hospital locations are subject to a heightened standard for construction and safety,

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which often exceeds the applicable municipality's construction requirements. Many regulations require building common areas to be renovated with respect to fire stairwell access points, outdoor overhead awnings, sprinklering, elevator capacity and additional fire protections. Landlord's are often reluctant to grant a tenant the right to perform alterations outside of its demised premises for reasons ranging from structural impacts to aesthetics. This means that Article 28 facility tenants must conduct a full site inspection and survey of any building it proposes to occupy and rely heavily on guidance from an Article 28-certified architect. While the Article 28 facility tenant can perform a certain level of diligence as to the current construction standards and their applicability to an existing building, that tenant must negotiate rights to perform both structural and non-structural alterations to the common areas (as well as its demised premises) in the event that a future construction requirement could impact its operating license. The Article 28 tenant must also reserve rights related to future regulatory inspection of the building as well as the right to receive copies of certain maintenance records. These can be tough pills for a landlord to swallow.

In addition to site specific and construction » Page 11

KAREN L. RODGERS, *a partner at Garfunkel Wild, practices in the finance and real estate group.* DAVID E. ZABELL, *a senior attorney at the firm, practices in the health care group.*

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Understanding Artists' Rights In Contracts for Building Art

BY THOMAS D. KEARNS AND CAROLYN SHA

Understanding **Artists' Rights** in Contracts For **Building Art**

BY THOMAS D. KEARNS AND CAROLYN SHA

Last year the New York Law Journal published the authors' primer on the federal Visual Artists Rights Act of 1990 (VARA) which protects visual artists' "moral rights" by prohibiting the destruction of "visual art," including paintings, drawings, sculptures or photographs, of "recognized stature."[1]

That article focused primarily on educating landlords on the issues raised by VARA. Given the increase in the use of art to market hotels, offices and apartment buildings, this article will address a number of issues that artists may raise when given agreements by landlords commissioning their work.

VARA Overview

VARA, 17 U.S.C. §101 et seq., was enacted by Congress in 1990 to protect the "moral rights" of certain artists by "afford[ing] protection for the author's personal, non-economic interests in receiving attribution for her work, and in preserving the work in the form in which it was created."[2] VARA permits the author of a work of visual art to prevent the use of his or her name as the author of the work of visual art in the event of a "distortion, mutilation, or other modification of the work that would be prejudicial to his or her honor or reputation,"[3] excepting modifications due to the passage of time or the inherent nature of the materials."[4]

Art of "recognized stature" (defined as art that "art experts, the art community, or society in general views as possessing stature"[5]) is entitled to protection under VARA, and the creator of such qualifying art will have the right to sue to prevent its destruction or, if the damage has already occurred, to sue for actual or statutory damages ranging from $750 to more than $30,000, and increasing to $150,000 for willful infringements and decreasing to $200 for innocent infringements.[6] VARA rights are non-transferrable, and are exercisable only by the artist.[7] The rights last only for the duration of the artist's life, or for joint works, through the life of the last surviving artist.[8] Copyright registration is not required to bring a VARA infringement action, or to secure statutory damages and attorney fees.[9]

VARA also recognizes and protects works of visual art that have been "incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work"[10] (Building Art). Examples of Building Art include murals, frescoes and sculptures and, more recently, street or graffiti art, that have been affixed or embedded into a building's floors, walls or ceilings. In *Cohen v. G&M Realty L.P.*, the court determined that at least some of the 24 graffiti art works, which plaintiffs contend were of recognized stature, were "sufficiently serious questions going to the merits to make them a fair ground for litigation."[11] In *Carter v. Helmsley-Spear*,[12] the art consisted of sculptures, glass mosaics and other permanent installations that were affixed to the building's walls, ceilings and floors, and in *Board of Managers of Soho International Arts Condominium v. City of New York*,[13] the work consisted of aluminum bars attached to the steel reinforcement braces of the outer walls of a building.

Note that VARA protection, unless waived, will survive the sale of the real property. Below are some ways that artists may waive their rights under VARA as it relates to Building Art.

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'Joie de Vivre' (Joy of Life), an outdoor sculpture by Mark di Suvero, is located at Zuccotti Park in the Financial District of Lower Manhattan.

Explicit Waiver: Artists can explicitly waive their VARA rights for Building Art that cannot be safely removed from the property and which was installed after June 1, 1991,[14] by executing a written instrument signed by both artist and building owner.

