LOWENSTEIN SANDLER NEWSLETTER
REAL ESTATE

ATTORNEY ADVERTISING

NEW YORK NEWS AND DEVELOPMENTS

October 2010

New York City to Implement Brownfield Program

An August 2010 Memorandum of Agreement (MOA) entered into by the New York City Mayor's Office and the New York State Department of Environmental Conservation (NYSDEC) further advances the city's program to return "Brownfield" sites in the city to productive reuse. The MOA, which is not a delegation of any state program to the city, is a key tool in the implementation of the New York City Local Brownfield Cleanup Program (LBCP) by the city's Office of Environmental Remediation (OER).

The MOA is applicable to persons and properties defined in the OER's regulations as being eligible for oversight under the MOA, which are authorized by NYC local law or enrolled in the city's LBCP. The MOA does not, however, create any rights, obligations or benefits for such persons or properties.

Under the MOA, the OER is authorized to adopt and implement procedures that are designed to: (1) provide oversight to ensure that the remediation of Brownfield sites complies with federal and state environmental requirements in order to "protect human health and the environment"; (2) require remedy selection and implementation in accordance with state regulations, standards, criteria and guidance, including NYSDEC's February 2007 *Presumptive/Proven Remedial Technologies* guidance; (3) review and approve, and require verification of cleanup plans; (4) ensure the recording of use restrictions in county records and establish a registry of such restrictions that is easily accessible to the public; and (5) ensure the reporting of petroleum releases and inactive hazardous waste disposal sites to NYSDEC. For petroleum releases, in addition to these general requirements, the city's LBCP is geared to ensure that cleanup is performed in accordance with NYSDEC's Petroleum *Spill Guidance Manual*. The MOA further requires the OER, upon receipt of an application, to review federal and state databases to ensure coordination with other environmental officials already overseeing or otherwise involved in site remediation.

Under the MOA, the OER is required to communicate to NYSDEC all "suspected" sites that it becomes aware of that would be regulated under NYSDEC's hazardous waste disposal site program requirements. Sites that, in the OER's view, pose a "significant threat to public health or the environment" are ineligible for LBCP oversight.

NYSDEC does not intend to take any administrative or judicial action at sites that are being overseen by the OER as long as such sites remain in compliance with LBCP and the OER's requirements and directives. However, the MOA is not a liability release on NYSDEC's part, and NYSDEC explicitly reserves the right to take any action it deems appropriate at any site administered by the OER.

NYSDEC will periodically audit the OER's implementation of the LBCP program, and the OER is required to submit annual status reports of its program.

Yellowstone Relief Denied for Commercial Tenant Relying on Technical Circumvention of Default

On September 23, 2010, in KB Gallery LLC v. 875 W 181 Owners Corp., 2010 WL 3701381 (N.Y.A.D. 1

Lowenstein Sandler
ATTORNEYS AT LAW

Dept.), 2010 N.Y. Slip Op. 06697, the New York Appellate Division, First Department, upheld a June 8, 2010 Supreme Court, New York County, decision (see KB Gallery LLC v. 875 W 181 Owners Corp., No. 603766-2009, slip op. at 3 (N.Y. Sup. Ct., Jun. 8, 2010)), which held that a commercial tenant could not maintain a Yellowstone application for injunctive relief that was filed after the default cure period under the lease had expired. In KB Gallery, the plaintiff KB Gallery, LLC ("KB") obtained a temporary restraining order under the Yellowstone doctrine, which prevented the defendant landlord, 875 W. 181 Owners Corp. ("Owner"), from terminating KB's lease for a breach of the lease's subletting clause. Under the lease, KB was allowed to sublease its premises to a third party only if it obtained Owner's consent prior to entering into the sublease.

Despite the consent requirement in its lease, KB entered into a sublease with a third party corporation to operate the premises as a children's play center without first obtaining the landlord's consent. In doing so, KB relied on the fact that the express terms of the sublease provided that the sublease's validity was conditioned on obtaining Owner's consent and that if such consent was not obtained within 15 days of execution, the sublease would become void. KB requested Owner's approval of the sublease after execution of the sublease and allowed the sublessee to use the leased premises and commence operation of the play center without Owner's consent.

Owner did not consent to the sublease and on November 17, 2009, sent KB notice of default because of its actions in connection with subletting the premises and entering into a sublease without consent. The landlord's notice gave KB until December 4, 2009, to cure the default. Thereafter, KB wrote to Owner stating that because of Owner's denial of consent to the sublease, the sublease was effectively terminated as a matter of law and therefore no default existed.

In response to KB's letter, on December 7, 2009, Owner sent KB a notice that the lease would terminate as of December 18, 2009, due to KB's failure to cure the default before December 4, 2009. KB thereafter filed a Yellowstone application for a temporary restraining order on December 16, 2009 – 12 days after the cure period had expired.

