BLANK ROME LLP
COUNSELORS AT LAW

DECEMBER 2016 • VOL. IV, ISSUE 3

REAL ESTATE

FOUNDATION

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INSIDE

THIS ISSUE

BY PELAYO COLL AND SAMUEL M. WALKER

A Note from the Chairs

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We are pleased to present our last edition of *Foundation* for the year, and hope that you have enjoyed the issues we have put together in 2016. We have worked hard to provide you with timely and relevant articles in a user-friendly format, and are pleased to see that our readership continues to steadily increase.

As another year draws to a close, we also want to take this opportunity to express our gratitude for your continued loyalty and trust. This past year has been another busy year in the real estate world and we are proud that you have entrusted us with many significant transactions. We anticipate continued strength in the real estate market as the new year begins, and we look forward to partnering with you as 2017 unfolds.

In this issue, we discuss CFIUS (the Committee on Foreign Investment in the United States) as it pertains to national security considerations, lending transactions, and the committee's process itself in our article, "Understanding the Role of CFIUS in Real Estate Transactions with Foreign Buyers and Lenders." In "The City of Philadelphia School District Challenges 2017 Taxpayer Assessments," we review the procedural background and developments involving the District's unprecedented action of recently filing a number of appeals with Philadelphia's Board of Revision of Taxes. "Owner Remedies in Construction Agreements" presents a discussion of the issues surrounding certain remedies available to an owner or developer of a project under a construction agreement with a prime contractor (and, in some cases, with a subcontractor). We also provide an overview of the complexities involved in condominium ownership of retail space in "Condominium Ownership in a Retail Leasing Transaction—Examining the Unintentionally Omitted." Lastly, our tax attorneys provide a special feature article, "Post-Election 2016 Tax Round-Up," which explores real estate implications with regards to potential tax reforms in the new political environment.

We also take pride in sharing with you our real estate group's recent media placements, speaking engagements, and industry recognitions, as well as some noteworthy deals and Firm news.

We hope you enjoy the articles featured in this edition, and find them to be informative as well as timely.

Stay safe and have a terrific holiday season. ◻

Understanding the Role of CFIUS in Real Estate Transactions with Foreign Buyers and Lenders

BY BRIAN S. GOCIAL, GEORGE T. BOGGS, AND MARTIN LUSKIN

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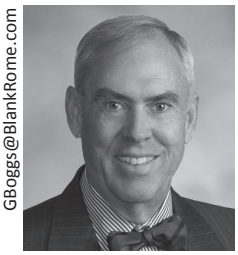

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The Committee on Foreign Investment in the United States ("CFIUS") is an interagency committee, chaired by the Department of the Treasury, authorized to review and investigate foreign investments in the United States to evaluate potential threats to national security posed by such transactions. CFIUS has authority to initiate review of almost any foreign investment in a U.S. company that may negatively affect the national security of the United States. Key national security concerns historically considered by CFIUS include whether the transaction involves secured facilities, government facilities, export-controlled information, U.S. government contracts, critical infrastructure, a foreign government purchaser, the opportunity for surveillance or sabotage, the acquirer's prior dealings with governments or entities unfriendly to the United States, and the post-acquisition plans for the acquired business. Chinese investments in the United States continue to be the leading source of most cases filed with CFIUS, followed by investments from the United Kingdom, Canada, Japan, and France. In 2014, notices from Germany, Israel, the Netherlands, South Korea, Switzerland, and the United Kingdom doubled from the prior year levels.

> ► Recent transactions reviewed by CFIUS demonstrate that CFIUS' interest extends far beyond those involving the traditional defense industrial base to include real estate located in proximity to critical infrastructure or sensitive government installations.

While notification to CFIUS of a contemplated transaction is voluntary, notification can be critical to protect the expectations and investments of all parties involved. If CFIUS finds that a transaction presents national security risks, it may impose conditions on the parties to mitigate such risks or recommend that the president block the transaction entirely. Most recently, on December 2, 2016, President Obama issued an executive order blocking the proposed takeover by a Chinese company of a German semiconductor equipment maker with a U.S.-based subsidiary due to national security concerns. CFIUS' authority to review a transaction is not time-barred; therefore, a transaction not submitted to CFIUS for review may be subject to scrutiny and potential unwinding at any time if it is determined that the transaction threatens or impairs national security. On the other hand, once CFIUS completes review of a transaction, the parties receive a "safe harbor" from subsequent review with respect to that transaction.

National Security Considerations: Critical Infrastructure and Proximity

CFIUS has jurisdiction to review a "covered transaction," defined as "any transaction…by or with any foreign person, which could result in control of a U.S. business by a foreign person."[1] "Control" is defined expansively to include direct or indirect control, whether or not exercised, through a majority ownership interest, a dominant minority ownership interest, board representation, or "other means, to determine, direct, or decide important matters affecting" the U.S. business.[2]

Recent transactions reviewed by CFIUS demonstrate that CFIUS' interest extends far beyond those involving the traditional defense industrial base to include real estate located in proximity to critical infrastructure or sensitive government

(continued on page 3)

Understanding the Role of CFIUS in Real Estate Transactions with Foreign Buyers and Lenders (continued from page 2)

installations. For example, in 2009, CFIUS reviewed a Chinese company's acquisition of a U.S. mining company and raised concerns about the proximity of the properties to sensitive military facilities, including the TOPGUN flight training school. CFIUS reportedly intended to recommend that the president block the transaction. As a result, that deal collapsed. In 2012, a Chinese-owned company was forced to divest its interest in a wind farm located in proximity to a naval base after President Obama ordered the divestment based on CFIUS' recommendation. In 2015, CFIUS reviewed a Chinese-based company's purchase of the Waldorf Astoria hotel in New York City. Although CFIUS ultimately determined to take no action with respect to that transaction, CFIUS' review of the acquisition further demonstrates the expansive scope of CFIUS' authority and interest in reviewing real estate transactions involving foreign parties.

