

## Trend Report: Development Issues Our Clients Are Talking About

### NEW GUIDANCE ON CONTINGENCY PROVISIONS FOR REAL ESTATE CONTRACTS

The Illinois Appellate Court recently provided some guidance on the use of a specific conditional term in real estate contracts that will be of interest to those negotiating and entering into deals involving tax credits.

In *Triple R. Development, LLC v. Golfview Apartments I, L.P.*, the buyer, Golfview, deposited \$230,000 in earnest money under a purchase and sale agreement for land with Triple R. Development, the seller. The purchase and sale agreement included contingent terms, one of which was that Golfview wouldn't be obligated to consummate the transaction until "buyer has determined its eligibility to receive tax credits for the Premises."

The agreement had a recital that stated that Triple R. understood that Golfview intended to finance the acquisition and construction of the real estate with the use of tax-exempt bonds and tax-exempt bond credit enhancement financing. The contract also included a provision that made the earnest money non-refundable after the expiration of the due diligence review, and the survey review, periods.

The review periods passed and during that time, Golfview never terminated the agreement. During that time, Golfview worked with third-parties to prepare appraisal reports containing statements that Golfview provided saying that Golfview was eligible for the tax credits. Golfview even began negotiations regarding the sale of those tax credits. When the closing date arrived, Golfview had not obtained the tax credits and terminated the contract. Triple R. filed suit to obtain the earnest money and Golfview objected.

At the trial, Golfview presented evidence that the closing was "conditioned upon Golfview obtaining tax exempt bond and credit financing." The contract even stated that the closing date would occur if Golfview "obtains the financing and/or government approvals set forth in this contract." But the court ruled that the closing date terms were separate, and a different obligation, from the terms obligating consummation of the transaction – those terms included the "determined its eligibility" language above.

The way Golfview wanted the "determined its eligibility" provision read was "until buyer has received," not "until buyer has determined its eligibility to receive." In fact, the parties even wrote the contingency the latter way in the definition of the closing date.

Triple R. was awarded the \$230,000 earnest money, any and all interest accrued on the earnest money, and thanks to an attorney's fees provision in the contract, a hearing was set on an award of the amount of attorney's fees Triple R. had incurred in the action.

Readers are advised to ensure that their contingency provisions accurately reflect the contingent events they wish to enumerate.

### IS YOUR INDEMNITY PROVISION TOO BROAD?

The recent opinion in *Hartz Construction Co. v. The Village of Western Springs*, is an informative discussion of the rights and remedies afforded municipalities under typical recapture and planned development agreements. A particular holding from this case is important for drafting and litigating these agreements.

Under a broad-form indemnity provision that includes choice of counsel and attorney's fees provisions, the losing party may be forced to pay for the opposing parties attorney's fees – even for fees incurred when the prevailing party brought a counter-claim against the losing party. The provision in *Hartz* read that the Village was allowed "the right to determine the attorney(s) of its, his, hers or their choice to represent and defend their interests in any legal or administrative action, all at the DEVELOPER'S expense." In *Hartz*, the indemnifying party was ordered to pay Western Springs' attorney's fees along with the fees that Western Springs incurred in suing the indemnifying party for relief, even where other causes of action that did not require suit against the indemnifying party existed but weren't brought by Western Springs. A broad form indemnity provision may come back to hurt the parties entering into it and there is no restriction in provisions, like the one in *Hartz*, that certain courses of action be taken in order for enforcement to garner attorney's fees.

Parties are advised to check with their counsel before entering into recapture or planned development agreements to ensure that, in the unlikely event that something goes awry, they aren't forced to lose more than they anticipated when they contracted.

## PRIVATE USE OF THE PUBLIC WAY IN CHICAGO

The City has control over, and owns the public streets, alleys and sidewalks; its paramount responsibility is to maintain them for vehicular and pedestrian movement. However, private use of the public ways is common, particularly in commercial areas. These uses can be located at street level, above street level or underground; as long as they do not impair vehicular and pedestrian movements and meet other requirements. Common uses at street level include planters, decorative pavers, bollards, kiosks and sidewalk cafes. Uses located above street level typically include canopies, awnings, signs, light fixtures, balconies and banners. Below street level vaults, building foundations, cables and conduits (e.g., telephone, data and power) are common.

Private users of the public ways are charged an annual fee, which varies depending on the type and extent of the use. Some annual fees are fixed and modest in amount: canopies (\$50 if less than 25 feet in length), bay windows (\$75 each) and signs (\$100 each if less than 25 square feet). Annual fees for some other uses are determined by a formula based on size, land value and location (i.e., above grade, grade or underground). For example, underground sheet piling and vaults can cost thousands of dollars annually. Some uses are exempt from fees. These include planters, tree grates and, due to a recent change in the law, extensions of historic landmark buildings (such as balconies) into the public way.

Initial approval of uses of the public way requires that an applicant submit detailed drawings, measurements and descriptions. Administrative approvals must be obtained from the Department of Business Affairs and Consumer Protection, the Department of Transportation, the Department of Buildings (where applicable) and possibly other departments and agencies. The Ward Alderman must approve. Underground uses must also be reviewed by CDOT's Office of Underground Coordination, which assembles comments from a group consisting of 24 public and private utilities with facilities or other interests in underground uses. Once the approvals are obtained, the application for use of the public way will be considered by the City Council's Committee on Transportation and Public Way and the full City Council. If approved, an ordinance will be adopted and a public way permit issued.

Permits for private uses of the public ways are generally renewable every five years; each renewal requires that the City Council adopt a new ordinance (though renewal is usually faster if the use and related structures have not changed). The City characterizes permits for private use of the public way as "Grants of Privilege". The City can revoke the privilege at any time in its sole discretion, pursuant to its overriding responsibility to protect the public way for vehicular and pedestrian movement.

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If you have any questions or would like assistance regarding the matters discussed above, please contact the editors of *Development News*:

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