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A QUARTERLY FOR THE DESIGN, CONSTRUCTION AND REAL ESTATE INDUSTRY FOR OVER 28 YEARS

Green Leases:

Adding Value to Landlord and Tenant

By C. Bradley Cronk, RA, LEED AP

After years of acquiescing to terms favoring landlords, commercial real estate tenants now hold the advantage in lease negotiations. For the last several years, landlords controlled negotiations and tenants received few if any concessions. Now, that relationship is inverted with landlords wooing prospective and existing tenants like never before. With landlords worried about a shortage of creditworthy tenants, and tenants worried about deteriorating economic fundamentals, is there an opportunity to establish a balanced, win-win relationship?

Mutual commitment to a green office environment may be one such solution. With more new green buildings entering the market, existing buildings undergoing energy-efficiency retrofits, and an increased desire for organizations to showcase environmentally sustainable practices, the green office presents promising opportunities for landlord and tenant alike. Green leases can mutually incentivize landlords and tenants by establishing parameters to design, construct and manage sustainable buildings.

Most tenants and landlords now see value in building and occupying sustainably designed and constructed office space. But as landlords and tenants enter into new leases, they are recognizing conventional, standard leases typically perpetuate divergent interests that discourage cost-effective resource conservation and energy efficiency.

From the tenant's perspective, standard multi-tenant gross leases offer no incentive to implement energy-saving procedures since tenants pay a pro-rata share of the landlord's building-wide utility bills. And if landlords improve energy efficiency, it may not be able to easily recoup those costs from existing tenants. In a net lease, the landlord has little incentive to improve the building's energy performance since the tenant pays its own utility bills. But, since energy costs are typically only a fraction of a tenant's cost of doing business, tenants are more likely to cut costs ►

This article was originally published in the April 2009 Mann Report.

WHAT CORPORATIONS ACQUIRING DESIGN PROFESSIONAL FIRMS SHOULD KNOW

By Ronald B. Feingold, Esq. and Alicia A. Bond, Esq.

Professional design firms, which are facing a severe business downturn with reported layoffs of 25 percent or more nationwide, may be attractive acquisition opportunities for corporations looking to provide in-house design capabilities. LePatner recently served as regulatory counsel for a Fortune 500 company in its acquisition of an international engineering firm. LePatner devised a strategy to satisfy the numerous complex regulatory obstacles, then outlined a process that allowed the acquired firm to legally provide engineering services in multiple state jurisdictions.

Corporate and general counsels should be aware that the regulatory rules for acquiring an architectural or engineering firm are separate and distinct from the regulatory rules with which they may be more familiar. Typically, there is a two-step process for a professional design firm to obtain authorization to do business in each state. First, the design firm must secure authorization to conduct business in states outside of its state of incorporation (foreign qualification). Then, it must satisfy the foreign state's licensing and regulatory compliance requirements to conduct its professional practice in the foreign jurisdiction (professional qualification).

Foreign Qualification ("FQ"). Generally, the process to obtain authorization as a foreign entity conducting general business is simple. An application for a Certificate of Authorization is completed, filed with the state authoritative body, and a filing fee is paid. Typically, the firm's managing agent for service of process must be identified on the application. The state authoritative body will then issue a Certificate of Authorization, which in turn allows the firm to transact business in the state.

Professional Qualification ("PQ"). Obtaining PQ is more complicated as each state has its own statutes, rules and regulations concerning a professional design firm's composition and practice. Once the design firm has obtained a Certificate of Authorization to transact business in the foreign jurisdiction, it may begin the PQ application process. This application process is similar to the FQ ►

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through personnel changes or changing suppliers, rather than changing light fixtures. Even if tenants wanted to make capital improvements, they would only do so to the extent they could reap economic benefits over the life of its lease. Standard gross and net leases do not incentivize energy conservation or efficiency for landlords or tenants.

How can landlords and tenants align to tackle urgent questions of energy consumption and greenhouse gas reductions? A new kind of gross lease – a “Green” Lease - would transfer control of the building’s operating costs back to the landlord, encourage or mandate green office building and energy efficiency, and provide shared cost savings to tenants when they reduce energy consumption.

For owners, green lease benefits include increased building value and market quality perception, increased occupancy, and decreased turnover. For tenants, benefits include increased brand marketability, increased employee retention and productivity, reduced absenteeism, and reductions in health premiums and worker’s compensation claims. Mutual benefits include lower energy and operations costs and potentially reduced insurance premiums.

