Spring 2011

REAL ESTATE & CONSTRUCTION NEWS

IT AIN'T EASY BEING GREEN

For the most part we all have a familiarity with "Green Buildings" and the rating systems developed by various organizations such as the Leadership in Energy and Environmental Design ("LEED"). As the greening of the building industry developed, for the most part the initiatives have been voluntary decisions by building owners to construct energy efficient facilities, sometime spurred on by governmentally sponsored cost incentives and credits. Generally however, the decision was one of marketing, user comfort and energy efficiency on the part of the owner. While governmental entities were interested in greening the landscape their involvement was collateral to the effort.

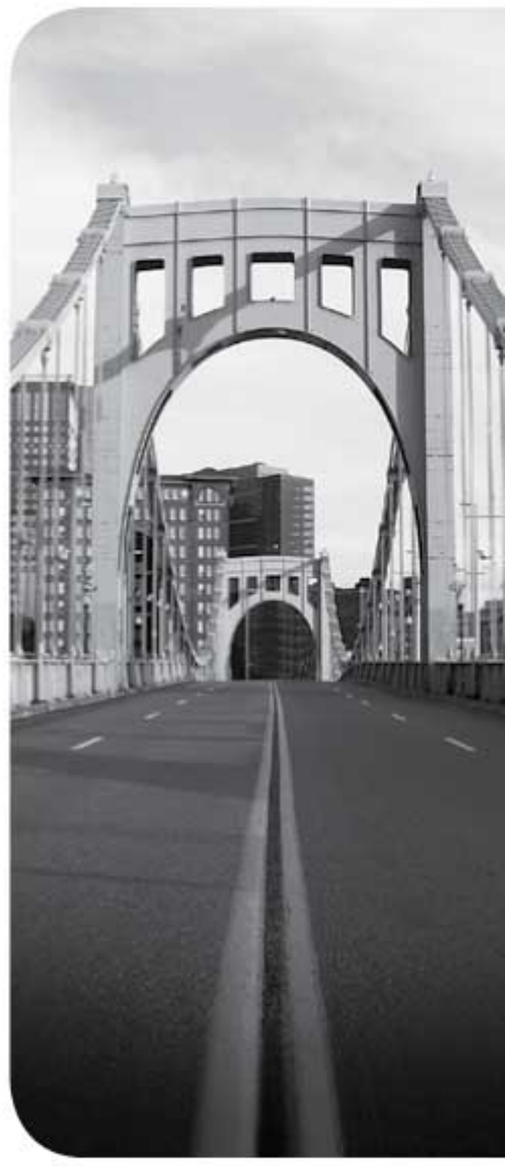
As the green movement matures and develops government is taking a more direct role. Various LEED initiatives including legislation, executive orders, resolutions, ordinances, policies, and incentives are now found in 45 states, including 442 localities (384 cities/towns and 58 counties), 35 state governments (including the Commonwealth of Puerto Rico), 14 federal agencies or departments, and numerous public school jurisdictions and institutions of higher education across the United States. For example, locally, in 2007, Pittsburgh City Council approved an amendment to The Pittsburgh Code entitled "Sustainable Development Bonuses," granting a density bonus of an additional 20% Floor Area Ratio and an additional variance of 20% of the permitted height for all projects that earn certain LEED certifications.

While no doubt that the adoption of green building standards serves to increase the scope of integration of energy efficiency into construction, it also comes with it the question of who will ultimately be held responsible for achieving the governmentally mandated rating which is in most cases determined by a third party non-profit organization. Additional questions are raised regarding which governmental entity is empowered to assert such regulation (typically a struggle between state and federal government). As we are well aware, the achievement of a specific rating is not merely a decision made by the Owner, but impacts all entities in the construction process and in some instances carries a continuing obligation of the Owner. In addition, how will the codes be enforced by governmental entities?

For example, the City of Pittsburgh grants an increase of the floor area ratio and increased height if the project achieves LEED certification. These bonuses are obviously granted in the early stages of the project during the initial approvals prior to any determination that the project is in fact LEED certified. While the ordinance does have a penalty provision of one percent of the construction cost should the certification not be obtained, is this cost worth the additional FAR and height?

