WENGER & CRONIN, P.C.

LEGAL MATTERS

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Commercial Broker Liens

As a result of recent legislation, commercial brokers now have lien rights which should assist in protecting the right for payment for services rendered. Historically, commercial brokers often found themselves in a compromised situation with their seller clients. If a seller decided on the eve of a transfer not to pay the broker, the broker was required to seek court approval before having the right to file a lien against property owned by their client. The only process available was cumbersome and time consuming with the result being that the transaction closed before the lien was recorded and without resolving the fee dispute between the seller and the broker.

By following the process, a broker can obtain some security for their fee while allowing the transaction to proceed to closing.

The new law gives the broker rights similar to those who provide services to improve real estate. Just like the roofing contractor who has the right to file a mechanic's lien, the commercial broker has the right to file a broker's lien. If the broker is entitled to a fee, commission or management fee according to a written agreement with the seller, buyer or tenant of commercial real estate, the broker has the right to record a notice of lien in the amount of the fee. The statute authorizes the broker to file the lien before the transfer if the relationship is with the seller and after the transfer if the relationship is with the buyer.

After the lien is filed, the parties may agree to an escrow arrangement to permit the transaction to move forward and provide security to the broker in the event that the broker can establish the right to be paid. Basically, the seller agrees to deposit sufficient proceeds from the sale to pay the broker if the broker prevails. In addition, the parties can agree on a process to resolve the dispute. If they cannot agree, the broker can proceed to court. The statute also permits the broker to recover the costs and fees associated with the action if the broker is successful in court.

One Less Tax!

Effective January 1, 2003, the New Hampshire Legacy and Succession Tax has been repealed. This tax on assets passed after death is also being challenged in the State Supreme Court in a case filed in 2002. If the Court determines the estate tax was unconstitutional before its repeal, estates with pending refund applications may be entitled to a refund. The refund request can be filed at any time within two years after the tax was paid.

Case Notes

On April 11, 2003, our Supreme Court issued an interesting opinion which sheds new light on the relationship between developers and local planning boards. A Concord developer sought site plan approval to construct a shopping center on a 35 acre parcel of property. After a lengthy application process and a number of public hearings, the planning board unanimously voted to deny the application because the plan did not comply with the requirements of the ordinance. The developer appealed to the Superior Court.

The developer argued that the planning board failed to provide "meaningful assistance" asserting that the Planning Board should have shared its concerns and provide an opportunity to address the concerns. The Supreme Court disagreed with the developer and concluded that the planning board had acted appropriately in this case. However, the Court reminded planning boards "that it is their function to provide assistance to their citizens, and that the measure of assistance certainly includes informing applicants not only whether their applications are substantively acceptable, but also whether they are technically in order." In addition, planning boards cannot ignore applications "or otherwise engage in dilatory tactics in order to delay a project." Thus, according to the comments in this recent case, the planning board must do more than conclude that an application is complete. Some comment on the substance of the plan is not only appropriate but arguably required.

Small Businesses and The Americans With Disabilities Act

The Americans with Disabilities Act (ADA) is a federal civil rights law designed to prevent discrimination and enable individuals with disabilities to participate fully in all aspects of society, in particular, the job market. The ADA also prohibits harassment of an individual on the basis of disability and mandates that employees offer reasonable accommodations to disabled employees. The law applies to all businesses with 15 or more employees.

"The accommodation is only required if the employee requests it or if the employer has reason to know the employee needs it."

According to the Equal Employment Opportunity Commission, in 2002 the United States' 25 million small businesses employed more than 50% of the nation's private work force and generated more than half of the nation's gross domestic product. Interestingly, in terms of ADA enforcement, it is small business employers that are most at risk of being sued under the ADA. The good news is that the risk can be minimized by keeping some important facts in mind when managing employee matters.

The ADA applies to disabled individuals who are qualified for the job they seek. An individual is disabled under the ADA standards if she is substantially limited in one or more major life activities, such as sleeping, standing, and sitting. The evaluation for a disability must take place after all medications and corrective measures are taken into account. The person must also meet all job related requirements, including education and training. If an individual is both disabled and qualified, she may be entitled to the protections afforded by the ADA. This means the employee may be entitled to a reasonable accommodation to insure her equal access and opportunity to work. The accommodation is only required if the employee requests it or if the employer has reason to know the employee needs it.

When a disability issue arises with an employee, an employer should start by deciding what the essential job functions are for the particular position. Then, explore your accommodation options and talk with the affected employee. There are many ways to assist disabled employees so that they may participate fully in the workplace. An understanding of the employee's needs and the requirements of the ADA is essential.

To Compete or Not To Compete?

Good employees are of vital importance to any successful business. Thus, employers invest a great deal of effort to build a workforce. In many businesses, the first six months to a year with a new employee are an investment in the future. Employers divulge valuable business information, client names and contact information, plans and strategies for the future, and sensitive knowledge unique to the business. When the relationship works, the employee takes it all in, devotes significant time and energy to learning the business and the employer and employee grow together with positive results for all.

