BBWG

Belkin Burden Wenig & Goldman, LLP

UPDATE

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Transactions Update

Tragic Events Highlight the Need of Adjacent Property Owners to be Legally Protected

By: Daniel T. Altman

It is unfortunate that sometimes tragic events highlight the need for property owners of buildings near construction sites to be legally protected. The recent crane collapse on East 51st Street caused several deaths, substantial damage to six buildings, and destruction of numerous homes and businesses, when pieces of a crane fell from 50th Street to 51st Street.

My partner, Robert Jacobs, and I have written a series of articles in prior newsletters highlighting the need of property owners, and cooperatives and condominiums, that are adjacent to development sites to consult with real estate counsel to ensure that they are properly protected, indemnified and insured against property damage and personal injury arising from the development process on sites adjacent to properties owned or managed by them. Under the New York City Building Code, owners that are adjacent to development sites are obligated to provide access to their properties for certain construction-related activities. Developers may require access, among other things, to perform foundation underpinning, roof protection to the adjacent property, sidewalk protection and installation of seismic and crack monitoring to determine if

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Three Key Questions to Ask When Buying a New Construction Condominium Unit

By: Craig L. Price and Jennifer Apple

New construction is an appealing option for a buyer in the condominium market. While on the surface, it may appear as if new construction has fewer risks, buyers considering this avenue need to ask the right questions.

A prospective buyer of a new condominium unit should directly ask, and get complete answers to: (1) What are the special risks associated with this purchase? (2) What is the procedure to purchase? and, (3) What are my closing costs?

Special Risks:

When evaluating a new condominium unit, a prospective buyer should carefully review the condominium offering plan with an attorney. The offering plan discloses important information, including highlighting the special risks that should be considered and understood prior to entering into a purchase agreement. One concern, for example, is the extent to which the sponsor of the plan is retaining its right to rent rather than sell units. It is common for a sponsor to re-

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the adjacent property's foundation shifts or cracks during construction.

Many property owners do not know their rights with respect to a developer that approaches them requesting access to their property. Our firm has developed a proprietary agreement that we call a "License, Protection and Indemnity Agreements ("LIPA's")" to ensure that property owners adjacent to construction sites are legally protected in case of damage to persons or property as a result of construction. Most important, the LIPA's that we have developed include provisions protecting the adjacent property owners against liability and damages incurred on account of accidents such as the recent crane collapse and include specific engineering safeguards, license fees for providing access to the developer to their property, insurance requirements, timeframes, and enforcement procedures.

While LIPA's cannot prevent damage from construction accidents, they do minimize the consequences by permitting the property owner adjacent to a construction site to participate in the construction process that impacts the adjacent owner's building and their occupants. In addition, the LIPA's establish a framework for dealing with such damage to mitigate the impact of construction on the lives of the occupants of buildings adjacent to construction sites.

Daniel T. Altman is a partner in the Firm's Transactional Department.

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tain an unconditional right to rent, and doing so may result in the creation of a residential building in which the majority of units are not owner occupied. This is important because if most owners rent the units or otherwise hold them for investment purposes, they may be collectively less concerned about day to day issues affecting the building. The occupancy of the units by renters instead of owners may also limit one's ability to obtain financing or refinancing as some lenders may require that a certain number of units be owner-occupied.

Another concern which often arises in new construction is that financing contingencies are typically not granted. If your obligation to purchase is not contingent on your obtaining a mortgage and you are unable to obtain financing, you will either have to close all cash, find financing from another source, or risk losing your downpayment.

The special risks discussed above are typical of new construction condominiums. However, every development is unique, so you should read the entire plan completely to understand all the risks associated with buying as well as other material aspects of the purchase. Only after the special risks have been thoroughly reviewed and understood should you proceed to signing a purchase agreement.

Procedure to Purchase:

A new construction buyer should clearly understand all the steps that are required to purchase the unit. Typically, upon signing a purchase agreement, the buyer is required to make a downpayment in an amount equal to ten (10%) percent of the purchase price. Depending at what point in the construction phase you sign, and the floor the unit you are purchasing is located on, it could be some time before you actually close and move in. The sponsor will usually provide an anticipated closing timeline, but the reality is that new construction is notorious for delay and closings cannot actually occur until a temporary certificate of occupancy ("TCO") is issued for the building. The TCO is issued when the "guts" or "bare bones" of the building have been completed and are in working order. These include such things as the electric, heating and plumbing systems. The TCO, however, does not speak to building aesthetics or amenities. Thus, if you agree to close upon the issuance of the TCO, you can expect that many services and features of the unit and the building may not be completed prior to your move.

