

LEGAL INTERACTION WITH THE OWNER'S REPRESENTATIVE OF AN ELEEMOSYNARY ORGANIZATION

by Frank J. Parker, CRE

As a Counselor of Real Estate (CRE), I serve as an owner's representative for eleemosynary institutions. In this capacity I act on the client's behalf as the individual owner, purchaser or seller of the real estate properties which must be bought, sold, adapted or maintained by the eleemosynary organization. Owner's representatives receive virtually unfettered delegation orders from the principal or the employing non-profit organization. Because he is not usually experienced in property dealings, a non-profit client rarely disputes the advice offered by the owner's representative. This state of affairs is not an unmixed blessing. Frequently, a more successful outcome is expected than when a for-profit corporation is involved. Subsequent disillusion can be severe. There is no reason why an owner's representative couldn't be engaged by large non-profit corporations, however, the board of directors and chief executive officers often will not cede real estate decision making to others.

Eleemosynary, the Latin word whose definition is, according to the American Heritage Dictionary, "of or pertaining to alms or the giving of alms; dependent upon or supported by alms; contributed as an act of charity; gratuitous." Organizations commonly referred to as eleemosynary include churches, religious orders, schools, museums, small hospitals, etc. In each instance the organization has applied for and received Section (501)(C) (3) status from the United States Internal Revenue Service.

Non-profits often have significant real estate holdings. Many such organizations, including Roman Catholic denominations and dioceses, either purchased or were given large parcels of land at a time when property values were a fraction of their current worth. Many of these holdings are underutilized. Sale or adaptation of such properties often provides the last chance for these organizations to pay off their debt, add to their asset base or, as is the case for many religious congregations, provide for the retirement and hospitalization needs of their members.

To carry out the direction of the non-profit client, the owner's representative might need to assemble a team of experts including environmental engineers, appraisers, architects, real estate brokers, mortgage brokers, engineers, construction companies, accountants and attorneys. This is one of the most important duties with which an owner's representative is charged. It should not be delegated to the attorney or any other member of the team. The owner's representative must serve with the highest level of professional skill and integrity with the best interests of the client always in mind. The

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organization involved has, for all purposes, abdicated its authority and placed it in the hands of an outsider.

Ownership Interests Clarification

The owner's representative usually will employ an outside law firm to handle the legal matters involved. The first step in the working relationship between an owner's representative and the law firm handling the matter, is to verify, with accuracy, the true state of ownership for the parcel under consideration. What property does the non-profit organization own and who else might possess an ownership interest which could cloud the title if transfer of the property is contemplated?

Until recently many smaller sized non-profit organizations were known for their casual management practices especially in dealing with real estate. Previously it was not unusual for properties to be bought and sold without legal representation. Benefactions were received without being recorded. Restrictive covenants in bequests were accepted, then ignored. Easements were granted, then forgotten. Amendments were made to the charter of incorporation or bylaws of the organization without altering the underlying real estate documentation. Environmental commitments were made to regulatory authorities. Leases with options to purchase were granted.

A proposed agreement could be scuttled if the items listed are not discovered and addressed in time. Whether acting for the buyer or the seller, the owner's representative and the attorney must pay the closest attention to ownership issues and decide on the best solution to address the problem in question.

Chain Of Command Clarifications

In many smaller non-profit organizations the question of who is in charge can be difficult to answer. Failure to identify someone could lead to both practical and legal difficulties. Here the owner's representative must know that the person at the non-profit who employed the agent might not be the ultimate evaluator of his work. Sometimes the name of the ultimate decision-makers is not even known to the owner's representative. Establishing trust with the true decision-maker is essential and the attorney often can assist in cementing the relationship. This is especially true if the attorney has previously represented the non-profit organization. Both in negotiations and in contract drafting, the chief decision-maker question is important. Otherwise the deal agreed upon, and in some cases its legal effect, is placed in jeopardy.

The chain of command question is most crucial to owner's representatives when dealing with an entity of the Roman Catholic Church. In most dioceses, for purposes of civil law, the bishop owns all the property as a corporation sole. However, exceptions exist, such as in the state of New York. There the local parish itself is the legal owner for purposes of civil law. Canon Law, the law of the Catholic

Church, is otherwise not recognized in New York courts.

To further confuse matters, a separate second group exists, often referred to by the not totally accurate designation as "exempt religious orders." In Canon Law, the proper designation for these groupings of men is "orders of clerical religious groups of pontifical right." They include Jesuits, Dominicans, Franciscans, Carmelites, Carthusians and Benedictines. These priests and brothers work in a diocese but are answerable primarily to their own superiors and only secondarily to their local bishop. It is not unusual for legal ownership of properties held by these orders to be vested in the name of the superior general of the order in Rome.

A third group are men's religious congregations comprised of officially recognized groups of religious priests and/or brothers who are neither diocesan priests nor members of religious orders. Their land could be owned by the local diocesan bishop, or by the congregation in Rome, or by their American headquarters, or by the local house of the congregation itself, or perhaps even by the current local superior as a corporation sole.