Sometimes, the relationship does not work. For any number of reasons, the relationship ends and the employee has a wealth of knowledge and company-sensitive information. The employee adds the recent work experience to a resume and seeks to establish a new business or move on to a new employer quickly. Most likely, the new employment position is very similar to the last one. Thus, the six month to twelve month employer investment benefits a competitor.

Can anything be done to protect the employer's investment while treating the employee fairly? In New Hampshire, employee agreements not to compete with employers after the termination of employment are enforceable if the restrictions on the employee are no greater than necessary to protect the employer's legitimate interests. To the contrary, a general prohibition on work in a particular industry is not enforceable.

A properly drafted covenant not to compete must weigh the competing interests of allowing employees to remain employable in an industry with the "assets" that belong to the employer. Our Supreme Court has articulated a list of legitimate interests that employers may protect in a covenant not to compete. They include employer's trade secrets which have been communicated to the employee during the course of employment; confidential information communicated to the employee during the course of employment that are not trade secrets, such as information on a unique business method; an employee's special influence over customers obtained during the course of employment; contacts developed during employment; and the employer's development of goodwill and a positive image. When the scope of a covenant is challenged, courts will generally enforce the covenant only to the extent necessary to protect these legitimate interests of the employer.

Pending Legislation: Workforce Housing

Developers of apartments and multi-family projects are meeting increasing resistance from municipal land use officials. Most projects are confronted with strong opposition from neighbors seeking to exclude housing for low and moderate income residents from their neighborhood. Such opposition is often referred to as the "NIMBY" or "not in my backyard" syndrome. In addition, planning and zoning boards are often utilizing innovative land use methods as a mechanism for exclusion under the guise of "growth control."

Developers may be relieved to know that new legislation is coming to the rescue. A bill pending in the New Hampshire State Senate would require communities to build, or allow to be built, affordable workforce housing and provide an expedited appeal for projects that are denied. This bill is designed to provide an approval process that is consistent with the limitation of municipal power found in the zoning enabling legislation. Section III-e provides that "all citizens of the state benefit from a balanced supply of housing which is affordable to persons and families of low and moderate income. Establishment of housing which is decent, safe, sanitary and affordable to low and moderate income persons and families is in the best interests of each community and the state of New Hampshire, and serves a vital public need."

But just what exactly *is* workforce housing?

According to this bill, workforce housing refers to housing units which are affordable to a household whose income is 80% or less than the median income of the area in which the units are located. Furthermore, "affordable" means that the rent plus the cost of utilities for the unit cannot exceed 30% of the earnings of the family. Housing developments that exclude minor children from more than 20% of its units, or in which more than 50% of the units have less than 2 bedrooms, do not constitute workforce housing.

Proponents of this bill anticipate that this law will greatly alleviate the severe shortage of affordable housing to working households in the state of New Hampshire. Such a shortage poses a real problem when it comes to expanding the state's labor force, and is having a negative impact on many communities that wish to attract new businesses. Nevertheless, these very communities view the creation of such housing as too financially burdensome on schools and municipal services, and as a result the development of workforce housing has been seriously curtailed. Therefore, the pending legislation will work to remove many of the barriers to developers by providing effective and expeditious procedures that will aid both the private and non-profit sectors' ability to readily respond to the critical need for affordable housing.

If enacted, this new law may limit municipal roadblocks, achieve a balanced supply of housing by increasing the supply of workforce housing, and serve a statewide interest by fostering a productive, self-reliant workforce and promoting economic growth.

Get The Lead Out!

Recently we received a call from a young expectant mother with an eighteen-month-old child. She had a question about lead paint. She rented an apartment in an older building that the landlord was hoping to sell. Because of the many showings of the building, she found herself cleaning almost daily. She noted that she was sweeping up paint chips. Apparently, the broker listing the property asked the landlord if he had complied with state and federal lead paint disclosure laws. On the day before a scheduled caesarean section, our young mother received a form for her signature disclosing the possible existence of lead paint.

Her landlord broke the law. Both state and federal laws require a specific lead paint disclosure for all housing built before 1978. In addition, the landlord must provide a federal publication entitled "Protect Your Family from Lead in Your Home" to all tenants before a lease agreement is signed. This fifteen-page publication explains the risks of lead paint exposure, how to test for and find lead paint, and what to do about it.

In addition to the disclosure of general information related to lead paint, landlords must disclose any known lead-paint sources. The regulations require landlords to disclose the location of all lead paint and the conditions of all lead painted surfaces. Landlords must also provide copies of any records or reports regarding the presence of lead paint. If there are no records or reports, landlords must state that fact. Finally, the tenant must acknowledge receipt of the lead paint disclosure, pamphlet and related information. Failure to comply with these disclosure requirements risks significant fines and criminal sanctions.