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Don't Ignore Liquor License Issues in Real Estate Transactions

By Jennifer L. Tsyn and Sarah Lewis Belcher

When representing a client in core real estate work, such as buying or selling real property or negotiating a lease, alcohol may be the last thing an attorney is likely to take into consideration. Clients are often looking for high-quality work on the specific issue presented to the attorney, with a quick turnaround and acceptable cost. A client who retains an attorney for representation in the purchase or sale of real property, or in the negotiation of a lease, may not necessarily bring liquor licensing concerns to the attorney's attention.

As with many other business considerations related to the use of real property, liquor licensing issues can significantly impact real estate transactions. These items may delay, or even derail, negotiations and closings of purchase/sale contracts and leases.

In the course of working with a potential buyer or tenant of commercial real estate, it is important to consider the licenses and other approvals the client will need to operate the intended business at the property. Many businesses may require a liquor license to remain sufficiently

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Leasing to a Foreign Entity Requires Special Attention

By Eugene J.M. Leone and Alexis Kessler

Leasing real property to a foreign entity presents a special set of concerns for landlords, and those who are leasing real property to a foreign entity should carefully evaluate these concerns — and, where appropriate, address them in the lease. This article highlights the special considerations that a landlord encounters when leasing to a foreign entity.

Leasing to a Foreign Mission

If the proposed tenant in a leasing transaction is a Foreign Mission or a foreign diplomat, special considerations are in play, and these may hinder the leasing transaction or prevent the landlord from adequately protecting its position under the lease. (A "Foreign Mission" is defined as "any mission to or agency or entity in the United States which is involved in the diplomatic, consular or other activities of, or which is substantially owned or effectively controlled by a foreign government, or an organization representing a territory or political entity which has been granted diplomatic or other official privileges and immunities under the laws of the United States or which engages in some aspect of the conduct of international affairs of such territory or political entity, including any real property of such a mission and including the personnel of such a mission." *See* http://bit.ly/2aKySCx.)

Department of State Approval Requirements

There are specific reporting and approval requirements that must be satisfied by any "Foreign Mission" tenant before a lease may be executed.

Pursuant to Section 4305 of the Foreign Missions Act, Foreign Missions are required to notify and obtain approval from the Department of State's Office of Foreign Missions prior to finalizing any proposed lease, acquisition or disposition of real property in the United States. Foreign Missions Act, 22 U.S.C. § 4305. (Note: An "acquisition" under the Foreign Missions Act includes any renovation,

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alteration, addition or change in use of an existing property. Diplomatic Note 11-189.) The notification and approval requirements often also apply to acquisitions by individual members of the Foreign Mission or to a foreign government's "miscellaneous foreign government office." Diplomatic Note 11-189. Furthermore, any residential home or apartment leased by a Foreign Mission for use by members of the mission is subject to the same notification and approval requirements. *See* Purchase or Lease of Foreign Mission Property, http://bit.ly/2asbBkL.

The burden under the Foreign Missions Act is on the Foreign Mission to seek and obtain the required approval of a proposed lease. However, a landlord may suffer negative consequences as a result of a Foreign Mission's failure to timely seek or receive this approval. To begin with, approval of the transaction may entail a substantial amount of time. Once a Foreign Mission has submitted the requisite information to the Office of Foreign Missions for approval of the transaction, the latter has 60 days to review and approve the request. Foreign Missions Act, 22 U.S.C. § 4305(a)(1)(A).

Additionally, if the Office of Foreign Missions of the Department of State does not grant approval, it may require the Foreign Mission to divest itself of, or forgo the use of, any real property determined by the Office of Foreign Missions not to have been acquired in accordance with the Foreign Missions Act. Foreign Missions Act, 22 U.S.C. § 4305(b). Furthermore, the Foreign Mission's property will not be granted the diplomatic privileges and immunities that would otherwise be available to it, including inviolability and exemption from real estate tax.