Green leases can be based on a standard commercial lease with the addition of a few critical provisions that address questions such as:

- What benchmark defines the premises as green? Is it a third-party independent rating systems such as LEED, EPA Portfolio Manager, Green Globes, or a set of mutually agreed-upon performance goals?
- How are green-related costs shared? Costs could include sustainability consultants and engineers as well as construction costs.
- Is there a green building insurance policy that insures green like-kind replacement and re-commissioning costs if a loss occurs?
- How are green provisions enforced? If a violation constitutes a default, specific remedies should be negotiated, with financial penalties as needed.
- How are energy consumption data and utility bills shared and audited to determine real energy costs and savings?
- Is there a tenant improvement manual identifying green build-out procedures and minimum performance specifications? Include items such as: construction waste management; energy and water use reduction; energy-efficient lighting, heating and cooling; and improved indoor air quality standards through better ventilation and use of low/no volatile organic compound (VOC) emitting materials.
- Is there an environmentally friendly purchasing standard for products, cleaning supplies and consumables used in the building?
- Is individual tenant accountability for resource and energy consumption tracked through the building management system?
- How are capital improvements that decrease building-wide resource and energy consumption and operating costs shared with tenants? Should tenants be allowed to audit such projects to confirm proper allocation of savings?

An excellent resource for further green lease information is BOMA’s Green Lease Guide, which outlines specific green provisions and enforcement mechanisms to incentivize landlord and tenant cooperation.*

As all buildings will eventually be built and operated sustainably, green leases will become standard too. Until then, it is important to distinguish the provisions that set green leases apart from standard commercial leases. These leases must explain how green provisions align landlord and tenant interests to achieve mutually beneficial cost savings. In addition, savvy landlords and tenants will also realize that green leases provide the tools and benchmarks needed to quantify energy consumption and calculate carbon footprint as demanded by today’s corporate sustainability reporting requirements. ▲

* Also see the California Sustainability Alliance’s “Green Leasing Toolkit” [http://www.sustainca.org/content/leasing_toolkit]



THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

By Sean McBride, Esq.

The American Recovery and Reinvestment Act of 2009 (the “Act”), also known as the “stimulus package” or “stimulus bill,” was signed into law February 17, 2009 by President Obama and is intended to provide a stimulus to the U.S. economy in the wake of the economic downturn brought about by the subprime mortgage crisis and the resulting credit crunch.

The Act is composed of federal spending and tax cuts to increase gross domestic production growth 1.4%-3.8%. Tax cuts total \$288 billion (37%) of the package and \$144 billion is allocated to state and local fiscal relief (more than 90% of the state aid is going to Medicaid and education). \$357 billion is allocated to federal social programs and spending programs. Over the next two years, total project stimulus funds will roughly total \$787 billion, including spending in the following areas:

Healthcare:	\$147.0 billion
Education:	\$90.9 billion
Unemployment & Aid:	\$82.5 billion
Infrastructure:	\$80.9 billion
Energy:	\$49.7 billion
Housing:	\$12.7 billion
Science & Research:	\$8.9 billion

Preliminary calculations suggest that New York State is expected to receive at least \$24.6 billion in aid from the Act by 2011 under the Obama Administration mandate, “Use it or lose it.” Governor David A. Patterson quickly established the New York State Economic Recovery and Reinvestment Cabinet to manage the development of State and local infrastructure projects financed through the federal stimulus bill.

AMERICAN RECOVERY AND REINVESTMENT ACT

WHAT'S IN IT FOR NEW YORK?

The Act provides direct fiscal relief to state and local governments including \$87 billion for increased Medicaid coverage and increased payments alone. New York's share of that funding is nearly \$11 billion over a 27-month period: \$1.9 billion in 2008-09, \$5 billion in 2009-10, and \$4.2 billion in 2010-11. The State has not released information detailing the use of the balance of New York's share of the \$147 billion for healthcare spending. However, if New York spends its share of these funds proportionally with the amounts allocated under the Act, expected payments may include: subsidies for unemployed under COBRA; healthcare information technology improvements; medical care for service members and their families; prevention and wellness; Veterans Health Administration expenses; NIH expenses; community health centers; and research and training.

The Act also delivers substantial support for local infrastructure projects, with funds being distributed and put into action at the local level as well as the state level. At the national level, this includes \$48 billion in funding for transportation capital projects (\$8.4 billion for mass transit, \$27.5 billion for highways and bridges, \$9.3 billion for rail, \$1.3 billion for airport improvement services, \$1.5 billion for discretionary surface transportation transit projects). Of this total, New York is expected to receive at least \$1.25 billion for mass transit and \$1.1 billion for highways and bridges.