Recent court cases have also arisen challenging the ability of cities to impose their own energy codes. For example, various trade associations have challenged the City of Albuquerque's 2007 enactment of an energy Conservation Code alleging that the Code's regulations are preempted by Federal law, namely the National Appliance Energy Conservation Act. On a motion for summary judgment ruled on in September of last year, the Court agreed only in part. The Albuquerque code has various components with allowances for compliance in either performance based path outlining a LEED certification process or for some structures a prescriptive path requiring that HVAC systems and equipment comply with minimum efficiency standards. The Court held that the prescriptive path setting forth efficiency standards was in fact pre-empted by federal law, because the local standards were more stringent than the federal standards. The court found that the federal act was adopted to reduce a patch-work of state requirements and establish a single standard for equipment which was violated by the Albuquerque code. The Court denied the trade associations attempts to dismiss the prescriptive path based on a LEED certification. Because the case continues, it remains to be seen whether such system will be preempted by federal law. Similar litigation

INSIDE THIS ISSUE:



has been instituted in the State of Washington by the Building Industry Association of Washington.

The exercise of governmental power in the energy conservation arena is growing and will undoubtedly raise concerns from various entities involved in the construction industry as to whether such power has been properly exercised, the scope of regulations as well as enforcement and penalties. These challenges are of course coupled with the always present issues among those directly involved in the process as to responsibility of certification and the attending liability in the event of the failure to achieve certification.

Also noteworthy is a recent New York case that does not challenge the exercise of governmental power but the underlying legitimacy of the LEED certification process. In October of 2010 a class action suit was filed against the U.S. Green Building Council ("USGBC"). The class members include consumers who paid for LEED certification, taxpayers whose city and state tax dollars have been spent on the costs of LEED certification in publicly-commissioned buildings, and building design and construction professionals who design energy-efficient buildings. The Complaint alleges that the LEED rating system is not based on objective scientific criteria or actual measurements. The Complaint also alleges that USGBC commissioned a study to support its goals which used skewed samples and data that are fraudulently misrepresentative. The six count complaint also asserts violations of Sherman Anti-Trust Act by fraudulently monopolizing the market; violations of the Lanham Act through deceptive marketing tactics; violations of New York's Deceptive Trade Practices Act; false advertising; wire fraud under the Racketeer Influenced Corrupt Organization Act ("RICO"); and, unjust enrichment through fraudulently induced sales tactics. While the outcome is certainly uncertain, if the plaintiff's prevail, the underlying basis of the certification process could be un-ended leaving a morass of confusion not only to going green but also compliance with governmentally imposed regulations which at their heart have the LEED rating system.

ARTICLE FEE & IG

Update – Private Transfer Fee Covenants

In Fall of 2010 we published a short article concerning private transfer fee covenants (a covenant attached to real property that require a fee to paid to a third party upon each re-ale of the property). A bill was introduced last fall before the Pennsylvania legislature (SB 1481), which would prohibit such private transfer fees as being against public policy however; did not pass the House before the end of the session. We will keep you posted if the bill is reintroduced this year.

Oil and Gas Leases – certain delayed rentals clause held to be unenforceable by PA Superior Court.

The Court found in favor of the property owner/plaintiffs in *Hite, et al v. Falcon Partners, et al*, 2011 Pa. Super. 2 (2011), in connection with a dispute over an oil and gas delayed rental provision. In the *Hite* case the oil and gas lease at issue had a primary term of one year with a delayed rentals clause that provided for payments of $2 per acre per year for an indefinite period. The gas lessee never commenced development or drilling at the site for a 5 year period after the oil and gas lease was signed. After 5 years the property owners were approached by parties offering good financial incentives in return for the oil and gas lease rights to the property. The owners sent the original lessee an option to match the offers they were receiving, and then when they received no response sent confirmation to the lessee that the original lease was terminated.