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Diplomatic Note 11-189. Hence, a landlord should ensure that any Foreign Mission obligated to obtain approval under the Foreign Missions Act fulfills its obligation to timely obtain such approval prior to lease execution.

Since most landlords and tenants kick off lease transactions with a letter of intent, the completion of a letter of intent is the ideal time to obtain approval from the Office of Foreign Missions. Note that the Office of Foreign Missions generally takes the position that it is approving an activity rather than a document, and it is possible for the parties to a lease to obtain the requisite approval prior to completion of documentation.

Properties that are acquired by Foreign Missions for diplomatic purposes must be used for such purposes, and they may not be used for any other purpose or leased to any party not affiliated with the Foreign Mission. Purchase or Lease of Foreign Mission Property, available at http://bit.ly/2asbBkL. In order to avoid an improper use, leases should restrict a Foreign Mission's use of the leased premises, and they should limit the right of the Foreign Mission to sublease the property to those uses permitted under the Act.

Foreign Sovereign Immunity

In addition to hurdles relating to lease execution, a landlord must also consider the sovereign immunity of a Foreign Mission tenant in any transaction, and should attempt to receive a waiver of this immunity. As a general matter, the doctrine of foreign sovereign immunity provides a foreign state with immunity from the jurisdiction of United States courts; however, the Foreign Sovereign Immunities Act of 1976 (the FSIA) limits this immunity to "public acts." Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602-1611). "Private acts," which include commercial activities, are not granted such immunity. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as

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Tenant Improvements Lead to Mechanic's Lien on Owner's Property

By Krista C. McCormack

For the first time, a Missouri Court of Appeals has held that a contractor who has performed work for a shopping mall tenant may have mechanic's lien rights on the landlord's simple interest in the entire mall.

In *Crafton Contracting Co. v. Swenson Construction Co.*, No. ED102910, (Mo. App. E.D. April 12, 2016), landlord Plaza Frontenac Acquisition, LLC, and tenant Allen Edmonds Corporation entered into a 10-year lease for space in which the tenant desired to operate an Allen Edmonds shoe store. The lease required the tenant to improve the leased space, including a bump-out of the storefront; installation of storefront signs, customer entrance doors, and floor coverings; applying plaster; undertaking interior decoration; connecting plumbing lines to the mall system; and completing extensive electrical work. As required by the lease, the tenant submitted plans for these improvements to the landlord for approval, and the landlord approved them.

The tenant hired Swenson Construction Company (SCC) as general contractor to perform the work. SCC then subcontracted the demolition, framework, drywall, carpentry, heating, ventilation and air-conditioning work to two subcontractors, Crafton Contracting Company (Crafton) and Vogel Sheet Metal and Heating, Inc. (Vogel). Upon completion of the work, the tenant paid SCC, but SCC never paid subcontractors Crafton and Vogel. Soon thereafter, SCC went out of business. Crafton and Vogel then filed mechanic's liens on the mall against the landlord and filed suit to enforce the liens. The trial court found that the liens were unenforceable against the landlord because Crafton and Vogel failed to establish that the tenant was the landlord's agent under Missouri's mechanic's lien statute.

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Landlord-Tenant Agency Relationship

Missouri Revised Statute § 429.010 provides that a mechanic's lien may be placed upon an owner's land for any work or labor completed upon such land by any person who contracts with the owner or his agent. The court of appeals in the *Crafton* opinion explained: "When a lease requires the lessee to make improvements of a substantial and permanent nature, the lessee, in making such improvements, becomes, as a matter of law, the agent of the lessor within the meaning of the mechanic's lien law." *Crafton*, No. ED102910, at *4.

The court noted that this lessor/lessee agency relationship "is not a typical principal-agent relationship, but rather, a special, limited agency arising out of section 429.010." *Crafton*, No. ED102910, at *4 (citing *Mid-West Eng'g & Constr. Co. v. Campagna*, 397 S.W.2d 616, 628 (Mo. 1965)). The express terms and requirements of the lease therefore become of the utmost importance in determining whether an agency relationship has been created in the mechanic's lien context.