Governor Patterson recently announced that the infusion of \$1.1 billion in transportation funds to New York will allow the State to restore local highway funds originally proposed to be cut from the 2009-10 Executive Budget. The Economic Recovery and Reinvestment Cabinet will be working with State agencies and local governments to seek additional sources of transportation funding. The bidding process for the first shovel-ready projects eligible for federal funding through the Act started March 5. Some projects have already been approved, including the replacement and repair of bridges in Steuben, Onondaga, Oneida and Herkimer counties, and will be fully funded by stimulus package funds.

Stimulus package funds available to New York infrastructure projects are not under the discretion of the Governor's office. Using the same method of distribution of all federal transportation funds, the stimulus package infrastructure spending is allocated to projects that are selected by thirteen

regional Metropolitan Planning Organizations comprised of local elected officials, transit agency staff and members of the Department of Transportation. Some projects have already been approved, including:

- Bridge replacements in Steuben County;
- Albany County road reconstruction;
- City of Syracuse road resurfacing;
- Drainage improvements in Steuben County;
- Bridge repairs in Onondaga County;
- Bridge repairs in Oneida County;
- Resurfacing in Oneida County;
- Bridge cleaning in Allegany, Steuben, Fulton, Hamilton, Herkimer, Madison and Montgomery counties; and
- Culvert repairs in Jefferson and St. Lawrence.

Tax Saving Provisions Benefit Contractors and Business Owners

The Act includes a number of tax benefits to design professionals, engineers and contractors, with the potential for savings to be passed along to property owners and developers, including an extended net operating loss carryback of 5 years (for 2008, not 2009) for businesses with gross receipts of \$15 million or less. Any loss not absorbed in the carryback period can be carried forward up to 20 years, with the option to waive the carryback and carry the entire loss forward. Thus, ARRA increases future gain offsets for owners of small properties and small business contractors facing 2008 losses.

Government also seeks to spur capital investments by increasing tax breaks on expenditures. Congress extended the Section 179 expense election limit from \$125,000 to \$250,000 for newly acquired assets that otherwise would have to be depreciated over a number of years. Small businesses now can claim these expenses within the current year. Additionally, the dollar for dollar phase out of the tax break has been increased to \$800,000 from \$500,000, and applies for calendar year 2009 or a business's fiscal year that begins in 2009. Small businesses purchasing vehicles and other machinery will benefit from the Section 179 extensions.

Owners should also be aware that the Act expands the incentives to "Go green." Certain facilities can qualify for a 30% advanced energy investment credit. A renewable electricity production credit has been extended through 2013 (2012 for wind facilities), and alternative fuel pump tax credit has been increased from 30% to 50% (capped at \$50,000).

Owners of qualifying facilities thinking of going green, and contractors seeking to make capital expenditures on facilities and machinery, have a number of new incentives at their disposal to help make the transition. ▲

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process in that an application for a Certificate of Authorization to provide professional services must be completed and sent to the state authorities, along with a filing fee. Once the application is filed and approved, the firm may provide professional design services in the foreign state.

Below are a sampling of requirements that corporate counsel must be aware of before securing a PQ Certificate of Authorization.

Ownership Interest. Some states require that all owner/shareholders be licensed professionals. A corporation, however, will want to seek authorization in those states that allow a business corporation or an unlicensed professional to own shares in the design professional firm. In Connecticut for example, unlicensed individuals and corporate entities may be a shareholder of an engineering corporation. It is crucial to research the state statutes to determine which allow ownership in professional design firms by non-licensed individuals or business entities.

Corporate Governance. Some states may require a change to the design firm's board of directors and officers. For example, in Michigan, at least 2/3 of the officers or directors must be licensed to practice in Michigan. In Connecticut however, only personnel "in responsible charge" are required to be licensed in Connecticut; officers and directors are not required to be licensed unless they are designated as the person "in responsible charge."

Person "in Responsible Charge." On most PQ applications, the corporation will need to include the name(s) of the person(s) who would be designated as the individual(s) "in responsible charge" of the firm's practice in that particular foreign state is required. The person "in responsible charge" ordinarily must be licensed to provide professional services in the foreign state. "Responsible charge" may entail a certain degree of control over, and detailed professional knowledge of the content of technical submissions during their preparation, as is ordinarily exercised by professionals applying their customary standard of care. While most states require only a licensed employee to serve as the person "in responsible charge", other states are more rigid.