The lessee attempted to enforce its lease under the $2 per acre per year delayed rentals clause, which read, "Lessee has the right to enter upon the Property to drill for oil and gas any time within 1 year from the date hereof and as long thereafter as oil or gas...is produced from the Property, or as operations continue for the production of oil or gas, or as Lessee shall continue to pay Lessors $2 per acre as delayed rentals, or until all oil and gas has been removed from the Property, whichever shall last occur." In finding for the property owner, the Court noted that 'royalty based leases are to be construed in a manner designed to promote the full and diligent development of the leasehold for the mutual benefit of both parties," citing *Jacobs v. CNG Transmission Corp*, 332 F. Supp. 2d 759, 781 (WD Pa. 2004), and that a lease will not be construed to create a perpetual term unless the intention is expressed in clear and unequivocal terms. In addition to the lack of clarity as to a definitive term, the Court noted the long-established rulings grounded in policy considerations that, under 'no term' leases, a lessee could not postpone development indefinitely by a payment of delay rentals. In its opinion the Court recited that historically, customary delayed rentals clauses were not effective unless development had a least commenced during the primary term. The delay clauses were intended to enable the lessee thereafter to complete is removal of the minerals or gas from the site, not to create a perpetual or indefinite inchoate right. The Court stated that "if the lessee desired to enjoy the benefit of a longer period of permitted inaction, it should have drafted the leases to include a longer primary term."

BE PREPARED FOR THE 2012 REASSESSMENT

All property owners in Allegheny County should be prepared for the countywide reassessment that will be effective for tax year 2012. All properties will be receiving new values upon which real estate taxes are based. Maiello Brungo & Maiello has compiled a tentative schedule of significant dates for the 2012 Reassessment Plan.

EVENT	TENTATIVE DATE
New 2012 assessed valuations begin to be mailed:	July-August 2011
Opportunity to challenge correct factual property description errors:	Fall 2011
New 2012 assessments certified:	January 2012
2012 assessment appeals accepted:	January 2012
2012 appeal hearings begin:	January 2012
2012 appeal deadline:	March 31, 2012
Appeal hearings continue:	Through 2012

MB&M represents property owners in real estate tax assessment appeal cases throughout Western Pennsylvania. MB&M formulates strategies to protect the monetary interests of property owners and has a team of attorneys that handle all types of residential and commercial property appeals, large and small. Past examples of favorable outcomes for our clients include the reduction of an assessment on a commercial bank building which saved the client over $55,000.00 in taxes; winning a tax refund of $49,396 for an office building; successfully defending a homeowner in an appeal filed by a taxing body which reduced the client's potential tax increase by $5,587 annually; and appealing a homeowner's assessment which ultimately saved the client $10,498 annually in real estate taxes.

We invite you to contact Attorneys Donald Walsh and Jennifer Cerce to make an appointment to discuss the assessed value of your property. Donald can be reached at 412.242.4400 or daw@mbm-law.net. Jennifer can be reached at 412.242.4400 or jlc@mbm-law.net.

NEW ADA REGULATIONS TAKE EFFECT

On March 15, 2011 new Americans with Disabilities Act ("ADA") regulations took effect governing access to state and local governmental facilities and other facilities generally open to the public. Compliance with these 2010 standards will be required for new construction, alterations and barrier removal on March 15, 2012. The new regulations require facility owners to afford easier access to the disabled on everything from amusement rides to judicial facilities. The regulations also create new rules for ticketing, service animals, wheel chairs and other power driven mobility devices, and lodging facilities. The new regulations also provide a general safe harbor under which elements in covered facilities built in compliance with the 1991 standards or UFAS would not be required to be brought into compliance until the elements were subject to a planned alteration. Similar safe harbor rules were adopted for path of travel elements to an altered area.

Visit the Newsletter section of our website, mbm-law.net to access the complete 2010 ADA Revised list of Requirements. If you have any questions, please contact David Raves dr@mbm-law.net.

MB&M REAL ESTATE & CONSTRUCTION NEWS

Spring 2011

The MB&M Real Estate & Construction Law Team:

Alfred C. Maiello	acm@mbm-law.net
Lawrence J. Maiello	ljm@mbm-law.net
John H. Prorok	jhp@mbm-law.net
David Raves	dr@mbm-law.net
Kathleen C. McConnell	kcm@mbm-law.net
Jennifer L. Cerce	jlc@mbm-law.net
Donald A. Walsh, Jr.	daw@mbm-law.net

To speak with any of our attorneys, call 412-242-4400.

DAVID RAVES TO SPEAK AT SBA ANNUAL MEETING

David Raves of the Construction Law Team spoke on Teaming Arrangements at the Small Business Administration 8(a) Annual Meeting. The event was held at the U.S. Department of Energy on Friday, April 1, 2011. Mr. Raves' presentation will focus on the revisions to the regulations governing the 8(a) Business Development program, the first comprehensive revisions since 1998. The rule changes took effect March 14, 2011. If you have any questions, contact David Raves at dr@mbm-law.net.