The instrument must:

1. specifically identify the work and use of the work to which the waiver applies; and

2. specify that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal.[15]

For joint works prepared by two or more artists, a waiver made by one will waive the rights of all. It is therefore critically important that joint artists have a prior agreement regarding their VARA rights since the unilateral exercise of a waiver by one will effect a waiver for all artists involved.[16]

De Facto Waiver: For Building Art that *can* be safely removed, VARA only requires that building owners make a "diligent, good faith" attempt to notify the artist of its intention to remove the work.[17] There is a presumption of such attempt if the building owner sends notice by registered mail to the artist at his most recent address as recorded by the Register of Copyrights.[18] No VARA claim shall lie if such attempts at contacting the artist were unsuccessful, or if the owner provides notice, but the artist fails to remove the work or to pay for its removal within 90 days after receiving notice.[19]

For this reason and others detailed below, artists should diligently maintain their forwarding address information with the Register of Copyrights.

Work for Hire: Just as the Copyright Act does not grant the artist a copyright for works "made for hire," VARA also does not apply to such work, which is defined as *either*:

1. a work prepared within the scope of an employee's employment; *or*

2. a work specially ordered or commissioned as part of a collective work … [or a compilation, that has been agreed in writing, signed by both parties, to be work made for hire."[20]

With respect to the first prong, courts will consider many factors in its determination of whether an artwork is a "work for hire" (in which case the artwork is owned by the hiring party), and the mere use of the words "work for hire," "employee" or "employment," without the presence of any of the factors named above, will be insufficient to designate it as such.[21]

If the work was created by an independent contractor, then it can only be deemed "work made for hire" if (a) it falls within one of nine categories delineated in the Copyright Act, including among them "collective work" or "compilations" *and* (b) there is a written agreement between the parties specifying that the work is a "work made for hire."[22] A "compilation" is work "formed by the collection and assembling of preexisting materials … selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." A "collective work" is work in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.[23] Examples of "collective work" include a periodical issue, anthology and encyclopedia.

Based on the above and contrary to popular belief, the "work for hire" exception to VARA protection is quite narrow and most Building Art will likely not qualify as "work for hire."

VARA affords artists additional protections not previously given under statute. Its application and scope, however, are ultimately rather limited; it applies only to visual art and may be waived. Artists in other countries receive much more extensive protections, some of which extend moral rights to non-visual art and also requires by statute that such rights be permanent and inalienable.[24] In addition, many countries have enacted legislation for resale royalty rights ("droit de suite"), which entitles artists to compensation in the sale of their work in secondary markets.[25]

In the United States, the Copyright Act (of which VARA is a part) does the most to protect artists. Among the rights granted to artists under the Copyright Act is the automatic and exclusive right to reproduce all or portions of their work, to prepare derivative works, and to use or sell those reproductions, regardless of whether the physical work of art has been sold and is now belonging to another, or whether the work has been registered with the Copyright Office. Copyright protection applies upon the creation of the work, even if it has been sold; mere physical ownership of a work of art does not grant the possessor a copyright unless it has been expressly granted. The duration of copyright protections vary depending on the date of the work's creation but if the work was created on or after Jan. 1, 1978, then it is protected for the life of the longest living artist (for joint artwork) plus 70 years.[26]

Many mural and graffiti artists have recently sued under a claim of copyright infringement for unauthorized use of their work which, while publicly displayed, remained under copyright protection. The artist Maya Hayuk recently sued pop star Sara Bareilles and the luxury brand Coach for copyright infringement, alleging that defendants used her mural "Chem Trails NYC" (2014) as the backdrop for advertisements without her permission.[27] In a similar lawsuit, street artist Craig Anthony Miller recently sued a real estate developer for using "very recognizable" images of his "Elephant Mural" (2009) in the developer's advertisements without his permission.[28]

Practical Considerations

While an artist's work enjoys automatic copyright protection, an artist may inadvertently waive or transfer any or all of his copyright to another. Here are a few practical tips for the preservation of an artist's VARA rights and copyright in Building Art:

1. A contract for the commission of Building Art should not include a transfer or waiver of the artist's copyright in the work. Note, however, that waiver language may not necessarily include or reference the words "copyright." It could simply grant the commissioning party the right to "reproduce," "replicate," "duplicate," or "publish" the commissioned art. For the avoidance of doubt, consider including the following language in any contract for the commissioning of Building Art:

> Notwithstanding anything herein contained to the contrary, the [Artist] hereby reserves his/her full rights under copyright law to the commissioned work, including without limitation the exclusive right to, in whole or in part, reproduce, duplicate, publish or license the use of such commissioned work.