For example, Michigan requires that the engineering firm must employ a person in responsible charge at each place of business in Michigan where engineering services are offered by the firm. Virginia requires that the corporation must name at least one professional engineer, who is licensed in Virginia, to be responsible and have control of the corporation's engineering services there. Ohio requires that the foreign firm must designate one or more full-time directors, partners, managers, members or officers, licensed to practice engineering in Ohio, as being "responsible for and in responsible charge" of the professional engineering activities and decisions of the Ohio firm.

By-Laws. The corporation may be required in some states to amend its by-laws in order to obtain FQ and/or PQ. Each state's statutes should be researched by corporate counsel to ensure compliance with the particular corporate governance issues.

For example, in Washington, the board of directors must pass a resolution stating that its

bylaws have been amended to include the required statutory language. This resolution must be included with the PQ application. The Missouri PQ application requires a foreign engineering corporation's president to sign an affidavit stating that its board of directors has voted to assign the responsibility for the proper conduct of all the engineering activities provided in Missouri to a licensed managing agent. The affidavit must also state that the managing agent is either (a) an owner; (b) an officer; or (c) a full-time employee of the corporation.

Reciprocity. A state's reciprocity rules and regulations governing licensure may make it less onerous in securing a PQ filing. For example, one or more shareholders, officers or directors licensed in New York may obtain a license in the foreign state through reciprocity, provided the state allows reciprocity. Although reciprocity is ordinarily a relatively straightforward process, corporate counsel should know that approval may take several weeks because state professional boards, which approve the applications, usually meet only once per month. The alternative would be for the licensee to sit for the foreign state's professional licensing exam, but this is typically a more lengthy process.

Name of Design Firm. Most states are uniform in their requirements for a professional design firm's name. The corporation, however, may not use a name for the design firm that states or implies that it is able to perform professional services other than those it is authorized to perform. For example, in Connecticut, the name of a foreign business corporation may not contain language stating or implying that the corporation is organized for a purpose other than for which it was formed. In California, an engineering firm may not use a business name which includes the name of an unlicensed person. Every state's statutes must be looked at to determine name(s) which may be used by the design firm.

New York Requirements. Unlike most states, New York allows professional design firms to form as a professional corporation, not as a business corporation. Accordingly, a corporation seeking authorization for its acquired design firm to provide design services in New York would have to add "P.C." to the design firm's name. The corporation must ensure that the design firm satisfies three basic requirements before performing professional design services in New York: (1) all of its officers, shareholders and directors must be licensed in its home jurisdiction; (2) at least one shareholder, officer or director must be licensed in New York; and (3) the individual(s) performing the professional services must be licensed in New York.

Conclusion. The purchasing corporation must be conscious of these requirements when acquiring a professional design firm. Penalties for unauthorized business practice could be severe and include substantial fines, an injunction against the further practice of business in the state, and censure or reprimand affecting a professional's license. In addition, the unlawfully practicing firm is generally prohibited from initiating legal proceedings in the foreign jurisdiction. Thus, while obtaining FQ and PQ authorization represents an additional cost of doing business, it is crucial to do so before performing professional services in foreign states. ▲

Project Strategy Director, **Brad Cronk**, moderated a "Green Office" panel at the Law & Office conference sponsored by Schein Media. Cronk led a discussion with the architect and engineer panelists on cost-effective green design and operational strategies that law firms can employ during their office renovations and day-to-day operations management.

Barry LePatner appeared on Fox Business News to talk about the inefficiencies of the construction industry in light of the economy and federal stimulus spending on infrastructure. Visit LePatner.com to view the video segment.

Partner **Ronald Feingold's** article "Protecting Owners and Developers In Their Construction Contracts" appeared in the **New York Law Journal** on April 28, 2009. Visit LePatner.com to read the article.

The firm congratulates associate, **Sean McBride** on being admitted to the New York and New Jersey Bar.

A national hotel holding company retained LePatner in connection with one of its hotel properties in the Times Square / Theater District area. LePatner is working with a renowned preservation architect to evaluate whether or not it will be advantageous for the parent company's hotel to be granted landmark status by the Landmark Preservation Commission.

QUOTE OF THE QUARTER

Be wary of the man who urges an action in which he himself incurs no risk.
- *Joaquin Setanti*

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