In most new construction contracts, around the time the TCO is issued, the sponsor will send you a closing notice. The closing notice

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will emphasize that "time is of the essence" with respect to your obligation to close. In other words, once the sponsor gives you notice to close, your failure to do so could result in forfeiture of your downpayment. To avoid such harsh consequences, a buyer should try to negotiate in the purchase agreement a right to adjourn the date and time for closing originally designated by the sponsor.

Closing Costs:

To avoid potential "sticker shock," you should carefully review associated closing costs with your attorney. Although the sponsor will only be able to provide *approximate* closing figures, your attorney, working in conjunction with a title company, should be able to provide a fairly accurate estimate of the closing costs that you will be responsible for in addition to the balance of the purchase price. In a typical financed purchase, closing costs are usually made up of the following:

- **Transfer taxes:** any time there is a conveyance of real property in the City of New York, both the City and the State are entitled to a percentage based on the purchase price. For conveyances under $500,000.00, 1% of the purchase price goes to the City, and $2 for each $500 of the purchase price goes to the State. For transfers over $500,000.00, the percentage payable to the City jumps to 1.425%. Generally, payment of transfer taxes are the obligation of the seller; however, in new construction condominium offerings, it is customary for purchasers to pay these fees.
- **Mansion tax:** when purchasing a unit for $1 million or more, a buyer will be required to pay an additional tax to the State, commonly referred to as the "Mansion Tax." This tax is currently 1% of the purchase price.
- **Working capital contribution:** Reserve funds are typically not established for new construction condominium offerings. Rather, purchasers are required to make a contribution at closing to a working capital fund, generally in an amount equal to two (2) months' common charges assessed against the unit at the time of closing.
- **Residential common charges:** one month's common charges for the first full month following the closing. (However, you should be aware that projected common charge figures are notoriously low and the initial fee you pay may not be realistic in its ability to handle future repair and infrastructural issues as they arise. Thus, you should expect your common charges to rise, maybe by as much as 20%, as the complex fills.)
- **Sponsor's legal fee as well as your own legal fee and bank fees.**
- **Title insurance premiums:** Varies depending upon the purchase price and mortgage amounts.
- **Mortgage Tax:** Currently 2.05% with respect to mortgages of less than $500,000.00, and 2.175% with respect to mortgages in the amount of $500,000.00 or more. The lender will be responsible for .25% of the mortgage tax.
- **Recording fees**: The fees charged by the City Register's Office for recording the Unit Deed, Unit Power of Attorney and mortgage. Approximately $650.00.
- **Miscellaneous title charges:** Generally totaling approximately $1,000.00

A buyer can never ask too many questions, and the foregoing is in no way an exhaustive list of all issues that should be addressed by a buyer contemplating the purchase of a new condominium. The important thing is to be thorough in your due diligence and, working with your attorney, knowing the right questions will help to achieve a successful purchase transaction.

Craig L. Price is a partner and Jennifer Apple is an associate in the Firm's Transactional Department. Mr. Price and Ms. Apple represent buyers and sellers in all types of commercial and residential transactions.

Recent Transactions of Note

BBWG's Transactional Department highlights some of the significant deals which we have handled recently:

Craig Ingber and Denise DeNicola represented the seller of a commercial building in Albany for $49 million.

Dan Altman, Craig L. Price and Allan Gosdin represented the purchaser of a commercial property in the West Village, as part of a larger assemblage being handled by BBWG. The developer plans to build a luxury residential condominium with parking in the heart of the West Village.

Robert Jacobs and Aaron Shmulewitz represented a midtown cooperative on the sale of excess development rights ("air rights") for $4.5 million.

Craig L. Price represented a condominium sponsor on the sale of two commercial condominium units to a foreign government for $15 million.

Craig L. Price and Allan Gosdin successfully completed lease negotiations for an investment bank's relocation of its New York City headquarters to a commercial co-op building on Fifth Avenue.

Seth Liebenstein and Aaron Shmulewitz represented a commercial tenant on the buyout of its lease for $2.25 million.

Denise DeNicola represented two condominiums on loans obtained from commercial banks in excess of $1.5 million.

Denise DeNicola, Jennifer Apple, Cody Campbell, Rosa Lombardo and Nadia Hutchinson represented the sponsor of a new construction condominium in downtown Brooklyn on the sale of the first 20 units.

Aaron Shmulewitz represented the seller of an Upper East Side townhouse for $10 million in a section 1031 exchange.

Administrative Update

The MCI Rider: Collect the MCI Increase Immediately After the MCI Order is Issued by Including the Proper Lease Rider

By: Vladimir Favilukis

The collectibility of an approved application for a rent increase as a result of completing a major capital improvement ("MCI") project in a rent regulated building depends, in large part, on the owner's steadfastness in applying the approved rent increase to the affected tenants' rents. The rules setting forth the collection procedures need to be followed, and they can be complex.