Lease Requires Tenant Improvements

In *Crafton*, the terms and requirements of the lease mandated that the tenant perform a complete build-out of its store. The court pointed to various elements of the lease to illustrate the mandatory nature of the improvements, including the fact that the lease required the tenant to replicate the design of its other Allen Edmonds stores through a complete overhaul of the premises and that the tenant's contractor had to provide the landlord with a security deposit to facilitate the completion of the work if the tenant or contractor abandoned the project.

Substantial and Permanent Improvements

The second element the court looked to was whether the required improvements were of a substantial and permanent nature. The trial court had found that the tenant was not the landlord's agent because the improvements made were only in an area comprising less than 1% of the entire square footage of the mall, and the value of the improvements was no more than 2% of the value of the mall. The court of appeals rejected this limited analysis. Instead, the court noted that the "substantial and permanent" element is not required by the express language of § 429.010 but had become a part of the mechanic's lien-agency analysis over time, involved a much lower threshold than was used by the trial court, and was not subject to a precise mathematical formula.

The court of appeals explained that "where the improvements are required and completed under the control of the owner with the view of improving the property, it is immaterial whether the owner ultimately benefits by the transaction and it is unnecessary to discuss the effect of the improvements on the property." When improvements are mandatory and the aforementioned control and intent requirements are met, "the owner's interest is enhanced at least in such a substantial manner as to make the mechanic's liens recoverable."

The court also noted that the issue of agency in the mechanic's lien context must revolve around the intent of the owner at the time the agreement is made, and not whether the improvements ultimately increased the property's value or were "a wise decision."

In *Crafton*, the landlord exercised control over the entirety of the tenant's construction of its improvements. Pursuant to the terms of the lease, the tenant was required to submit plans for the work for the

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landlord's approval, and the tenant could only begin work once approval was given. The Crafton contractor's bid for the improvements was submitted to and approved by the landlord. The tenant's contractor was also required to give the landlord a security deposit so the landlord could complete the work if the tenant failed to finish it, and the tenant was required to have its contractor cooperate with the landlord and correct any deficiencies found by the landlord. Further, The tenant was only permitted to use the leased premises as an Allen Edmonds shoe store, which has a particular design, and "for no other purpose whatsoever."

Finally, the improvements constructed by the tenant were to become the landlord's property upon the expiration of the lease. Due to the substantial amount of control and supervision permitted in the lease and exercised by th landlord before and during the construction of the improvements, and because these improvements were made with the intent to improve the property, the court found that the substantial and permanent nature test of the mechanic's lien agency inquiry had been met.

Ultimately, because the tenant was required to construct and complete the improvements under the clear control of the landlord, the Missouri Court of Appeals reversed the trial court's judgment and held that the tenant became the landlord's agent for purposes of Missouri's mechanic's lien laws, and that the liens placed on the mall for work contracted for by the tenant were enforceable against the landlord.

Other Jurisdictions

Mechanic's lien laws are not uniform in each state. Minnesota courts, for example, have found that "[a]n owner of property is not subject to a mechanic's lien for improvements contracted by another if the owner gives adequate notice of the owner's intent not to be bound." *Marksman Const. Co., Inc. v. Mall of Am. Co.*, C0-97-1030, 1997 WL 757392, at *1 (Minn. Ct. App. Dec. 9, 1997); *see also* M.S.A. § 514.06 ("As against a lessor no lien is given for repairs made by or at the instance of the lessee"). A Virginia court has held that a contractor's lien "may only cover property on which they have worked," precluding the lien from extending "beyond the property worked upon to reach the entirety of the mall." *Elder-Jones, Inc. v. Byers, Inc.*, 23 Va. Cir. 40, at *2 (Va. Cir. Ct. 1990); *see also* VA Code Ann. § 43-20 ("Subject to the provisions of § 43-3, if the person who shall cause a building or structure to be erected or repaired owns less than a fee simple estate in the land, then only his interest therein shall be subject to liens created under this chapter.").

