

Legal Issues Impacting the Commercial Real Estate & Construction



Industries in the Garden State

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APPARENTLY THE MARKET FORCES THAT CREATED the recent period of unprecedented growth in New Jersey's commercial real estate and construction industries have subsided. Market predictions range from a sustained period of flat growth to a modest decline. As economic conditions worsen, the competition among regional real estate markets intensifies.

In the early going of this more competitive environment, the state has not performed well. It is anticipated that New Jersey will lose a significant number of highly paid professionals in the information technology and pharmaceutical fields—industries essential to New Jersey's economy. New Jersey recently dropped in median family income from first to third. The 2010 Census is likely to result in New Jersey losing a congressional district.

New Jersey's poor performance in this new economic climate is due in large part to the state's apparent unwillingness to create a business-friendly environment. New Jersey was recently ranked last among states as an environment conducive to small business. Specifically, New Jersey's regulatory and tax environments are currently not conducive to growth and cause New Jersey to be at a competitive disadvantage with surrounding areas. New Jersey's well-deserved reputation for fiscal irresponsibility and governmental corruption only adds to the problem.

Part and parcel of the business climate in New Jersey is a development approval process that is famously dysfunctional. New Jersey's land use law is administered through the planning and zoning authorities of the state's 566 municipalities and 21 counties. Each municipality has its own unique planning/zoning ordinances and idiosyncrasies. This "home rule" creates uncertainty as to the likely outcome of a given development application and stymies growth because would-be developers have to factor this uncertainty into their investment decision making. A similarly situated market with a workable development approval process has a significant competitive advantage.

Added to the foregoing concerns is the predilection of the state's regulatory agencies to expand the scope of their jurisdiction either to further complicate the development approval process, eliminate the "developability" of significant portions of New Jersey real estate, or simply make doing business more difficult. For example, the New Jersey Department of Environmental Protection (NJDEP) recently increased the scope of its regulatory jurisdiction by: (1) proposing amendments to its Surface Water Quality Standards to add more than 900 miles of C-1 waterways; (2) imposing a 300-foot development buffer for surrounding properties; (3) proposing significantly revamped Stream Encroachment permit regula-

tions; (4) proposing significantly stricter Groundwater Quality Standards; and (5) proposing changes to the NJDEP's Freshwater Wetlands Rules that will complicate the permitting process and create delay and increased costs in affected development projects. The DEP also recently proposed stricter rules for its Site Remediation Program, including more stringent soil cleanup standards and other onerous technical requirements.

The state's commercial real estate and construction industry insiders are also keeping a close watch on the anticipated next round of Coalition on Affordable Housing (COAH) regulations. COAH is the agency charged with implementing the state's mandate to create affordable housing for low- and moderate-income residents, a mandate met in large part by shifting the costs of building these units onto developers as a condition of development approval. A recent appellate court decision effectively turned this area of the law on its ear by eviscerating COAH's then-current rules. At press time, COAH was under a court-imposed deadline to administer new regulations by Dec. 31, 2007. These new rules will have a significant impact on the industry.

The recent subprime lending crisis is another major factor of concern to the New Jersey commercial real estate and construction communities. In response to the heightened risk in mortgage-based securities, many lending institutions are becoming more risk averse. This reassessment of risk creates a decrease in available capital as well as higher interest rates. As financing becomes more difficult to obtain and more costly, it becomes more difficult to turn a profit on a real estate investment.

On the positive side, New Jersey policymakers have seemed to embrace "Green Construction," an exciting new concept that focuses on high efficiency, environmentally friendly design methods. New Jersey has been on the forefront of this effort. For their part, the commercial real estate and construction industries have found that green design makes sense from a costs savings, marketing and development approval perspective. Look for green construction projects to become more commonplace in New Jersey.

These issues notwithstanding, New Jersey's commercial real estate and construction industries have a lot going for them. The state's prime geographical positioning will always ensure a certain level of economic vitality. The fortunes of the industry, however, will turn on whether the state's policymakers take steps necessary to restore New Jersey's reputation as an excellent place to do business. ■

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