The Appellate Division found that KB's Yellowstone application should have been denied as untimely, reasoning that KB failed to provide a "good reason to permit a Yellowstone Order to issue…after the cure period has expired." The Court summarily rejected KB's arguments that "the sublease was conditional upon consent and that upon [Owner's] refusal of consent the sublease became void by operation of law." Noting that tenant's position was an "astonishing proposition" in light of the fact that the play center subtenant remained in occupancy through the cure period, the Court rejected KB's argument that a tenant "can sublet the [premises] without the requisite consent, permit its subtenant to commence occupancy and use of the premises in violation of the terms of the lease, and then if the landlord refuses its consent to what is already a fait accompli, the tenant can then avoid any responsibility under the explicit terms of its lease" by claiming the sublease was never in effect. In making its decision, the Appellate Division noted that KB cited no authority for its positions and vacated the previously granted Yellowstone temporary restraining order.

What this decision reiterates is that if a landlord terminates a lease for a tenant breach, the aggrieved tenant who seeks an injunction must file its Yellowstone application within the period of time required for cure under the lease.

Deadline to Qualify for Treasury Department's Renewable Energy Cash Grant Program is Quickly Approaching

The American Reinvestment and Recovery Act (Public Law 111-5) was enacted in 2009 to promote economic recovery by creating jobs and investing in infrastructure. One such sector benefitted by the Act is renewable energy. In particular, Section 1603 of the Act appropriates funds for payments to qualified applicants who have put "specified energy property" into service during 2009, 2010 or 2011 (if construction began in 2009 or 2010). The payments are generally equal to 10% to 30% of the basis of the specified energy saving property, however, the applicants who receive Section 1603 payments are not eligible for the production or investment tax credits under Sections 45 and 48 of the Internal Revenue Code. Section 1603

payments may also be passed through to eligible tenants if the specified energy saving property will be owned by the tenant. But the time to take advantage of these payments is about to expire; while applications do not need to be filed until October 1, 2011, construction of a project must have commenced during 2009 or 2010 (even if the application has not yet been filed). Guidance and the application for the Grant program are available on the U.S. Department of Treasury's web site here: http://www.treas.gov/recovery/1603.shtml.

Recent Amendments to New York Power of Attorney Law Excludes Most Corporate Transactions From Rigid Disclosure and Execution Requirements

Power of attorney forms are frequently used in connection with real estate transactions. The New York Legislature recently passed amendments to the 2009 power of attorney law (NY General Obligations Law § 5-1501 et seq.) to correct a number of perceived problems that its 2009 statute created for various commercial and real estate transactions. On August 13, 2010, Governor David A. Paterson signed into law corrective amendments to the 2009 statute including a new provision (GOL § 5-1501C) specifying that the rigid disclosure and execution requirements imposed in the 2009 statute do not apply to "powers of attorney given primarily for a business or commercial purpose." The effective date of the revised provisions was September 12, 2010 (30 days from August 13), and the provisions apply retroactively to September 1, 2009 (except that powers of attorney validly executed under prior law will remain valid).

The 2010 amendments clarify ambiguities in the 2009 statute and specify that routine powers of attorney for certain commercial or business purposes do not need to comply with the statute's extensive notification, content, formatting, notarization and witness requirements. Another major change in the new statute is the elimination of the presumption of automatic revocation of all prior powers of attorney previously executed by the same principal unless the principal affirmatively stated otherwise. The new statute also clarifies that a power of attorney executed in another jurisdiction in compliance with its laws or the laws of New York is valid in New York.

The broad exclusions specified in the 2010 amendments should relieve concerns about the need for most business transactions to comply with the rigid requirements set forth in the power of attorney statute. It is possible that further amendments to the power of attorney statute may be forthcoming as the Law Revision Committee is directed to study "all aspects of the implementation" of the new statute and to issue its final report on January 1, 2012.

Please contact any member of Lowenstein Sandler's Real Estate Practice Group with questions regarding the topics discussed in this newsletter.

Lowenstein Sandler makes no representation or warranty, express or implied, as to the completeness or accuracy of this newsletter and assumes no responsibility to update the newsletter based upon events subsequent to the date of its publication, such as new legislation, regulations and judicial decisions. Readers should consult legal counsel of their own choosing to discuss how these matters may relate to their individual circumstances.

www.lowenstein.com

New York
1251 Avenue of the Americas
New York, NY 10020
212 262 6700

Palo Alto
590 Forest Avenue
Palo Alto, CA 94301
650 433 5800

Roseland
65 Livingston Avenue
Roseland, NJ 07068
973 597 2500

© 2010 Lowenstein Sandler PC. In California, Lowenstein Sandler LLP.

Lowenstein Sandler
ATTORNEYS AT LAW