2. Artist's work shown in public should have the following information near the art and in any catalogue:

i. artist's name

ii. the title (in italics)

iii. materials used

iv. the year of creation, and

v. that no one shall use the artist's work without written permission or license from the artist.

3. Registering the work with the U.S. copyright authorities is also critically important. Firstly, registration is required before an infringement suit may be filed. Secondly, it is generally advisable to create a public record of such copyright, though the right springs from the moment of its creation. Thirdly, if registration is made within three months after publication of the work or prior to the alleged infringement, statutory damages and attorney fees will be available; otherwise, only actual damage and profits will be available. Registration information may be found at http://copyright.gov/eco/.

4. Artists should also diligently maintain and update their forwarding address with the Register of Copyrights to avoid a "de facto" waiver of the artist's VARA rights as described above. Instructions to update addresses may be found at http://www.copyright.gov/circs/sl30a.pdf.

5. Although the United States has not yet enacted any resale royalty legislation (except for the state of California), artists may perhaps achieve by contract what other countries have provided for by statute by including in any commission agreement/contract of sale the requirement that subsequent contracts of sale designate the artist (and his successor and assigns) as third-party beneficiaries entitling them to a percentage of the resale price.

6. To ensure the application of VARA protections in Building Art regardless of whether the work would be held by a court to be of "recognized stature," consider including in a contract for Building Art:

> Notwithstanding anything to the contrary contained herein, the [commissioning party and building owner] agree not to cause or permit the [commissioned work] to be removed, destroyed, distorted, mutilated or otherwise modified, except as may be due to the passage of time or inherent nature of the materials. Prior to any planned removal, destruction, distortion, mutilation or other modification of the [commissioned work], the [commissioning party and building owner] shall provide the [Artist] written notice of such intention, to be delivered at the [Artist's] address as provided herein, which may be updated from time to time. Within ninety (90) days after the [Artist's] receipt thereof, the [Artist] shall have the right to remove or to pay for the removal of the work, at the [Artist's] sole discretion, after which time the [commissioned work] shall belong to the [Artist]. There shall be a presumption of such attempt if the [commissioning party and building owner] send notice by registered mail to the Artist's last known address, including any address as recorded by the Register of Copyrights. Failure by the [commissioning party and building owner] to observe this covenant shall subject the [commissioning party and building owner, jointly and severally] to the damages set forth under Visual Artists Rights Act of 1990 ("VARA") only, whether or not the commissioned work is deemed to be of "recognized stature" under VARA.

7. Finally, artists may also consider contractually expanding their rights and protections beyond VARA, such as the right to dictate the time, location and/or manner of display of their work.

THOMAS D. KEARNS *is a partner and* CAROLYN SHA *is an associate with Olshan Frome Wolosky's real estate department.* MARY GRIECO, *a partner in the IP department, contributed to this article.*

1. 17 U.S.C. 106A(a)(3)(B).
2. *Pollara v. Seymour*, 344 F.3d 265, 269 (2d Cir. 2003).
3. 17 U.S.C. §106A(a)(2).
4. Id. at § 106(A)(c).
5. *Carter v. Helmsley-Spear*, 861 F. Supp. 303, 324-25 (S.D.N.Y. 1994).
6. 17 U.S.C. 504(b) and (c).
7. 17 U.S.C. 106A(e)(1).
8. Id.
9. 17 U.S.C.A. §106A(a)(3).
10. 17 U.S.C. §113 (d)(1)(A); see generally *Cohen v. G&M Realty LP*, 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013) (citation omitted).
11. *Cohen*, 988 8 F. Supp. at 225.
12. *Carter*, 861 F. Supp. at 324-25.
13. No. 01 Civ.1226 (DAB), 2003 WL 2140333 (S.D.N.Y. June 17, 2003).
14. VARA applies only to art installed its effective date (June 1, 1991).
15. See 17 U.S.C. §113(d)(1)(B).
16. 17 U.S.C. §106(A)(e).
17. 17 U.S.C. §113(d)(2).
18. Id.
19. Id.
20. See 17 U.S.C. §101.
21. Id. at 87 ("use of these terms does not transform them into "magic words" imbued with legally controlling significance").
22. See 17 U.S.C. §101.
23. Id.
24. See e.g., CODE DE LA PROPRIÉTÉ INTELLECTUELLE [Intellectual Property Code], enacted July 1, 1992, as amended by Decree No. 2012-634 of 3 May 2012, art. L121-1 (French law granting moral rights to artists which are perpetual (i.e., an artist's heirs may assert the right), inalienable (i.e., an artist may not waive such right by contract) and imprescriptible (i.e., the right may be asserted even if the work is no longer in use)).
25. U.S. Copyright Office. Resale Royalties: An Updated Analysis, at 17. Revised. Washington: G overnment Printing Office, December 2012.
26. U.S. Copyright Office. Duration of a Copyright, Circular 15A, at 1. Washington: Government Printing Office, August 2011. http://www.copyright.gov/circs/circ15a.pdf.
27. *Hayuk v. Coach Services, et al.*, No. 1:14-cv-06668 (S.D.N.Y. Aug 19, 2014); *Hayuk v. Sony Music Entertainment et al.*, No. 1:14-cv-06659 (S.D.N.Y. Aug. 19, 2014).
28. *Miller v. Toll Brothers*, No. 1:15-cv-00322 (E.D.N.Y. Jan. 21, 2015).