Similarly, Texas courts have held that "[a] lien on real property cannot be established merely by virtue of a contract between a lessee of the property and the materialman. 'If a lessee contracts for construction, the mechanic's lien attaches only to the leasehold interest, not to the fee interest of the lessor.'" *2811 Associates, Ltd. v. Metroplex Lighting and Elec.*, 765 S.W.2d 851, 852 (Tex. Ct. App. 1989) (citing *Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor, Inc.*, 576 S.W.2d 794, 805 (Tex. 1978)).

Maryland law uses a mathematical approach in determining whether improvements made to leased premises in a building are substantial enough to have a mechanic's lien placed on the entirety of the building. Under statute, tenant improvements on leased property must improve the entire building to the extent of 25% of its value for a lien on more than the tenant's interest in the property to be enforceable. MD. Real Prop. Code Ann. § 9-103. Maryland courts have interpreted this statute to preclude a mechanic's lien against a portion of a mall leased by a tenant from being enforceable, unless the tenant's improvements increased the value of the entire mall by at least 25%. *See Hurst v. V & M of Virginia, Inc.*, 293 Md. 575 (Md. App. 1982).

Conclusion

Given the complexities of the mechanic's lien laws in each state, real estate counsel for landlords should consult with their construction law colleagues in drafting tenant work letters for the construction of tenant improvements, regardless of whether or not the landlord is providing a tenant improvement allowance, in order to best protect landlords before they become subject to these liens rights.

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amended at 28 U.S.C. §§ 1602-1611). Under the FSIA, Foreign Missions, government ministries, embassies, consulates and militaries are afforded protection under the FSIA, as are entities that are owned or controlled by foreign governments. *See* A Primer on Foreign Sovereign Immunity, March 8, 2006, available at http://bit.ly/2avc7BW. Pursuant to Section 1610 of the FSIA, absent a waiver of immunity, judgments may not be enforced against premises leased or owned for diplomatic purposes. Andrew L. Odell, Esq., Contributing Author, Leases with Foreign Sovereigns and International Organizations, Chapter 14, *Commercial Leasing Handbook*, New York State Bar Association original publication, 2002, revised edition February 2011.

A landlord should therefore obtain an express waiver of sovereign immunity under the FSIA from any tenant that falls within the purview of foreign sovereign immunity in order to ensure that the landlord will be able to: 1) enforce the terms of the lease; and 2) prevent the tenant from withholding rent or other obligations under the lease by claiming protection under the FSIA. While "private acts" are not granted immunity, a landlord should not take the risk that the activity could constitute

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a "public act" and therefore be entitled to immunity. The landlord should obtain a waiver under the FSIA from the tenant in order to deflect a tenant's defense to enforcement of the lease on the basis of its sovereign immunity for public acts.

A similar concept of sovereign immunity applies to individuals, and a landlord should determine whether a person has diplomatic immunity when leasing real property to a foreign diplomat. The Geneva Convention provides that U.S. courts may not hear cases against people who have been granted diplomatic immunity, and the Vienna Convention on Diplomatic Relations protects diplomatic premises in addition to individual diplomatic officers. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. The Department of State issues identification cards to foreign officials who have diplomatic immunity, and a lease cannot be enforced in the event of a default if the landlord does not receive a waiver of immunity from such individual. Sarah Louppe Petcher, Leasing with Impunity? A Landlord's Guide to Diplomatic Immunity, Feb. 4, 2013, available at http://bit.ly/2afvAYx. Hence, a landlord should consider its options when deciding to lease to an individual who has been granted diplomatic immunity, and appropriate waivers should be addressed in the lease.