Lending Transactions

While a loan or similar financing by a foreign person to a U.S. business does not generally, by itself, constitute a covered transaction, a loan or similar financing arrangement through which a foreign person obtains an interest in profits of the U.S. business, the right to appoint directors of the U.S. business, or other rights typically characteristic of an equity investment rather than a loan, may constitute a covered transaction.[3] Similarly, where a foreign lender obtains the right to control the U.S. business upon default or another event, CFIUS may review the transaction once there is a significant possibility that the foreign person will obtain control of the U.S. business due to the imminent or actual default of the loan or financing arrangement.[4]

The Process

The CFIUS process is initiated by a written notice submitted jointly by the buyer and seller. The notice must include detailed information about the proposed equity structure, as well as detailed corporate and personal identifier information for all entities in the proposed chain of ownership and their officers and directors or other key management personnel. Pre-filing of a draft notice at least five business days prior to the filing of the formal notice is highly recommended but not mandatory. After the formal filing is made, CFIUS will confirm that the filing is complete and has been accepted, after which it has a statutory requirement to advise the parties within 30 days as to whether it intends to conduct a further investigation or, alternatively, that it has determined that there are no issues of national security to warrant such further investigation. If no investigation is required, the matter will be closed and the parties may proceed with the transaction. If a further investigation proceeds, it must be concluded within 45 days. If CFIUS determines that the transaction creates a risk to national security, then it may require that the parties take certain steps to mitigate such risk (*e.g.,* restructure the transaction so that the foreign party does not have control over certain assets or business). If the parties refuse to implement the mitigation steps required by CFIUS, the matter may be referred to the president for a determination as to whether the transaction should be blocked or unwound. The president is required to make such a determination within 15 days of the referral from CFIUS.

Conclusion

Prudent buyers and sellers of U.S. real estate involving foreign interests must carefully analyze transactions for potential national security implications and plan to submit a CFIUS notice, where appropriate. Similarly, foreign lenders that obtain the right to control a U.S. business (whether exercised or not) through a loan or similar financing arrangement should consider the national security implications of the contemplated transaction and require the parties to seek CFIUS approval where appropriate in order to protect their investment. A CFIUS filing is detailed and time-consuming. Parties to real estate transactions involving foreign acquirers or lenders are therefore well-advised to analyze the national security implications of the transaction early in the due diligence process to determine whether submitting a CFIUS notice is warranted, and, if so, to plan at least four months to draft and submit the notice as well as receive a final determination from CFIUS. □

1. 31 U.S.C. §800.207.
2. 31 U.S.C. §800.204.
3. 31 U.S.C. §800.303(b).
4. 31 U.S.C. §800.303(a)(2).

BLANK ROME LLP
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Celebrating 70 Years

Dear Friends of Blank Rome:

Did you know that in 1946, Blank Rome started as a Philadelphia-based law firm of just two attorneys, then known as the law offices of Blank & Rudenko? This year we are celebrating our 70th anniversary by reflecting upon the many milestones and successes we have achieved on behalf of our clients, for the communities in which we live and work, and as an innovative firm that continues to grow and evolve.

As a friend of Blank Rome, I invite you to join us in celebrating the hard work and dedication that has transformed us from a small, regional firm to the current-day Blank Rome with 14 offices throughout the U.S. and in Shanghai and more than 620 attorneys.

To commemorate each turning point in our history, we've created an animated timeline that will guide you through the years and highlight important occasions along the way. I hope you'll spend a few moments navigating the facts, photos, interactive maps, and abbreviated history we've assembled here:

www.blankrome.com/70

It has been a true honor to lead Blank Rome through what have been some of our most transformative and successful years. With your ongoing support and confidence in us, we have stayed true to our culture, expanded our reach by practice and geography to meet our clients' needs, embraced technological advances, affected case law and legislation, and made a positive impact on our communities. Thank you for being a part of our history, and we look forward to what the future brings.

Sincerely,

Alan J. Hoffman, Chairman and Managing Partner
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Condominium Ownership in a Retail Leasing Transaction—Examining the Unintentionally Omitted

BY SAMUEL M. WALKER AND HENRI CHALOUH

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While leasing retail space in New York City can ordinarily prove to be a complex venture, condominium ownership of the space presents an added layer of complexity. A condominium regime allows a single property to be legally divided into individual units, each of which may be independently owned, operated, sold, and leased, but all of which are governed by (1) the condominium declaration, which creates such a structure; (2) the condominium's by-laws and rules and regulations; and (3) the board of managers responsible for the management of the condominium on behalf of the condominium association. The declaration, by-laws, and rules and regulations, commonly known as the "condominium documents," may have a significant impact on crucial leasing terms. Moreover, many key decisions inherent in a retail tenancy will likely require the prior approval of the board of managers. Because the board is not normally a signatory to the lease, however, landlords and tenants sometimes unintentionally omit the condominium's role in the transaction from their strategic considerations.