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requirements, 10 NYCRR 600.2(e) provides that no lease to an Article 28 facility tenant may contain a provision whereby rent and/or rent increases are based upon any cost-of-living index. Often landlord's will tie annual rental escalations to the Consumer Price Index in an attempt to measure "market" rent increases. Landlord's should be advised of the foregoing prohibition, with an understanding that if the following conditions are met, then the Department of Health will permit an index to be used: (1) the lease is reviewed and approved by the Department of Health; (2) the space rented is in a multi-purpose, multi-use building not constructed specifically for the purpose of housing an outpatient facility; (3) the rental, if the lease is a sublease, is the same or less than the rental in the overlease; (4) the Article 28 facility has no interest, direct or indirect, beneficial or of record, in the ownership of the building or any overlease; and (5) the rental per square foot, in the judgment of the Department of Health, is the same as or is comparable to other rentals in the building in which the outpatient service or administrative space is to be located, and the rental per square foot is comparable to the rental of similar space in other comparable buildings in the area when such comparisons can be made.[2]

HIPAA

The Health Insurance Portability and Accountability Act of 1996, as amended (HIPAA), requires that health care providers implement appropriate administrative, technical and physical safeguards to protect the privacy and security of protected health information of their patients. HIPAA applies to both (a) health care providers and health plans and (b) their "business associates." A "business associate" is generally a person or entity who "creates, receives, maintains or transmits" protected health information in the course of performing services on behalf of the health care provider and/or health plan (e.g., consultants; management, billing, coding, transcription or marketing companies; information technology contractors; data storage or document destruction companies; data transmission companies or vendors who routinely access protected health information; third-party administrators; personal health record vendors; lawyers; accountants; malpractice insurers; etc.).[3] Entities that do not create, receive, maintain, or transmit such information, however, are not deemed to be "business associates" and are not subject to HIPAA. Accordingly, given the potential cost of both compliance and penalties for noncompliance, landlords seeking to avoid "business associate" obligations may want to include a provision in the lease confirming that the landlord does not require protected health information to perform its functions and that the landlord agrees to avoid contact with confidential patient records or other information when access to the premises by landlord is permitted under the lease.

Anti-Kickback Statute and 'Stark'

The restrictions contained in the Anti-Kickback Statute and "Stark" reflect the federal government's ongoing concern with respect to economic referral relationships among individuals and entities who participate in federal health care programs (e.g., Medicare, Medicaid, etc.). The Anti-Kickback Statute makes it a crime to knowingly and willfully solicit or receive any direct or indirect remuneration (a) for referring a patient to a person who furnishes services for which payment may be made in whole or in part under a federal health care program, or (b) to induce the purchasing, leasing, ordering or arranging of any good, facility, item or service for which payment may be made in whole or in part under a federal health care program.[4] The Ethics in Patient Referrals Act (commonly referred to as the physician self-referral laws or "Stark" (after Congressman Pete Stark who originally sponsored it))[5] prohibits physicians from referring patients needing certain designated health services to an entity in which such physicians or an immediate family member has a direct or indirect financial interest, unless the relationship fits within an enumerated exception. While Stark applies only to physicians and their immediate family members, the Anti-Kickback Statute applies to all persons and entities. Stark is a strict liability statute, meaning that it is immaterial whether one intended to violate the law—an inadvertent violation can trigger liability. The Anti-Kickback Statute, however, is a criminal statute and requires intent.[6]