Foreign Entities As Guarantors

In a number of lease transactions, a domestic U.S. entity will be the tenant, and its parent, a foreign entity, will act as the guarantor of the tenant's obligations. The enforceability of the guaranty against the foreign entity becomes a paramount concern. If a landlord leases space to a U.S. subsidiary of a foreign entity, and the subsidiary either: 1) does not have sufficient net worth to support the lease obligations; or 2) does not maintain financial statements separate from its parent, the foreign parent entity (the Foreign Parent) may be required to guaranty the lease. While the Foreign Parent may have sufficient assets to act as the guarantor, the landlord may encounter difficulties in enforcing or collecting any judgment against the foreign guarantor.

In order to protect itself, a landlord evaluating a lease guaranty from a Foreign Parent should give special attention to guaranty provisions relating to consent to jurisdiction, service of process, choice of law and enforcement of a U.S. judgment in the guarantor's place of formation or domicile. Sidney G. Saltz, International Guaranties, 2008, available at http://bit.ly/2aMZuE9. The guaranty should also do the following: 1) provide that the guarantor consents to jurisdiction in the U.S. jurisdiction (city and state) in which the leased property is located; 2) specify an agent for service of process who is located in the same state as the leased property, which agent will not or cannot revoke its appointment; and 3) clarify that the internal laws of the state (without reference to principles of conflicts of law) shall apply to the terms of the guaranty. Commercial Lease Guaranties from Foreign Entities: What You Need to Know to Safeguard Your Security, *Real Estate, Land Use & Environmental Law Blog*, July 28, 2015, available at http://bit.ly/2as1AtW.

The landlord's ability to enforce a judgment obtained in a U.S. court against a foreign guarantor requires the greatest level of attention while drafting and negotiating the guaranty, as it requires knowledge of the laws of the country in which the foreign guarantor is located. A foreign jurisdiction may impose requirements that affect the validity and binding nature of the guaranty. For example, some foreign states require the corporate seal of the guarantor to be affixed upon a guaranty in order to bind the guarantor. Additionally, while the principle of apparent authority (discussed in further detail herein) applies in the United States, a guarantor's foreign jurisdiction may not follow the same principles, and thus the guarantor's corporate authority to execute the guaranty, and authorization of the signatories, should be confirmed under the laws of the foreign jurisdiction.

Furthermore, a judgment obtained in the United States may not be enforceable in a foreign jurisdiction unless certain procedural requisites have been satisfied. If the judgment is not immediately enforceable, a trial may be required in the jurisdiction of the guarantor. This trial, which is likely to be time-consuming and expensive, will occur in the home court of the defendant guarantor, and all of these obstacles may be too great for the landlord to overcome. At a minimum, a guaranty should give the landlord the right to recover all fees and expenses incurred in enforcing the guaranty, including enforcement in a country other than the United States. *Id*.

As a practical matter, a landlord may prefer to address the uncertainty of enforcement of a judgment rendered in the United States in a foreign jurisdiction by requiring the guarantor to provide a legal opinion. Counsel should be able to state whether or not a judgment obtained in U.S. courts will be enforceable in the guarantor's foreign jurisdiction without a new trial. *See* Sidney G. Saltz, International Guaranties, 2008. Of course, it would be preferable if the guarantor had sufficient unencumbered assets in the United States to satisfy a judgment in the United States. Another possibility is inclusion of an international arbitration clause in the guaranty. The New York Convention, which the United States has ratified, provides that nations will enforce arbitration awards from other nations. Commercial lease guaranties from foreign entities: what you need to know to safeguard your security, *Real Estate, Land Use & Environmental Law Blog*, July 28, 2015.