Elements of Condominium Ownership

The condominium documents lay out the rights and obligations of the parties bound by the condominium regime: the condominium unit owners, their tenants and mortgagees, and the board of managers. As these documents will be superior to the provisions of the retail lease, it is critical for the tenant's attorney to review the documents carefully before execution of the lease, determine if they pose any obstacles to the tenant's use or occupancy of the premises, and, if so, attempt to resolve or ameliorate these obstacles from the outset. This exercise is especially important when the landlord/unit owner is unaffiliated with the condominium association; it means the board of managers will have its own preferences and standards for approval that may not align with those of the landlord, which will in turn translate into more legwork for the tenant, now that it must obtain the approval of two different parties and satisfy the standards of each. As such, we recommend that condominium retail landlords, tenants, and their attorneys utilize the checklist below in an attempt to ensure that their transaction will go as smoothly as a traditional retail lease.

Avoiding Future Drawbacks by Front-Loading Efforts

Addressing the following items in advance of lease execution will allow retail parties to tackle potentially weighty issues head-on and may save a lot of time and headaches down the road.

1) It is important to confirm that the dimensions of the demised space fall within the boundaries of a "retail unit" as designated by the condominium documents. Any portion of the space situated outside these boundaries will likely not be operable for retail purposes, due to zoning or other restrictions.

2) The next step is to confirm that the intended retail use is permitted under the condominium documents. While newer condominiums are relatively flexible about permissible retail uses, older condominiums tend to be more stringent. If the condominium documents specifically prohibit the intended use or are unclear as to whether it is permitted, the parties should arrange for the board of managers' approval of the use by way of a letter agreement entered into prior to, or simultaneously with, lease execution, as more fully explained in item 3 below.

3) Inevitably, there will be certain tenancy details prohibited or regulated under the condominium documents. It is essential to identify these details and settle them directly with the board of managers prior to execution of the lease because any restrictive language in the condominium documents will supersede permissive language in the lease. In our practice, we routinely examine the condominium documents for any express or implied restrictions as to the following themes—some of which are common to every retail tenancy, while others may be unique to the needs of the tenant at hand—and handle them in a letter agreement between the tenant and the board of managers:

   a. Fundamental to virtually all retail tenancies, the initial build-out of the space and the tenant's storefront signage are topics generally covered in the condominium documents. The condominium association's involvement in these matters will vary from one scenario to

another, but often the tenant will be required to submit its build-out and signage plans to the board of managers for approval. To avoid surprises after lease execution, the tenant should have final plans—or, at the very least, conceptual or prototypical plans—approved in the letter agreement. Blade signage, sandwich and menu boards, and lettering on storefront glass sometimes will come into play and should be similarly approved in the letter agreement along with plans detailing their specifications, especially if they are standard features in the tenant's prototypical design model. Some tenants utilize signage or menus that are seasonally or periodically replaced or modified as part of uniform company-wide or regional patterns; any anticipated changes to the tenant's signage should be similarly approved, as even minor changes to the tenant's signage likely will be regulated under the condominium documents.

b. We have occasionally come across the so-called "retail control zone" concept in condominium documents, which grants the condominium association absolute or limited control over what a tenant is allowed to display, install, hang, and inscribe on the storefront glass and within a fixed area immediately abutting the interior and/or exterior sides of the glass. The restricted area will usually encompass the space from the glass to a point up to three feet away, and may affect a tenant's ability to place display mannequins, interior signage, hanging signs, and glass inscriptions. Therefore, tenants should consider trying to eliminate, or reduce the size of, the control zone, and, in situations where the condominium association insists on maintaining approval rights over control zone paraphernalia, asking the board of managers to approve—in advance of lease execution—any planned signage or materials requiring approval. If timing does not allow for such pre-approval, it is essential that the letter agreement require the board of managers to act reasonably in granting or denying such approval when requested.

c. It is imperative that tenants ascertain whether the condominium association is the party that signs tenant applications for government approvals and building permits associated with the build-out and operation of the space. If this is the case, the letter agreement should require the association's complete cooperation with the tenant in its pursuit of such approvals and permits—including prompt execution of applications—as well as appropriate remedies in the event the association fails to cooperate.

d. The hours during which a retail tenant may perform construction of its initial build-out and future alterations constitute another vital detail that likely will be regulated under the condominium documents. As such, depending on the specific tenant's needs, optimal time slots for construction should be negotiated and approved in the letter agreement. If the condominium project contains residential units, the board of managers may be hesitant to approve specific construction hours out of concern that the work may cause a nuisance or disturb the condominium's residents. If this happens, we find that having a tenant covenant to exercise reasonable efforts to minimize noise and disturbance to residential tenants of the condominium sometimes goes a long way in easing the board's concerns, increasing the likelihood that it will approve the requested time slots.

► It is imperative that tenants ascertain whether the condominium association is the party that signs tenant applications for government approvals and building permits associated with the build-out and operation of the space.

e. Finally, a retail tenant may need to install its own HVAC unit or utilize satellite dishes, equipment, or building services that will require access to, and use of, the roof, setback, terrace, or some other portion of the building under the control of another condominium unit owner or the board of managers. In each of these instances, access and use rights should be negotiated and laid out in a separate license agreement between the tenant and the party or parties whose approval is required for such rights, and, where appropriate, referenced in the letter agreement.