Issues relating to these laws are encountered in scenarios whereby both the landlord and tenant are medical professionals or health care-related entities that potentially have a referral relationship (e.g., a hospital leasing space to a physician or ancillary service provider, a physician group that owns an office building and leases space to other medical tenants, a medical practice subleasing/licensing space to another medical practitioner, etc.). Prior to entering into any health care facility lease or "license" agreement, each party and their respective ownership structures must be analyzed to identify actual and potential referral relationships that may violate these laws. If a property is under the management of a third party, the parties to the lease should also take a look at the ownership structure of the manager. The purpose of such diligence is to ensure that the parties are aware as to whether and in what respect these laws may apply. In addition, if the tenant is going to provide "designated health services" at such location, additional rules may apply. Notwithstanding the existence of a "referral" relationship between the landlord and tenant, however, a statutory exception to Stark and a similar safe harbor under the Anti-Kickback Statute may permit the parties to enter into certain rental arrangements that might otherwise be viewed as violating these laws; provided that the parties satisfy certain criteria.[7]

> Landlords need to understand the **structure of their prospective urgent care tenant** because the Article 28-licensed variety will be required to meet heightened construction standards and include additional lease language and Department of Health notification requirements.

We note that remuneration, compensation and other financial benefits between the parties, for purposes of these laws, include not only direct cash payments, but any arrangement where something of value (e.g., discounts on products, services and rent or opportunities to invest, etc.) may be deemed to have been traded for referrals. Thus, paying or charging amounts above or below fair market value to another provider (where a referral relationship exists) for equipment, space, personnel or services clearly violates these laws. Medical landlords who opt to lease to medical tenants should be advised that rents and other compensation under the lease must be analyzed with respect to fair-market value. Likewise, medical tenants must be advised not to pay more and less than a fair market rent for the use and occupancy of a space when a potential referral relationship exists with the landlord.

Urgent Care Phenomenon

Another example of the ever-changing medical landscape relating to the landlord-tenant relationship that is noteworthy is the relatively recent emergence of the so-called "Urgent Care Center." Urgent care centers, urgent care "clinics" or "walk-in" medical offices have been popping up in retail shopping centers across the area. These non-hospital-based medical practices rely upon visibility and walk-in traffic. Accordingly, retail spaces offer them better access to a high volume patient base. In return, these tenants are often willing to pay a premium rent. These tenants often require longer operating hours that exceed that of the typical medical tenant (e.g., late nights, weekends and holidays), hence the appeal of retail spaces. Convenient access to properly illuminated parking and availability of proper security safeguards are important to the urgent care tenant.

Urgent care facilities are operated either as Article 28 facilities (requiring Department of Health approvals and licensing) or as a private medical practices. Landlords need to understand the structure of their prospective urgent care tenant because the Article 28-licensed variety will be required to meet the heightened construction standards and include the additional lease language and Department of Health notification requirements discussed above. For those private practice structures, lease negotiations can, generally speaking, follow that of a traditional retail negotiation with special attention focused upon the regulatory issues addressed above as well as any heightened parking, sewer, water usage and other local municipal, zoning or building code applicability.

1. N.Y. Pub Health L. §2801 defines "Hospital" as a facility or institution engaged principally in providing services by or under the supervision of a physician or, in the case of a dental clinic or dental dispensary, of a dentist, for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition, including, but not limited to, a general hospital, public health center, diagnostic center, treatment center, dental clinic, dental dispensary, rehabilitation center other than a facility used solely for vocational rehabilitation, nursing home, tuberculosis hospital, chronic disease hospital, maternity hospital, lying-in-asylum, out-patient department, out-patient lodge, dispensary and a laboratory or central service facility serving one or more such institutions, but the term hospital shall not include an institution, sanitarium or other facility engaged principally in providing services for the prevention, diagnosis or treatment of mental disability and which is subject to the powers of visitation, examination, inspection and investigation of the department of mental hygiene except for those distinct parts of such a facility which provide hospital service.

2. In addition to the exception set forth above, if the lease covering a hospital premises contains provisions whereby it is the lessor's responsibility to pay expenses such as real estate taxes, utilities, insurance, etc., such lease may contain provisions which allow adjustments to the rent only to the extent necessary to compensate for changes in such expenses.