Apparent Authority

In general, apparent authority arises when a principal holds an agent out as having authority to act

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on the principal's behalf, and a reasonably prudent person would assume that that agent has authority to act in light of a principal's conduct. As noted above, while parties in the United States rely on the principle of apparent authority for domestic contract law, a foreign jurisdiction may not follow the same principle, and a foreign tenant could argue that a lease was not properly executed and therefore is not binding on it. Prior to entering into any lease, a landlord must be mindful of a foreign jurisdiction's requirements for authority to create a binding contract or obligation. As is so often the case, delivery of a legal opinion addressing authority, as well as enforceability, would be quite helpful.

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profitable to operate. However, both the location and physical layout of the property being purchased or leased can cause several issues for a client applying for a liquor license. These factors should be considered in the contract or lease negotiations, as well as in the due diligence phase of any real estate transaction involving a business that will sell alcoholic beverages.

We discuss the issues surrounding liquor licenses and commercial real estate transactions by looking at how these subjects are dealt with in the State of New York.

Initial Considerations

At the outset of any purchase or lease of commercial real estate, the client should be asked whether the business it intends to operate at those premises is a food and beverage establishment or a retail business that sells alcohol. If the response is yes, the next step is to determine whether the client will apply for a "retail" or a "wholesale" liquor license. The "retail" classification allows the licensee to sell or serve alcohol to the public. N.Y. Alco. Bev. Cont. Law § 3(26) (McKinney 2016). "Wholesale" liquor licenses are issued to alcohol manufacturers or distributors. Alco. Bev. Cont. Law § 3(34).

If the client is seeking a "retail" license, the attorney should determine if an "on-premises" or "off-premises" license is appropriate. An "on-premises" retail liquor license allows the licensee to serve alcohol to customers to be consumed on the premises. *See, e.g.*, Alco. Bev. Cont. Law §§ 55, 55-a, 64, 64-a, 64-b, 79-b. An "off-premises" retail license only allows the licensee to sell alcohol "to-go," with no consumption allowed on the premises. *See, e.g.*, Alco. Bev. Cont. Law §§ 54, 54-a, 63, 79, 79-a.

From a real estate perspective, the "on-premises" retail liquor license … is the classification that is most likely to impact purchase or lease negotiations.

From a real estate perspective, the "on-premises" retail liquor license (which would generally apply to a bar, restaurant, hotel, club, catering or event hall, arena or entertainment venue) is the classification that is most likely to impact purchase or lease negotiations. If the client will be seeking this type of license and is purchasing or leasing a property to start such a business, the first step in the liquor license application process is to notify either the municipality in which the premises is located or the community board serving the premises, using the New York State Liquor Authority's approved form. Alco. Bev. Cont. Law § 110-b; Application Notice to Local Municipality or Community Board, Liquor Authority http://on.ny.gov/2aN9PQE.

If the property is located outside New York City, the notice is sent to the clerk of the municipality in which the property is located. *Id*. Once the clerk receives the notice, the client must wait 30 days from delivery of the notice form before submitting a liquor license application to the Liquor Authority. *Id*. Some municipalities will waive the waiting period, but larger municipalities may be less willing to do so. Clients may wish to send this notice while still negotiating the contract/lease and/or working through the due diligence portion of the transaction, as it is a relatively easy and low-cost part of the application process and does not obligate the client to actually purchase or lease the property or file any liquor license application for that location.

If the property is located in New York City, the notice must be sent to the applicable Community Board. The appropriate Board is determined by searching Community Board maps available on the official website of the City of New York. *See* http://on.nyc.gov/2aGfBks. The client must provide information to the Community Board about the new business. *See, e.g.*, Community Board No. 2, N.Y.C., http://on.nyc.gov/2asawzx. A hearing before the Community Board, or one of its committees, may also be required. Clients may not wish to commit the time and effort to work through the process with the Community Board until the real estate transaction is far enough along that it is reasonably certain the client will be purchasing or leasing the property at issue.