Conclusion

This article is intended to address the main issues retail tenants are likely to encounter when leasing space in a condominium project, but does not represent an exhaustive analysis of all such issues. Entering into a letter agreement directly with the board of managers to cover these issues can provide a measure of clarity for all parties involved. Given the complexity of these lease transactions, however, it is critical for the landlord, tenant, and condominium association in question to each engage counsel experienced in this area. □

Blank Rome's Real Estate Practice Ranked Top-Tier in *U.S. News – Best Lawyers®* 2017 "Best Law Firms"

Blank Rome LLP is pleased to announce that the Firm's real estate practice ranked tier one in the national *U.S. News & World Report – Best Lawyers®* 2017 "Best Law Firms" survey, and received numerous regional top-tier rankings throughout the Firm's offices. To view Blank Rome's full 2017 rankings, please click here.

Blank Rome's industries and services recognized in this year's survey include:

INDUSTRIES

- Energy
- Financial Services
- Gaming
- Healthcare
- Insurance Coverage
- Maritime
- Real Estate
- Zoning & Land Use

SERVICES

- Alternative Dispute Resolution
- Business Restructuring & Bankruptcy
- Commercial and Corporate Litigation
- Copyright
- Employment Litigation
- Environmental
- Equipment Leasing and Finance
- Finance
- Intellectual Property
- IP Litigation
- Labor and Employment
- Litigation
- Matrimonial and Family Law
- Mergers & Acquisitions
- Patent
- Policy and Political Law
- Securities
- Securities Litigation
- Tax
- Trademark
- Trusts & Estates
- White Collar Defense & Investigations

The U.S. News & World Report – Best Lawyers® survey rankings are based on a rigorous evaluation process that includes the collection of client and lawyer evaluations, peer reviews from leading attorneys in their field, and a review of additional information provided by law firms as part of the formal submission process. For more information on the methodology, please visit bestlawfirms.usnews.com. □

Owner Remedies in Construction Agreements

BY MICHAEL A. SCHEFFLER

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PARTNER

This article presents a discussion of the issues surrounding certain remedies available to an owner or developer of a project ("Owner") under a construction agreement with a prime contractor (*i.e.,* general contractor or construction manager, referred to below as "Contractor"), some of which is also applicable to the remedies available to the Contractor under its agreement with a subcontractor.

This discussion will highlight the main issues pertaining to principal remedies, but is not intended to serve as an exhaustive survey of all issues and remedies. Also, the article is based on New York State law, though most of the discussion is likely applicable to contracts governed by other state laws.

Termination for Cause

In the contract provision entitling the Owner to terminate the contract "for cause" (*i.e.,* breach of contract and other events), the term "cause" (or any other term used in its place, such as "breach" or "event of default") should be defined with specificity to avoid any ambiguity when the Owner exercises its termination right. Grace periods for curing a default are customary, but should not be granted for defaults incapable of being cured, such as a bankruptcy filing by the Contractor. Moreover, the grace period should be for a fixed period of time, not an open-ended period deferring the contract termination indefinitely—that is, for as long as the Contractor is diligently working towards remedying the default.

The Owner's initial contract draft may provide that all payments due to the Contractor are forfeited if the contract has been terminated for cause. The Contractor will likely request payment of any amounts earned through the date of termination. As a compromise, the contract can allow any earned payments to be made to the Contractor, but only after the project has been completed and only if and to the extent those payments exceed the damages the Owner incurred as a result of the Contractor's default.

It is important for the Owner to collect the Contractor's project documents on a regular basis during the course of the project (such as, for example, subcontracts, as-built drawings, and subcontractor warranties/guaranties), because it may be difficult to do so if the Owner terminates the contract for cause, or is battling with the Contractor over defaults that may lead to a termination.

It is also imperative that the prime contract provides that, at the Owner's election upon a termination of the prime contract, any or all of the subcontracts will be deemed assigned to the Owner, without the need for the Contractor to take any action. The subcontracts should contain a corollary provision. The subcontractors will likely want assurance that any payment default by the Contractor will be cured by the Owner upon any such deemed assignment. This requirement can be problematic for the Owner because of the possibility that, at the time of the deemed assignment, the Contractor will not have paid the subcontractors from funds it received from the Owner. The best way to mitigate this problem is to procure monthly lien waivers from the subcontractors so that there should be only a one-month deficit between the payment made to the Contractor and the payments received by the subcontractors.

Termination for Convenience

In addition to the standard right the Owner has to terminate the prime contract for cause, the prime contract should also allow the Owner to terminate the contract without cause. Given the need to move quickly when faced with an unsatisfactory Contractor (especially one not technically in default), it is important that the Owner have a termination right that does not require demonstrating that a default has occurred or waiting for grace periods to expire. Of course, the Contractor may require a termination or break-up fee, but such a fee may be less expensive than the additional costs potentially incurred by the Owner due to the delay resulting from a default-based termination.

Continuing to Work Despite a Dispute

It is essential for any construction project that the prime contract requires the Contractor to continue working even if there is a dispute with the Owner over payment or another matter. In exchange, the Contractor will likely want the Owner to agree to pay any undisputed amounts.