3. See 45 C.F.R. §160.103.

4. 42 U.S.C. §1320a-7b(b).

5. 42 U.S.C. §1395nn and 42 C.F.R. §411.350 et seq.

6. Violations of either of these laws may also give rise to violations under the federal False Claims Act (31 U.S.C. §3729, et seq.).

7. Such criteria includes, among others: (1) the terms of the lease must be commercially reasonable; (2) the lease must be in writing, signed by the parties, and identifying all of the leased space; (3) the lease must have a term of at least one year, and, if terminated during the first term, the parties may not enter into a new lease until the end of the first year of the original term; (4) rent must be fixed in advance, and the amount of the rent must be consistent with commercial fair market values; (5) rent cannot be contingent on the value of referrals or the volume of business that is generated between the parties, nor can rent reflect any additional value due to the leased premises being located near a referral provider (i.e., a hospital or doctor's office); and (6) the leased space cannot exceed what is reasonable and necessary for tenant's legitimate business purposes, and it must be used exclusively by tenant.

Retail Shift

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ty, for $5.9 billion, the largest real estate deal of the year thus far. Blackstone Group announced in December 2014 that it has agreed to sell IndCor Properties to GIC Pte. Ltd. for $8.1 billion. While Blackstone initially had plans to sell IndCor in an initial public offering, the high demand for industrial site space made IndCor's portfolio of 117 million square feet of industrial space a highly profitable sale.

As the demand for industrial space continues to increase, rates of construction and development of these types of space are also continuing to rise. Such new projects are particularly competitive as the large blocks of space for development are becoming more difficult to find, making new industrial development projects, particularly those near major metropolises and shipping ports, highly coveted. Unlike the traditional shopping center industry, which has seen a significant drop in new construction and development projects, the increasing demand for industrial space spurred by growing reliance on e-commerce has only caused construction and development of industrial sites to increase. Indeed the specialized needs of online retailer companies (specifically customized space for stacking systems and highly advanced HVAC and power systems) will only push the need for more newly developed industrial spaces forward as societal reliance on e-commerce advances.

Clients presently leasing industrial site space who maintain a right of first offer in their lease agreement might find they're priced out of making a bid to purchase the space, as the increasing demand for industrial sites will continue to drive prices up. As online retailers continue to shrink delivery times and consumers participate more exclusively in the realm of e-commerce, the idea that traditional shopping centers will fall extinct in favor of industrial warehouses and customer fulfillment centers is not a far-fetched one. The effects of this shift can be seen both in the legal issues facing the real estate market and viewed online in the photographs of once grand shopping centers left abandoned.

EB-5 Program

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allows for additional EB-5 capital to be raised. Under the EB-5 extension bill proposed by Sens. Charles Grassley and Patrick Leahy and discussed below, after approval of his or her application by USCIS, the foreign investor receives conditional resident status for a period of two years. At the end of this period, the investor's status is changed to unconditional permanent resident status, provided that the investment has been maintained and the required jobs have been created.

EB-5 Pilot Program Extension

The Pilot Program has been extended multiple times by Congress. The latest, in 2012, renewed the program through Sept. 30, 2015. Although the consensus in the industry is that the Pilot Program which allows for the use of regional centers will be renewed or made permanent, the details of such extension are still under consideration. On June 5, 2015, the bill "American Job Creation and Investment Promotion Reform Act of 2015"[3] was introduced in the U.S. Senate with bipartisan support, introduced by Grassley and Leahy, to reauthorize the Pilot Program for five years, until Sept. 30, 2020. Although it is too early to determine what changes would actually be adopted, the proposed bill would make significant changes to the operation of a regional center and structuring of EB-5 projects as described below.

As drafted, the current bill would include, among other things, the following changes (1) increase the amount of foreign investment from $500,000 to $800,000 in a TEA or a rural area and from $1 million to $1.2 million for investments in other areas; (2) transfer authority from the individual states to the Department of Homeland Security for the determination of a TEA; (3) require that at least 50 percent of jobs must occur in TEA locations; (4) foreign investors will only be allowed to receive credit for up to 30 percent of the jobs created as a result of investment capital provided by sources other than EB-5 investment; (5) limit the indirect job investment to 90 percent of the total job creation, thereby requiring that 10 percent of all jobs created to be directly created jobs; and (6) the bill would set limits of 120 days for processing of exemplars, which become mandatory, thereby requiring that USCIS will review each project before it reviews the individual petitions and a limit of 150 days, on average for the processing of the I-526 petitions and 180 days for processing of the I-829.

