Barley Snyder

Real Estate and Construction Newsletter, October 2018

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When One Door Closes

By: Caroline M. Hoffer
Related Practice Area: Real Estate
Related Industry: Construction

While the closure of beloved national and international retail store chains could leave millions of square feet of the mid-Atlantic region's commercial real estate vacant, forward-thinking companies likely already have started scouting these locations to see what kind of future business opportunities may be available at these sites.

This year alone, Toys "R" Us has announced it will close its entire fleet of stores and companies like the Ascena Retail Group - the parent company of Ann Taylor, Loft, Dress Barn, Lane Bryant and Justice - have announced widespread store closures. This comes on the heels of major retailers like Sears/Kmart continuing to announce rampant store closures and filing for bankruptcy this fall.

These sites are attractive because most of them are in high-traffic, high-density areas that often already have built-out infrastructure of roads, water, sewer and other necessary attributes. That presents a strong opportunity for those looking for turn-key ready buildings or available (and under market value) real estate in highly visible areas.

Whether a company wants to relocate its operations into that vacant building or demolish the building and start from scratch, there are a number of legal questions to ask first:

What conditions and restrictions burden the property? Most multiple-tenant properties are subject to operating and use covenants such as required operational hours/days that could be too restrictive for a potential new business. Use restrictions limit allowed uses of the property and may create exclusive rights in favor of current tenants such as the right to operate a pharmacy, full-service restaurant or supermarket. Restrictions often prohibit uses that create high parking demands or operate during hours that do not attract customers to the other businesses on the property, such as theatres, bowling alleys and fitness facilities.

If the building is part of a shopping center, what rights does the building or outparcel occupant have in the shared areas? Leases and other agreements generally address rights of all occupants of a shopping

center to use common areas such as parking areas and access drives, but may also restrict certain areas from use. Supermarket and retail anchor tenants often have protected parking areas that are not available to other tenants of the center.

What signs are permitted on the building or the property? An increasing number of municipalities are attempting to control signs in their communities by adopting very restrictive sign ordinances, restricting items such as height and the amount of light a sign emits. The installation of a new sign will likely require compliance with the current sign ordinance and may have a significant, adverse impact on the visibility of the proposed use. Leases and operating and use restrictions for multiple-tenant properties also could restrict the size and placement of signs.

How extensively can the building be renovated? Times change. Even though the building is current on all of its permits and approvals, zoning and building regulations may have changed since its initial construction. Any new construction a new owner does at the site will have to comply with the current regulations and building code requirements. What appears to be a turn-key operation could turn into an expensive rebuild to meet current building codes and land development regulations governing storm water, landscaping, access and traffic controls.

Every property is unique and will present different opportunities and issues. If you are a developer or business owner looking to take advantage of some of this newly available commercial real estate and would like some guidance through the process, please contact me or any of the attorneys in Barley Snyder's Real Estate Practice Group.

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Appraisers, This is How You Should Work with Attorneys

By: Abby Medin Tucker
Related Practice Area: Real Estate
Related Industry: Construction

As a real estate attorney, I frequently engage appraisers to value properties for assessment appeals. These appeals come up on an annual basis, so attorneys can be a recurring source of work for appraisers. Here are some tips for working with attorneys when engaged to appraise property for assessment appeals.

Understand the project, and offer a courtesy first look. Unlike with appraisals completed in connection with financing, when a client is considering an assessment appeal it may or may not make sense for the client to expend the resources to appeal. The appraisers who offer to do an informal valuation at a discounted rate, to give us an idea whether the appeal is worth pursuing, are the ones I turn to time and time again. In the instances where the assessed value appears reasonable, our clients save significant time and resources when an appraiser is able to tell us that at the outset. While you may not get a full fee if we decide not to pursue an appeal, you will certainly be on our call sheet for the next client.

Communicate. Attorneys' practices are built on securing good results for our clients, and offering superb client service when doing so. When we engage a third party - an appraiser, engineer, broker, or someone else - to help us achieve the results our clients want, we can't sacrifice the service aspect of our profession. Don't be shy about enlisting the help of your office staff to keep an attorney up to date on any progress. We

are accustomed to working with paralegals and administrative assistants so we understand if you can't personally return our call. Lawyers also like to keep a written record so we can keep our client in the loop, so follow up on voicemails with an email message.

Let us know your specialties. Many people only interact with appraisers in connection with lending, so when a client needs a recommendation for an appraiser, their first call is often to their real estate attorney. Our firm views part of our service to our clients as being able to provide referrals to appraisers, so our group keeps an ongoing list of appraisers we have worked with. We also take note if an appraiser has any special expertise. Our clients own properties ranging from continuing care retirement communities to industrial operations to hotels to residential properties, so a quick way to rise to the top of our list for projects is to make your expertise known. Our clients also often own property outside of our geographic footprint, so let us know if you do work in other regions.

Be Professional. Attorneys have very little vested interest in the actual fair market value you determine a property to be worth, but are generally looking for qualifications, professionalism, and reliability over any other qualities. Your work product and responsiveness reflect back on the attorney, so don't sacrifice these qualities if you can avoid it. The better you can make the attorney look, the more likely they are to recommend you for work in the future.

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How the 2017 Changes to the AIA Construction Contract Documents May Affect You: Part 3

By: Reilly S. Noetzel
Related Practice Area: Real Estate
Related Industry: Construction

Editor's note: This article is the third part of a three-part series addressing the American Institute of Architect's (AIA) 2017 changes to its contract forms. The first and second articles in the series addressed various changes to the Owner-Contractor and Owner-Architect contract forms. This article will highlight the significant changes to the AIA Contractor-Subcontractor contract form, the A401.