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Due Diligence Considerations

The Liquor Authority generally treats the issuance of a liquor license as a privilege, not a right. *Rios v. State Liquor Authority*, 32 A.D.2d 995, 995 (3d Dept. 1969). Pursuant to ABC Law § 64(6-a), the Liquor Authority may consider the following factors in reviewing a liquor license application and determining if granting the license will be for the "public convenience and advantage":

- Number, class and character of other licensed premises in proximity and in municipality or subdivision;
- Evidence that applicant has all other necessary licenses and permits to operate from the premises;
- Effect on vehicular traffic and parking;
- Noise level; and
- History of liquor violations and criminal activity (even while the premises was operated by a different party).

Alco. Bev. Cont. Law § 64(6-a).

In practice, however, these factors are more closely scrutinized if the "500 Foot Rule" is applicable. Alco. Bev. Cont. Law §§ 64(7), 64-a(7). This rule applies if the client is seeking to serve liquor (as opposed to only beer and/or wine) for on-premises consumption in a city, town or village with a population of 20,000 people or more. The rule states that if the premises is within 500 feet of three or more other locations that serve liquor, and not just beer and wine, for on-premises consumption, a 500 Foot Rule public hearing must be held to determine whether issuance of the new license is in the public interest. *Id*. *See also* "Measuring the Distance' The 200 and 500 Foot Rules," N.Y. State Liquor Authority available at http://on.ny.gov/2b0e9IG. Any delay in scheduling this hearing may impact the timeline for the real estate transaction.

Clients should also be aware of the "200 Foot Rule" contained in ABC law §§ 64(7), 64-a(7) and 105(3). This rule requires the Liquor Authority to consider, in connection with any application for a license for the on-premises consumption of liquor (as opposed to a beer and/or wine license) or a license to sell liquor and wine for off-premises consumption (such as a package store or wine store), whether the premises is within 200 feet of any locations used "exclusively" as a school, church or place of worship. If the premises for which the application is submitted is within 200 feet and on the same street as any such school, church or place of worship, the location will be ineligible for a liquor license.

It is also important for the attorney to review diagrams of the premises, paricularly if the business holding the liquor license … does not encompass the entire building.

If the premises is within 200 feet but is not on the same street as the school, church or place of worship, the Authority will determine if issuing the license is appropriate, given the circumstances. The Authority measures the distance in a straight line from one entrance to the other. *Id*. Even though the school, church or place of worship may have other "incidental" uses, these will not, as a general matter, defeat the "exclusive" use of the property as interpreted by the Liquor Authority and courts. *See id*. For example, the conduct of bingo games or fundraisers, the use of the building by other groups or for social activities, the conduct of health-focused activities such as yoga or exercise classes, or the occasional rental of the building to non-congregate individuals for private social functions will not render the building's religious or educational use "non-exclusive."

It is also important for the attorney to review diagrams of the premises, particularly if the business holding the liquor license will operate in a physical space that does not encompass the entire building. A liquor license will only be granted to allow service (and consumption, in the case of an on-premises license) within the area under the "exclusive dominion and control" of the applicant. N.Y. Comp. Codes R. & Regs. tit. 9, § 48.4(b)(1). Exclusive dominion and control generally must include the power to control and oversee the service and consumption of alcohol, the employment or control of those serving the alcohol, and the ability to remove patrons who may be violating Liquor Authority rules (*e.g.*, by being disorderly or intoxicated). This area is known, in liquor licensing parlance, as the "licensed premises."

If the "licensed premises" is only a part of the physical structure, the client must be careful not to run afoul of the rule prohibiting interior access between the "licensed premises" and any unlicensed area in certain cases. Alco. Bev. Cont. Law § 106(9). In addition, the licensed premises must generally have its own exterior entrance. In certain cases where these requirements cannot be met, the client may need to license the entire building, even if it only plans to serve alcohol within a limited area. If the entire facility constitutes the "licensed premises"; however, children under 16 must be accompanied by a parent or guardian while at certain licensed entertainment venues, such as skating rinks and bowling alleys. See N.Y. Comp. Codes R. & Regs. tit. 9, § 48.2, N.Y. General Business Law §§ 398-c & 399-d.