Low-Income Housing Tax Credits

LIHTC is a federal subsidy used to finance the development costs of low income housing which was enacted as part of the Tax Reform Act of 1986 and became effective on Jan. 1, 1987.[4] LIHTC is the example of a successful public private partnership program where private capital is combined with federal tax incentives for the development of affordable rental housing and economic development.

The state allocation agency of each state and territory of the United States issues tax credit allocations to developers who then sell the tax credits to private investors. The LIHTC allows a taxpayer, typically the partners of the partnership which owns the project, to subsidize either 30 percent or 70 percent of eligible costs for the development of the low-income units in a rental housing project.

There are two "pools" of credits:

- the 9 percent credit (which subsidizes approximately 70 percent of eligible project costs), and
- the 4 percent credit (which subsidizes approximately 30 percent of eligible project costs).

The 4 percent credit refers to the credit percentage which is available for existing housing or for federally subsidized new construction or rehabilitation, while the 9 percent credit refers to the credit percentage available for new construction or rehabilitations, subject to the satisfaction of certain thresholds. The annual amount of 9 percent credits available to each state is based on population. Due to the limited availability of these credits there is a lot of competition and states create their own allocation process. The 4 percent credit is not subject to annual allocation caps, but depends on the availability of volume cap for private activity bonds that must finance at least 50 percent of the total development cost for which the 4 percent LIHTC will be claimed.

The way the low-income tax credit works is that the credit is claimed by the taxpayer pro rata over a period of 10 years and can be used in connection with both new construction and renovation of residential rental units. Taxpayers claiming the LIHTC may use the tax credit to offset its regular tax liability, subject to certain limitations.

To avoid tax credit recapture and the repayment of any tax savings, LIHTC taxpayers must comply with all applicable compliance rules and retain an ownership interest for at least a 15-year period. As a result, an investor in the project will typically retain its participation in the project for at least the compliance period. In addition, most state allocating agencies require an additional restriction on rents for a specified period beyond the initial 15-year compliance period, typically evidenced in an additional 15-year extended use agreement.

'Sale' or Syndication of LIHTC

As mentioned above, the LIHTC provides an additional source of equity for the construction of rental low-income housing projects for families and seniors. Once a developer is allocated tax credits by a state allocating agency, such developer "sells" the tax credits to a private investor or syndicator by entering into a limited partnership or limited liability company with such investor or syndicator. The investor's or syndicator's participation in the newly formed entity is typically 99.99 percent of the profits, losses, depreciation and tax credits, as a limited partner or member of the entity, and the developer typically serves as the general partner or managing member of the entity, holding the remaining 0.01 percent of the newly formed entity. The capital raised by such sale or syndication of the tax credits reduces the amount of equity that a developer would have to obtain from loans or the issuance of debt to cover the costs of the project. Additional benefits to an investor acquiring the LIHTC include allocating the depreciation of the buildings owned by the entity, which is tax deductible, based on the investor's equity participation in the entity.

New Markets Tax Credits

The NMTC was created by the Community Renewal Tax Relief Act of 2000[5] in an effort to stimulate investment and economic development in low income urban neighborhoods and rural communities that generally do not have access to the capital needed to support their growth. Similarly to LIHTC, the NMTC program provides private investors with a federal tax credit for an investment made in a low income area. A NMTC investor receives a federal tax credit equal to 39 percent of the total Qualified Equity Investment (QEI) made in a Community Development Entity (CDE). The tax credit is realized by the private investor over a seven-year period as follows: 5 percent annually for the first three years of the investment and 6 percent in years four through seven of the investment. Any redemption prior to the end of the seven-year term would be subject to recapture.

Impact of NMTC Investments

According to the Community Development Financial Institutions Fund (CDFI), since the NMTC Program's creation, CDFI has made 836 awards allocating a total of $40 billion in tax credit authority to CDEs. This investment has generated a significant amount of jobs and economic growth. According to the New Markets Tax Credit Coalition, between 2003 and 2012, the NMTC program generated about 750,000 jobs.

The NMTC program expired at the end of 2014, but the New Markets Tax Credit Extension Act[6] was introduced in the U.S. House of Representatives with bipartisan support on Feb. 10, 2015. A nearly identical piece of legislation was introduced in the U.S. Senate on Feb. 26, 2015.[7] Both pieces of legislation look to extend the NMTC program indefinitely.