One area of note involves timing. Oftentimes, after the New York State Division of Housing and Community Renewal ("DHCR") has granted an owner's application for a rent increase pursuant to an approved MCI project, actual collection of the permitted MCI increase is delayed for certain apartments until the expiration of the lease for that particular unit. Such an occurrence, in effect a forfeiture of funds to which the owner should be immediately entitled as of the date stipulated by the DHCR order, is the result of an owner's failure to provide a "Rent Adjustment During

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The MCI Rider. . .
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the Life of the Lease" rider with the tenants' vacancy and/or renewal lease. This rider is typically known as the "MCI Rider."

The MCI Rider is an explicit prerequisite to collecting an increase during the life of an active lease. The rule is set forth in Section 2502.5(c)(3)(i) of the Emergency Tenant Protection Act ("ETPA"). Specifically, Section 2502.5(c)(3)(i) states, insofar as is relevant, that the legal regulated rent established in a lease may only be adjusted pursuant to a DHCR order "where the vacancy lease recites that" an application for a rent increase pursuant to § 2502.4(a)(2)(i) of the ETPA (the relevant section governing MCI increases) is pending before the agency.

Although Section 2502.5(c)(3)(i) of the ETPA specifically refers to a "vacancy lease," the DHCR has interpreted this provision to mean that an owner may not collect an MCI rent increase unless the lease in effect at the time of the increase recites that an application for a rent increase is pending before the DHCR. So, even when the original vacancy lease contained the MCI Rider, DHCR has adopted the position that the current lease must also attach the MCI Rider because the "regulations require an owner to provide specific notice to the tenant that an MCI application is pending and that the legal regulated rent is subject to increase if the MCI application is granted." *J. DeBenedictus Building Corp.*, DHCR Adm. Rev. Docket No. EL-810310-RO (5/17/95).

Moreover, the DHCR has set forth specific and stringent requirements which MCI Riders must satisfy in order to be effective. Compliance depends on the following factors being included in the MCI Rider:

- specificity as to the improvements being considered in the MCI application;
- the DHCR Docket No(s). assigned to the application, if any; and
- the approximate amount of the increase applied for.

DHCR has stated that a tenant must be provided with sufficient notice of any increase which may be imposed during the course of a lease term in order for the tenant to be able to make an informed decision as to whether to obligate him/herself to pay the possible increase by signing the renewal lease.

It is also noteworthy that any collection of a permitted MCI increase in the absence of a compliant MCI Rider could subject the owner to a penalty of treble damages, if the tenant initiates an overcharge proceeding with DHCR.

Thus, in order to be able to collect a MCI increase when such increase is granted, rather than waiting until the expiration of the lease in effect, and to protect against the possibility of overcharge penalties, an owner must include the proper MCI Rider with every vacancy lease issued to a potential tenant ***and*** with every renewal lease issued to an existing tenant.

Vladimir Favilukis is an associate in the Firm's Administrative Department.

Litigation Update

Noise Complaints Did Not Entitle a Former Tenant to Summary Judgment in Action Alleging Habitability Breaches and Constructive Eviction

By: Kristine L. Grinberg

In *Armstrong v. Archives, L.L.C.*, the owner, represented by BBW&G, successfully appealed to the Appellate Division, First Department, from a decision of the Supreme Court, which had summarily ruled in favor of a former tenant seeking damages for alleged noise from a neighboring tenant.

The former tenant of a market-rate apartment sued the owner after she vacated on account of alleged "excessive noise" from a neighboring tenant's apartment. The Supreme Court found that the owner was liable for breach of the implied warranty of habitability and constructive eviction primarily because the owner had served the neighboring tenant with a notice to cure

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Noise Complaints . . .
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based on the former tenant's allegations. The Supreme Court found that since the owner had recorded the former tenant's complaints in its building complaint log books, and acknowledged receipt of the former tenant's letters and phone calls in the notice to cure, the owner had sufficient notice of the problem. However, because the neighboring tenant had allegedly persisted in his noisy behavior for an extended period of time, the Supreme Court concluded, without a hearing, that the owner failed to take effective steps to deal with the problem.

On appeal, the Appellate Division unanimously reversed the Supreme Court's decision. The appellate court held that "the affidavits submitted by defendant [owner] raise material issues of fact as to whether the alleged noise emanating from a neighboring apartment was 'so excessive that [the former tenant was] deprived of the essential functions that a residence is supposed to provide.'"