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Owner Remedies in Construction Agreements (continued from page 8)

Indemnification

The indemnification clause in a prime contract may require the Contractor to indemnify the Owner from any liability or losses arising from the Contractor's work. In response, the Contractor may seek to limit the scope of its indemnification to liability or losses arising from personal injury or property damage claims. Such a limitation will exclude contract breaches from the indemnification coverage. As common law affords the Owner the right to recover damages for contract breaches, however, limiting the indemnification remedy in this manner should not be objectionable. The one difference is that, under a standard indemnification provision, the Owner has the right to recover its legal fees as part of the indemnified damages, while common law does not similarly provide for such recovery. Therefore, without a contractual provision awarding legal fees to the prevailing party, omitting contractual breaches from the indemnification coverage would preclude the Owner from recovering those fees.

► In fact, the prime contract should provide that the Contractor must, at the Owner's discretion, either enforce the warranties and guaranties against the subcontractors, or assist the Owner in its enforcement of the warranties and guaranties.

Liquidated Damages

A liquidated damages provision in a contract will fix the amount of damages to which the Owner is entitled if the Contractor fails to timely complete its work or certain phases of the work. The principal issue with respect to a liquidated damages remedy is that it is generally the sole remedy available for delays; if the Owner's actual damages ultimately exceed the fixed liquidated damages amount, the Owner will not be able to recover the higher amount. On the other hand, a liquidated damages remedy allows the Owner to avoid proving its damages, or proceeding to court in order to recover the damages (as long as there is enough withheld from the Contractor to fund the liquidated damages). It is important to keep in mind that the amount of liquidated damages must be a reasonable approximation of the actual damages the Owner would incur by reason of the Contractor's delay.

The Contractor will likely request a cap on the total amount of liquidated damages, which may further increase the gap between the liquidated damages amount and the actual damages amount. One other potential problem is that the Contractor, when threatened with the assessment of liquidated damages, may sacrifice quality for speed in order to avoid being assessed.

Warranty/Guaranty

The Owner is, of course, the direct beneficiary under the guaranty and warranty provisions in the prime contract. The prime contract should require that the Owner be named a third-party beneficiary under the guaranties and warranties provided by each subcontractor (whether in its subcontract or a separate warranty/guaranty document). The Owner should also have the option of enforcing its rights against the Contractor or the subcontractors. If the Owner elects to proceed directly against a subcontractor while its warranty or guaranty rights against the Contractor have not yet lapsed, the Owner should involve the Contractor in the process in order to preserve its warranty and/or guaranty claims against the Contractor. In fact, the prime contract should provide that the Contractor must, at the Owner's discretion, either enforce the warranties and guaranties against the subcontractors, or assist the Owner in its enforcement of the warranties and guaranties.

Even though the Owner will have recourse against the Contractor, it is important for the following reasons that the Owner ensure that the warranty and guaranty benefits it expected to receive from the subcontractors are actually memorialized and the documents granting such benefits are delivered to the Owner:

- The warranty or guaranty periods in the prime contract may be shorter than the periods afforded by a particular subcontractor.
- If the Contractor becomes insolvent or otherwise ceases to operate its business, the only recourse available to the Owner may be against a subcontractor.
- There may be an independent business relationship between the Owner and the Contractor, making it inadvisable for the Owner to seek recourse against the Contractor.

When assessing the Contractor's responsibilities, the enforcing party should make sure it reviews any warranties or guaranties contained in the design specifications, in addition to those set forth in the contract.

It is also important to note that if a warranty breach is discovered during the "guaranty" period, then the breaching party should be given the opportunity to remedy the defective work; otherwise, that party may have a defense to a damage claim under the warranty provision (at least as to the amount of damages sought), arguing that it could have mitigated the damages if it had corrected the defect itself. After the guaranty period has expired, there is no obligation to afford the breaching party the right to repair the work itself, but there may be business or practical reasons to do so.

Prompt Payment Act

The Owner's rights and remedies may be limited by a Prompt Payment Act, which may override provisions in the prime contract, affecting such issues as the time period for payment to the Contractor, the Contractor's right to suspend its work for non-payment, interest chargeable on late payments to the Contractor, and other contractual matters.

Waiver of Consequential Damages

If the Contractor requests a waiver of its liability for consequential damages incurred by the Owner, and the Owner acquiesces, then, at the very least, there should be a reciprocal waiver benefitting the Owner. Also, the Owner should consider excluding damages arising from such actions as willful misconduct, gross negligence, or breach of confidentiality provisions.

Force Majeure

A prime contract's *force majeure* provision entitles the Contractor to a time extension upon the occurrence of a *force majeure* event (and possibly reimbursement of additional costs incurred). One of the key issues for the Owner is to ensure that the Contractor provides notice of the purported *force majeure* within a designated period of time. The Owner does not want to receive a notice months after the occurrence of such an event, when it would be much more difficult to confirm the existence and duration of the event and assess the validity of the Contractor's delay claim. The Contractor should also be required to provide a specific statement as to how the *force majeure* event created a delay in the Contractor's work or caused the Contractor to incur additional costs, and as to the duration of such a delay or the amount of such additional costs. If the time or cost impact on the Contractor's work cannot be ascertained at the time the Contractor's notice of the event is due, then the Contractor should be required to deliver such a statement promptly after the conclusion of the event or the impact becomes known. Finally, the Contractor should be obligated to mitigate, if possible, such time or cost impact.