Other physical attributes of the real property to be considered during the due diligence stage include:

- Whether alcohol will be stored in an area under the client's exclusive control. If alcohol will be stored in the

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basement, the client will need to have exclusive control over the basement and will have to license it.

- Whether there are at least two restrooms. If not, a bathroom waiver will be required.

N.Y. Comp. Codes R. & Regs. tit. § 48.4(d)(2).

Finally, the attorney should check whether any prior liquor licenses have been issued for the subject address. A physical location can be ineligible to be licensed for two years after certain disciplinary violations, particularly revocation. Alco. Bev. Cont. Law § 113. This may be the case even if the new applicant is unrelated to the owner at the time of the violation. *Id*. A client that purchases a building to open a bar, restaurant, hotel, etc. and only learns after the closing that a liquor license cannot be obtained for two years, is unlikely to remain a client.

Liquor Licensing Contingencies

When negotiating the purchase or lease of property where alcohol will be sold as either a new venture or the continuation of an existing business, a contingency for obtaining a liquor license should be included in the purchase and sale contract or lease. Such contingency should allow the buyer to terminate the agreement before closing or lease commencement if the liquor license cannot be obtained. Clients seeking an on-premises retail license may have to wait several months for the license to be issued. However, for the payment of an additional fee, a client can often obtain a Temporary Retail Permit from the Liquor Authority much more quickly. *See* Temporary Retail Permit, New York State Liquor Authority, http://on.ny.gov/2aNPURP.

This permit will allow the client to serve alcohol while the full application is being reviewed by the Liquor Authority, but does not guarantee that a license will be issued. Alco. Bev. Cont. Law § 97a. Due to the length of time it may take to obtain a liquor license, the buyer/tenant should apply for the liquor license and Temporary Retail Permit as soon as the purchase and sale contract/lease is executed. Sufficient time to satisfy the license contingency should be included in the agreement.

Liquor licensing considerations can be important even when representing a seller of commercial real property.

Considerations in Leases

When the applicant for a liquor license is leasing the "licensed premises," there are additional factors the Liquor Authority will consider during the application process. These factors may include the following: 1) whether the term of the lease is at least as long as the term of the liquor license being sought; 2) whether the lease identifies the property by street address (as opposed to legal description only); and 3) whether the rent is designated as a set dollar amount (as opposed to a rent equal to operating costs, debt service on the property, etc.). LCO. Bev. Cont. Law § 105(1), 106(1), 110(g).

In addition, if the tenant will pay a portion of the profits to the landlord as rent or in repayment of landlord-financed renovations, a number of additional concerns should be addressed. Liquor licensing counsel should review the lease to determine whether the profit sharing is high enough to require that the landlord act as a "co-licensee" under the liquor license. In that case, the landlord will be required to provide financial and business information, personal information on its owners, and will be subject to potential liability for alcohol-related issues.

Considerations in Property Sale

Liquor licensing considerations can be important even when representing a seller of commercial real property. If the property is currently licensed, or if the buyer will be using the premises for a business that will seek a liquor license, the timing with respect to the liquor license process can affect the transaction. The seller cannot transfer its liquor license to the buyer, and the buyer must instead apply for its own liquor license. The current liquor license will need to be surrendered or placed into "safekeeping" with the Liquor Authority to allow for the issuance of a new liquor license or permit to the buyer, which may make it difficult to coordinate a closing. State of New York Liquor Authority, Surrender and safekeeping of licenses, Advisory #2015-5 (March 10, 2015) available at http://on.ny.gov/2atqXbI.

Conclusion

Liquor licensing considerations can be important in the purchase, sale or lease of real property in any state, including, as we have seen, New York. Often overlooked, these considerations may have a significant impact on the timing of real property transactions, as well as on the client's ultimate ability to serve alcohol at the new location.

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