The Appellate Division further held that the owner's "notice to cure reciting the dates and substance of noise complaints against the offending tenant [did not] constitute a conclusive admission or proof that the alleged noise rose to the level of a breach of the warranty of habitability." The Appellate Division found that the former tenant's claim that the owner "did nothing to address her complaints is contradicted by [the owner's] evidence that its agents . . . assisted plaintiff on numerous occasions by calling the offending tenant and going to his apartment in response to her complaints and setting up meetings to explore her relocation options to another apartment in the building, and that [the owner's] counsel wrote letters to, and served a notice to cure upon, the offending tenant."

The Appellate Division's decision in *Armstrong* firmly establishes that complaints and incidents listed in a notice to cure do not constitute "proof" of excessive noise or an "admission" by the owner that the alleged noise was excessive and constituted a breach of the implied warranty of habitability. The burden of proving excessive noise falls on the complaining tenant.

Kristine L. Grinberg is an associate practicing in BBW&G's Appeals and Litigation Departments.

Lights, Camera, Action!!

By: Diana Morgan

Videotape recordings can help prove a non-primary residence or nuisance claim in a summary proceeding. Property owners should review the following issues when considering videotape recordings as a way to prepare and prove their case:

(A) *Time period of recordings* – Courts examine the time period prior to the date of the commencement of a summary proceeding. Recordings should be obtained prior to the date stated in the predicate notice and notice of petition. Any videotapes obtained subsequent to the date in the petition may be deemed irrelevant by the Court.

(B) *Placement of the camera* – The camera should be placed in an area outside the apartment where the property owner will obtain optimal visual results in a public or common space. The camera should not be obstructed by any structure or moving object. The recordings must be clear. The camera should not record the inside of the tenant's apartment. Cameras are usually placed in the lobby of the building, in the hallway facing the front door of the subject apartment, or in a location facing the front door of the building.

(C) *Person(s) responsible for reviewing and logging recordings* – It is important to hire a reputable investigative firm or an independent person to review and log the videotape recordings. It is best to have a person familiar with giving testimony in court. Also, logging which highlights relevant recordings will direct a judge to the portion of the recording that is most beneficial to the property owner;

(D) *Continuous v. motion-*

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sensitive videotape recording – Continuous recording is not the most effective method of recording. Videotape recordings controlled by sensors are the most practical methods of recording because they only record if there is motion in front of the camera. Most judges do not have time to review hundreds of hours of recordings.

(E) *Costs of videotaping* – The total cost of videotape recording and hiring the recording company or individual to log and testify in court may be expensive, but well worth the investment in terms of the evidentiary advantage it will provide in proving your case. Therefore, the value in regaining legal possession of a regulated apartment should be factored into the costs of employing videotape recording evidence.

Well prepared videotape recordings are a powerful evidentiary tool in a non-primary residence or nuisance summary proceeding. Conduct a diligent investigation before bringing a case, and if you know that a tenant is not occupying an apartment as a primary residence, or is engaging in nuisance conduct that is witnessed outside the apartment, let the cameras roll.

Diana Morgan is an associate in the Firm's Litigation Department. Ms. Morgan handles landlord-tenant disputes in the City's Housing Courts.

BBWG NEWS

Matthew Brett will be co-moderating and lecturing on April 18, 2008, on a panel of legal experts and public policy makers concerning recent housing issues in New York City. Mr. Brett will speak on rent regulation at the NYC Bar Association symposium entitled: Future Perspectives on Affordable Housing & Economic Development in New York City: Policy & Practice.

Sherwin Belkin authored the report adopted by the Real Property Section of the New York State Bar Association on April 3, 2008, concerning a proposed bill sponsored by NYS Assemblymember Richard N. Gottfried. The bill, A05476, proposes to eliminate the right of an owner to recover its rent regulated property for personal use. The report sets forth the reasons why the proposed legislation undermines fundamental property rights and is opposed by the Real Property Section.

Aaron Shmulewitz answered an inquiry in the January 30, 2008 Q & A section of the New York Times Real Estate Section. Mr. Shmulewitz gave his advice concerning a shareholder's problem with another shareholder who had acted without Board approval. Mr. Shmulewitz was later interviewed by WNBC-TV on the issues facing co-ops and condos that had rented space to therapists. The interview aired on February 14, 2008. In the March 16, 2008 Q & A section of the New York Times Real Estate Section, Mr. Shmulewitz was asked for advice regarding a co-op governance issue regarding the passage of a "flip-tax."

Craig L. Price was quoted in the January 9, 2008 edition of Real Estate Weekly concerning the current state of the real estate market place within New York City. On January 31st, Mr. Price spoke in the Warburg office in Harlem regarding the purchase and sale of condos and co-ops. Then, on February 14th, Mr. Price took part in the Warburg new broker training program.

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