Conclusion

There are many considerations that an Owner must take into account in drafting the remedy provisions in its construction contracts, and the enforcement of these remedies must adhere closely to the requirements of those provisions. Your lawyer should help you craft remedies that address these considerations, and are capable of being enforced expeditiously. ◻

Blank Rome Points of Interest

Media

Blank Rome Earns Perfect Score in 2017 Corporate Equality Index

Blank Rome LLP received a perfect score of 100 percent on the 2017 Corporate Equality Index ("CEI"), a national benchmarking survey and report on corporate policies and practices related to LGBT workplace equality, administered by the Human Rights Campaign ("HRC") Foundation. With this score, Blank Rome has been designated for the second year in a row as a "Best Place to Work for LGBT Equality" by the HRC, and joins the ranks of 517 major U.S. businesses that also earned top marks this year. To learn more, please click here.

Blank Rome Joins Diversity Lab's Women in Law Hackathon Alliance

Blank Rome LLP has joined the Women in Law Hackathon Alliance, Phase II of Diversity Lab's Women in Law Hackathon initiative that brings law firms from across the country together to increase gender parity in the top ranks of the legal profession. To date, 36 law firms, including Blank Rome, have signed on to join the Hackathon Alliance, as well as several legal departments that have agreed to partner with Diversity Lab and the participating law firms. Blank Rome joined the Hackathon Alliance after also participating and competing in the inaugural Women in Law Hackathon, a Shark Tank-style competition held in June 2016. To learn more, please click here.

Blank Rome's 2016 Adopt-A-Center Program Presents Live Performing Arts Event

Blank Rome LLP selected The Advot Project as the recipient of its 2016 Adopt-A-Center Program, which annually selects a Los Angeles-based nonprofit organization that benefits children and families in the community who are in need of outreach and support. On Sunday, October 30, at the Broad Stage in Santa Monica, Blank Rome and The Advot Project hosted "Listen," a special performing arts event presenting music, dance, and original poetry created and performed by the students of The Advot Project, and featuring guest musicians and singers. The sold-out event was enjoyed by an audience of 500 and raised more than $25,000 for The Advot Project. To learn more, please click here.

To view all of Blank Rome's noteworthy news and media, please visit www.blankrome.com/news.

Recognitions

Blank Rome's real estate practice ranked tier one in the national *U.S. News & World Report – Best Lawyers®* 2017 "Best Law Firms" survey, and received numerous regional top-tier rankings throughout the Firm's offices. For more information, please see page 7.

To view all of Blank Rome's recent recognitions, please visit www.blankrome.com/recognition.

Speaking Engagements

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ADAM LAVER

Blank Rome Partner Adam E. Laver led the CLE panel, "Fundamentals of Real Estate Tax Assessment Appeals and Minimization Strategies in Philadelphia," at the Pennsylvania Bar Institute's 20th Annual Real Estate Institute, on Thursday, December 8, 2016. The panel discussed the procedures and general deadlines for perfecting appeals to Philadelphia's Board of Revision of Taxes, as well as other topics such as the time and local rules of filing and the contents of appeal pleadings, to name a few.

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MIKE MARGOLIS

Blank Rome Partner Mike Margolis participated in:

The 2016 Private Fund & Real Estate Opportunities Forum in Shanghai, China, on Wednesday, November 16, 2016. Mr. Margolis moderated the panel, "Direct vs. Indirect Real Estate Investment & Portfolio Diversification—The Pros & Cons, Properly Sourcing & Evaluating Deals, and Offsetting High Risk Investments with Safe Long-term Strategies," and served as a panelist on "Entity Formation, Control Issues, and U.S. Choice of Law Provisions."

"Breaking Ground: Chinese Investment in U.S. Real Estate" Dialogue and Report Launch on Tuesday, November 15, 2016, at the Shenzhen Vanke Qianhai International Conference Center. Mr. Margolis was invited to speak on Chinese investment in the U.S. real estate market, emerging trends in the U.S. real estate market, commercial and residential real estate opportunities in America, and the challenges and processes of investing in one of the world's most lucrative real estate markets.

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PHILIP ROSENFELDT

Blank Rome Partners Philip R. Rosenfeldt, Jonathan A. Loeb, and Harris N. Cogan presented at the 2016 International Council of Shopping Centers' U.S. Shopping Center Law Conference in Hollywood, Florida, October 26-29, 2016. Mr. Rosenfeldt co-presented on "The ABCS of Old REAS and CC&R" and Mr. Loeb and Mr. Cogan led a roundtable discussion on "Enforceability of Exclusive Dealing Provisions in Lease/Purchase Agreements."

To view all of Blank Rome's recent speaking engagements and events, please visit www.blankrome.com/events.

Post-Election 2016 Tax Round-Up

BY MICHAEL I. SANDERS AND DUSTIN W. LAUERMANN

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2015-2016 NMTC Allocations

On November 17, the U.S. Department of the Treasury's Community Development Financial Institutions Fund ("CDFI Fund") announced its 2015 and 2016 New Markets Tax Credit ("NMTC") allocations. The CDFI Fund awarded seven billion dollars in NMTCs to 120 organizations in 36 states, the District of Columbia, and Puerto Rico.