October 31 is an important date in the construction industry.

That is when the 2007 versions of many AIA forms will no longer be available on the AIA software platform, meaning it will be crucial for contractors, architects, design professionals, suppliers, and others in the construction industry to become familiar with the 2017 AIA contract changes.

Not all AIA forms have been updated with the 2017 revisions, but many have. Below are the major changes to the A401 - 2017 "Agreement Between a Contractor and a Subcontractor" (the AIA form subcontract):

1. **New Representations and Warranties of Subcontractor**

New language has been added to the AIA form subcontract that includes certain representations and warranties made by the subcontractor when submitting shop drawings, product samples, and other submittals. The subcontractor in producing and submitting these materials is representing and warranting that it has read and approved the materials, verified the materials used and other construction criteria and has ensured the submittals

match the requirements of the work to be performed under the prime contract. This new provision shifts the risk of any deficiencies in the subcontractor's submittals to the subcontractor. Additionally, the new A401 requires all material, equipment and special warranties to be issued or transferrable to the owner - a change that may owners have already been adding to the prior version of the A401.

2. **Prohibition Against Certain Professional Services**

The AIA appears to have addressed the unauthorized practice of professional services among subcontractors. It's added a provision to the form subcontract that prohibits subcontractors from rendering services that constitute the practice of architecture or engineering. The language also protects the subcontractor from being required to provide any professional services in violation of applicable law and from being asked to perform outside the scope of its contractor's license. It also limits liability of the subcontractor in undertaking its duties set forth in the subcontract, which better allows the subcontractor to rely on the accuracy of performance and design criteria received from the contractor.

3. **Termination for Convenience**

Where an owner terminates the prime contract for convenience, the subcontractor is still given the right to receive reasonable overhead and profit on work not executed, in addition to other costs incurred as a result of the termination. However, the A401 now clarifies that in the event of an owner's termination for convenience, the subcontractor is only entitled to payment for work *properly* executed. This means that a subcontractor may not be paid for deficient work post-termination.

4. **Changes in Contract Time and Contract Sum**

The new A401 requires adjustments to the contract sum and contract time for delays, interruption, or suspension. While the old form permitted, but did not require, adjustments to the contract sum for delays, interruption or suspension to include profits on increased costs of work, the new A401 mandates these items be included in the adjustment.

5. **Simplified Date and Payment Options**

The A401-2017 includes more detailed computation formulas for calculating progress payments and retainage. The formulas are generally clearer and more user-friendly than the prior version. In addition, the new A401 allows users to select from several commencement dates and substantial completion date options. While there is still the option to fill in an alternative provision not listed, the menu of options is designed to encourage parties to agree on a definitive date or timeframe.

6. **Insurance**

The A401-2017 contains more detailed insurance limit and coverage thresholds. One important change is that the subcontractor's additional insured coverage must be primary and non-contributory to any of the contractor's general liability policies and apply to ongoing and completed operations. The subcontractor is required to procure additional insured coverage that meets specific thresholds set by Insurance Services Office Inc, if that coverage is available. The changes to the insurance provisions in the A401 suggest that the AIA drafters intend to reallocate risk among the contractors, subcontractors, and owners of a project to especially make sure the insurance protections flow down at each tier of a project. The new insurance provisions also allow the contractor to suspend the work if there is a lapse of

insurance coverage carried by the subcontractor.

7. **Addressing the Use of Building Information Models (BIM)**

As with the A101 and A201 forms, the new A401 contains a provision related to use of and reliance upon BIMs as well as electronic transmission of data. Just like in the A201, the A401 now requires the contractor and subcontractor to agree upon "protocols governing the transmission and use of" digital information. This provision also references AIA E203, the BIM and Digital Data Exhibit, as the appropriate means to establish such protocols. Use or reliance upon BIMs without any set protocols in the AIA contract documents or in the AIA E203 is done at that party's sole risk. If the parties are not agreeing to set such protocols, they may wish to remove this risk-assumption provision.

8. **Use of Contractor's Equipment**

The A401-2017 imposes a standard that the contractor's facilities and equipment is generally not available for use by the subcontractor unless the contractor agrees and approves the terms of the use. There is a space to add exceptions where the subcontractor may use the contractor's facilities and equipment without approval from the contractor. Parties should consider adding exceptions to this provision.

9. **General Indemnity Clause**

The AIA drafters have added a general indemnity clause to the A401 that requires the subcontractor to indemnify the contractor and owner from all damages, losses, and liabilities resulting from a lien or payment claim by any sub-subcontractors, suppliers or vendors. This is a broad indemnity clause and would apply to most situations where a subcontractor has failed to pay someone else for supplies or work rendered. The main exception to this indemnity clause is that it does not apply if the contractor has failed to pay the subcontractor for the subcontractor's work.

It is important for contractors and subcontractors to be aware of the changes to the A401-2017 and to ensure the terms of their prime contract account for these changes. In case there are discrepancies among the terms of the prime and subcontract, it is always important to include a "flow-down" clause or otherwise state how gaps or conflicting provisions are handled.

To update your personalized subcontracts to reflect the 2017 updates, or if you have any questions regarding the new 2017 AIA contract forms, please contact me or any of the attorneys in Barley Snyder's Construction Industry Group.

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