> Although EB-5 can be used in several ways within the capital stack, it is most common for projects to utilize EB-5 investment either in a **first mortgage position or as preferred equity or mezzanine debt.**

EB-5 as Part of the Capital Stack

Although EB-5 can be used in several ways within the capital stack, it is most common for projects to utilize EB-5 investment either in a first mortgage position or as preferred equity or mezzanine debt. EB-5 financing does not typically utilize underwriting criteria of traditional institutional lenders, and therefore EB-5 financing can be deployed as first mortgage debt for projects that might not have reached the leasing requirements or other criteria typically required by an institutional lender or investor. Typically, EB5 investments do not provide significant savings in rate over institutional first mortgages and construction mortgage financing. This is in stark contrast to the situation with mezzanine debt and preferred equity. EB-5 capital is a far lower cost alternative to traditional mezzanine lenders and can be used to replace higher cost equity either in the form of subordinated secured debt or preferred equity.

For large scale construction projects where the construction timeline extends beyond 24 months, the job creation generated by the construction of the project may support EB-5 participation in the range of 20-35 percent of the capital stack, with a term of at least five years with no amortization and interest rates in the range of 6 percent. This approach also has the benefit of maximizing job coverage security, as a project will generate the same number of jobs no matter how financed, but limiting EB-5 financing to 20-35 percent of the capital stack greatly reduces the number of jobs required for that project. Reducing the amount of the EB-5 funds raised will also enable greater flexibility in raising the capital by making the project more attractive to foreign investors.

For example, on a transaction combining EB-5 financing and LIHTC, the EB-5 financing portion is generally removed from the capital stack by funds generated from a refinancing transaction five to seven years after the closing of the EB-5 financing. At such time the project would be completed and in operation, therefore reducing the lending risk for the refinancing institution which should provide a more attractive interest rate. Should the Grassley-Leahy bill be enacted, its TEA provisions would make the qualifying areas for NMTC, LIHTC and EB-5 investment converge, so that projects that qualify for NMTC or LIHTC will most likely still qualify for EB-5 as well.

Other Tax Credit Programs

In addition to LIHTC and NMTC, projects incorporating other tax credit programs into their capital stack such as historic tax credits or investment tax credits can also benefit from incorporating EB-5 financing as a portion of their sources of funds. As described above, EB-5 financing can become a source of gap financing for projects taking advantage of these other tax credit programs.

Public Use of EB-5

States and municipalities have realized that EB-5 can be an important source of funding for high priority and infrastructure projects, including the development of affordable housing. Vermont, Michigan, Puerto Rico, Miami and Philadelphia are some of the states and municipalities that have created publicly owned and/or managed regional centers to use EB-5 as an additional source of financing for economic development. Through foreign private capital, these publicly-owned regional centers and the EB-5 financing they provide makes them a great tool to complement existing public and private financing sources for private and public uses.

For example, the publicly-owned Commonwealth of Puerto Rico Regional Center, that recently received approval by USCIS to service the Commonwealth of Puerto Rico, plans to provide EB-5 funding to high priority projects, including affordable housing projects being allocated LIHTC. Other publicly owned regional centers, such as the City of Miami Regional Center, are also looking to use EB-5 financing to promote the development of affordable housing in their communities by providing much needed capital for these projects.

Given the diminishing availability of grants and subsidies for the development of projects, particularly affordable housing projects at the federal and state levels, combining EB-5 funding with tax credit equity would provide the much needed gap financing required in the market.

Conclusion

At a time when financing options for real estate construction projects remain limited, the use of EB-5 funding for these real estate development projects already taking advantage of tax credit programs could be the difference in making a project viable. For example, incorporating EB-5 financing to LIHTC projects for the development of low-income housing rental projects facilitates the construction and development of these projects, while providing an incentive for private developers to make affordable rental housing available. Also, as more states and municipalities see the advantages of EB-5 to complement their traditional funding efforts, we expect to see an increase in the number of public entities taking advantage of this alternative financing source by creating their own publicly owned regional center or partnering with existing centers to provide EB-5 financing. In so doing, they are leveraging the investment dollars of foreign investors into important projects for U.S. municipalities and creating jobs.

1. Statistics of the National Association of Home Builders.
2. USCIS Website as of June 7, 2015.
3. S. 1501 of 2015.
4. See Section 42 of the Internal Revenue Code.
5. PL 106-554.
6. HR 855 of 2015.
7. S 591 of 2015.