Since the NMTC Program was established in 2000, the CDFI Fund has awarded more than $50 billion in NMTCs, which have created jobs and stimulated economic growth in rural and low-income areas throughout the United States by financing over 4,800 businesses. Moreover, the federal government's return on investment has been tremendous—for each dollar invested by the CDFI Fund into the NMTC Program, there have been eight dollars invested from the private sector.

The Protecting Americans from Tax Hikes Act of 2015 ("PATH Act") authorized $3.5 billion to be allocated through the NMTC Program through 2019. The NMTC Program provides an excellent opportunity for commercial real estate developers looking to finance developments in rural or low-income areas. Allocatees are actively looking to invest in projects in these areas. Recently, Blank Rome LLP attorneys represented rPlanet Earth, a Los Angeles manufacturing company, in a $21 million NMTC deal in Vernon, CA.

Tax Reform and Real Estate Deals

It has been 30 years since the Tax Reform Act of 1986 was enacted. Both Democrats and Republicans have expressed an interest in reforming the Internal Revenue Code (the "Code"). In the wake of the election last month, the legal community and policy wonks have been trying to read the tea leaves and discern what might happen with tax reform now that the Republicans control both houses of Congress and the presidency. At the outset, it is worth noting that no one knows what will actually happen with tax reform. However, broad outlines have emerged based on President-elect Donald Trump's tax plan ("Trump Plan") and the House GOP blueprint for broad income tax reform ("House Plan") unveiled by Speaker Paul Ryan in June 2016, which are compared below.

> ► If House Republicans insist on revenue neutral tax reform legislation, eliminating tax credits will be a tempting revenue source to offset the cuts in corporate and/or individual rates.

Reduced Business Tax Rates

Currently, the top corporate tax rate is 35 percent. Both the House Plan and Trump Plan aim to reduce the corporate income tax rate. The Trump Plan calls for a reduction of the corporate rate to 15 percent while the House Plan supports a reduction of the corporate rate to 20 percent. Both plans would eliminate the corporate alternative minimum tax. The House Plan calls for a new tax rate of 25 percent for sole proprietorships or pass-through entities (*e.g.,* partnerships, S corporations, and limited liability companies), so the income from these entities would no longer be taxed at individual tax rates, which currently top out at 39.6 percent. The Trump Plan would permit owners of pass-through entities to elect to be taxed at a flat rate of 15 percent rather than at their individual income tax rate.

Capital Investments and Depreciation

The Trump Plan would permit firms engaged in manufacturing in the United States to elect to "expense" (*i.e.,* immediately deduct) capital investments while losing the ability to deduct corporate interest expense. Once made, the election could be revoked within the first three years thereafter; however, the election becomes irrevocable after three years. The House Plan would also provide a full and immediate deduction on capital investments on both tangible property (*e.g.,* equipment), intangible assets (*e.g.,* intellectual property), and real property other than land (*e.g.,* buildings). Both plans would simplify the straight-line and accelerated depreciation methods in the current code.

Tax Credits

The Trump Plan is silent on tax credits. However, President-elect Trump utilized the historic preservation tax credit to help finance the development of the Trump International Hotel on the site of the Old Post Office Pavilion building in Washington, D.C. The House Plan would limit net operating loss deductions and calls for the elimination of the "Section 199 deduction" (a deduction for domestic production activities) and all business credits other than the research and development credit. Although Section 199 of the Internal Revenue Code is the only specific section mentioned, there is some speculation that the House Plan would eliminate energy credits, low-income housing tax credits, and historic preservation tax credits, as well. If House Republicans insist on revenue neutral tax reform legislation, eliminating tax credits will be a tempting revenue source to offset the cuts in corporate and/or individual rates.

► The Trump Plan is silent on tax credits. However, President-elect Trump utilized the historic preservation tax credit to help finance the development of the Trump International Hotel on the site of the Old Post Office Pavilion building in Washington, D.C.

How Could Reform Happen?

There are two paths tax reform could take. If there is broad bipartisan support in both houses of Congress for a complete overhaul of the tax code rather than just corporate tax reform, we may see the normal tax legislative process take place (*i.e.,* the House passes the tax reform legislation, followed by the Senate, and it is signed by the president). However, in the absence of bipartisan support for a complete overhaul, Republicans in the Senate may use a process known as budget reconciliation, whereby they would only need 51 votes to pass tax reform legislation in the Senate instead of the usual 60 votes required for most legislation. Senator Orrin Hatch (R-UT), Chair of the Senate Finance Committee, has stated on the record that he wants tax reform to be accomplished "in a bipartisan way." With only 52 Republican senators in the Senate, however, it may be difficult to pass partisan tax reform legislation through budget reconciliation.

Conclusion

It is too early to tell what will happen regarding tax reform. There could be a complete overhaul of the Code or only corporate tax reform. Similarly, there could be bipartisan reform legislation or a partisan bill passed through budget reconciliation. Regardless of what form the new tax legislation takes, Blank Rome LLP clients and prospective clients are uniquely positioned to engage the services of Blank Rome Government Relations LLC ("BRGR") to help shape to their benefit any tax reform legislation that will ultimately be enacted. Our BRGR professionals have considerable experience providing strategic advice on legislative issues in the real estate and affordable housing area, and are knowledgeable about the new market, low-income housing, and historic preservation tax credits that are important to our real estate clients. Our clients have included private developers, municipal authorities, state financing agencies, public housing agencies, and nonprofit organizations.

If you are concerned about how potential tax reform legislation may affect you or your business, or if you want the opportunity to shape real estate provisions in upcoming tax reform legislation, please do not hesitate to contact a member of Blank Rome's real estate practice group, who can put you in contact with the appropriate member of our BRGR team. ◘

The City of Philadelphia School District Challenges 2017 Taxpayer Assessments

BY PETER F. KELSEN

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PARTNER

In an unprecedented action, the City of Philadelphia School District (the "District") recently filed a number of appeals with Philadelphia's Board of Revision of Taxes, seeking to increase the 2017 real estate tax assessments set for approximately 175 high-profile properties. These market value appeals were filed with the Board of Revision of Taxes on or about October 3, 2016, by counsel representing the District, challenging the assessments of a wide range of properties, including office buildings, apartment buildings, and retail facilities. Although many of the properties whose assessments were so appealed had been recently sold, a substantial number had not been the subject of a recent transfer.

Procedural Background

These appeals are currently under review by the Board of Revision of Taxes and, as of this date, many of them have been dismissed. Should the District wish to contest these dismissals, it will file an appeal to the Court of Common Pleas of Philadelphia County. We expect that appeals will be filed. It is worth noting that, at this time, the City of Philadelphia and the Office of Property Assessments are not participating in the District challenges.

While school district tax appeals have become quite common in the Philadelphia region (many suburban property owners have been subject to such challenges), this is a case of first impression involving properties in the City of Philadelphia.

Related Developments

Determining whether or not the District has standing to file its selective tax assessment appeals, however, is essential to their disposition. To that end, an appeal filed in a separate case by a group of multifamily property owners challenging the legal right of a suburban school district to file selective assessment appeals is currently pending before the Supreme Court of Pennsylvania. The case, *Valley Forge Towers Apartments LLP, et al. v. Upper Merion Township Area School District and Keystone Realty Advisors, LLC,* No. 49 MAP 2016, has been briefed and is awaiting argument and decision by the court. The court's decision will be of major interest to both taxing authorities and property owners and will hopefully provide a judicial determination and framework concerning the right of taxing authorities, including school districts, to pursue selective tax assessment appeals in Pennsylvania. It should be noted that in the Valley Forge case, both the trial court and the appellate court ruled in favor of the school district's right to file such appeals.

Conclusion

We will provide updates to our clients as more information becomes available. Any questions regarding these appeals should be directed to Peter F. Kelsen, chair of Blank Rome's Philadelphia Tax Assessment practice. ◻

Noteworthy Real Estate Deals

Blank Rome LLP Recently Represented:

- **DRA Advisors LLC, in …**
  - **the acquisition of the Empire Portfolio,** under a joint venture with DLC Management Corp., a New York-based private owner and national operator of retail centers. The Empire Portfolio includes 15 shopping centers totaling 4.3 million square feet throughout Western New York, with its assets featuring high-quality, national retail tenants, including The Home Depot, Lowe's, PetSmart, Marshalls, Dick's Sporting Goods, T.J. Maxx, Tops Markets, Price Chopper, and LA Fitness. The portfolio was simultaneously closed through four separate loan pools from Wells Fargo, M&T, and Morgan Stanley.
  - **the acquisition of Brook Highland Plaza,** under a joint venture with DLC Management Corp. Brook Highland Plaza is a 550,000-square foot power center along the 280 corridor in Birmingham, AL, anchored by Sprouts, Lowe's, HomeGoods, Dick's Sporting Goods, Petco, Michaels, Stein Mart, Ulta, and Five Below.
  - **the $720M sale of a portfolio of properties, which Blank Rome helped to purchase in 2007 and refinance in 2014, to Strata Equity,** a privately held and managed real estate investment and development company based in San Diego, CA. The portfolio consisted of 24 residential communities located throughout the Southeast, and the deal is the second-largest apartment trade in the real estate industry this year.
- **EDF Trading Resources LLC,** in connection with the sale of a commercial office building located in Austin, TX.
- **Gladstone Commercial Corporation and its affiliates, in …**
  - an expansion project of an industrial building located in Birmingham, AL, for its tenant, Lear Operations Corporation.
  - the acquisition, leasing, and financing of commercial real estate located in Ft. Lauderdale, FL.
- **American HAVAL Asset Management, LLC,** in connection with its $15.5 million purchase of the 79,652-square foot Kubota Tractor research and development facility in Torrance, CA.
- **Cheviot Capri Apts., LLC and Imperial House Apts., LLC,** in connection with the sale of the apartments in an IRC Section 1031 exchange. The replacement property purchased by the apartment owners is a newly constructed Wal-Mart Neighborhood Market and Fuel Station facility in San Antonio, TX. This replacement property is subject to an absolute NNN lease guaranteed by Wal-Mart Stores, Inc. Blank Rome represented the apartment owners in connection with both the sale of the West Los Angeles apartments and the subsequent purchase of the San Antonio property, as well as the financing of the purchase of the San Antonio property through TexasBank. ◻

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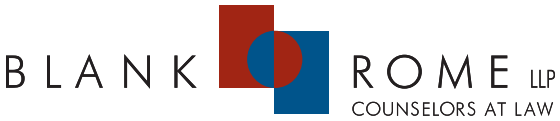

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