The fourth group are orders and congregations of religious women whose property, for purposes of legal ownership, could be held in any combinations applicable to the other three groups. And, fifth and finally, is separate incorporation. In the past, many Catholic colleges and universities were owned by orders, congregations and dioceses, but in the early 1970s a large number of these schools and religious entities separated into two separate non-profit organizations in the eyes of the state. Consequently, it is absolutely essential to read closely the separate documents of incorporation. The attorneys who drafted these separate incorporation agreements were trying to provide for the future needs of elderly members of the order. As a result they often resorted to complicated documents of trust to achieve their objective.

Mission Statement Clarification

My father had a friend who was the managing partner for one of Wall Street's most prestigious law firms. Among his duties was to interview promising candidates for positions with the firm. One day a superstar appeared who was at the top of his class at a major law school. He indicated that he had already received many, many offers from other law firms. In order to qualify the current firm for his august consideration, he asked the managing partner in a supercilious tone, "What is your firm's *raison d'être* (mission)?" The managing partner snapped back, "That's simple son, to make money."

The *raison d'être* of a non-profit organization rarely lends itself to such a direct answer. Many times the non-profit has never taken the time to articulate the organization's mission. Even if it did, the mission statement usually needs to be updated to account for changes in the world situation. Sometimes the board and administration have their own

agenda which does not coincide with the mission statement.

An owner's representative must understand and be able to articulate the client's mission. Otherwise, inappropriate deals could be proposed and wrong advice given. This maxim is applicable for the attorney, as well. There is an equal responsibility for the attorney drawing up the papers to understand the non-profit's goals. This understanding often will clarify the ownership interests and chain of command issues which might be unresolved. Early in the process the representatives of the non-profit organization should hold a meeting with the owner's representative and the attorney to clarify the scope of the mission and how it affects the real estate decisions which need to be made.

Risk Toleration Clarification

If there is one generalization that holds true for most non-profit organizations, it is they do not understand the risk-reward relationship. Almost by nature, non-profit organizations are risk adverse, sometimes to a degree of acute paranoia. If the real estate project in question is one which contemplates a joint venture with a commercial developer, it is almost guaranteed that the non-profit organization will expect the developer to take all the risks of loss and at the same time turn over a high percentage of the potential gains to the non-profit. Here, the owner's representative needs to act deftly to convince the client about the reality of the developer's position. The real estate attorney can play a useful role in working with the owner's representative to educate the client regarding the risks inherent in any real estate development.

Legal Situation Clarification

Often situations will occur in dealing with a non-profit which require special attention from the law firm which has been engaged. Thus, it generally is a mistake to hire an attorney who has not had previous experience in dealing with non-profit organizations, no matter how extensive this person's experience might have been in representing for-profit corporations. An offshoot of this problem comes about if the law firm's senior partner, with experience in dealing with the non-profit, delegates decision-making authority to a junior associate lacking any such experience. The owner's representative should be slow to approve legal bills when dissatisfied with the amount of time the senior partner actually devoted to the transaction.

There are a whole range of special problems that occur in dealing with church organizations. Churches and other eleemosynary still are corporations able to sign legally binding documents. In the early 1970s, during the day of "Philadelphia Plans" in the construction industry, a number of these non-profit organizations signed binding agreements with labor unions and other groups involving minority hiring on projects. Consequently, these documents still exist and with a court order can hinder the completion of work on a project while the problem is being resolved.

Second, in some states anything done by a church organization which is not purely religious in nature probably will be taxed. Generally, churches still think of taxation as somehow lacking in piety, somewhat less than spiritual. Even if the developer and the owner's representative are able to convince the church to set up a for-profit subsidiary, holdover resistance might still surface resulting in an otherwise excellent joint venture project being rejected. It may be necessary to accede to their wishes and have them remain as a completely non-profit institution. If so, everyone will have to be very careful about the tax questions involved; particularly in real estate syndications, religious orders have had trouble with the IRS on tax questions.

Third, because land has been given to non-profits over time, a whole group of restrictive covenants could apply which are not found in other dealings. A developer and the non-profit's advisors must be resigned to expect problems not ordinarily encountered in a for-profit venture. Some of these covenants, especially if they are racially restrictive in nature, often will not withstand contemporary court challenge. This is especially true if they came into effect many years ago. However, the time and expense involved in removing them from the deed can be most burdensome.

Fourth, members of many churches and other conservative charitable groups now demand that their institutions act as corporately responsible citizens. For example, a very reputable company with a limited amount of construction business in South Africa was trying to form a real estate joint venture with a church to build an apartment complex. Suddenly members of the church's congregation were sitting in front of the potential joint venture partner's corporate headquarters waving placards. Any developer entering a joint venture with a non-profit must pay attention to this issue of corporate responsibility. Some demands will be fair, some not, but the developer's political and environmental record will be carefully scrutinized.

Fifth, zoning is a greater problem in dealing with a former seminary or school than with almost any other type of land used for joint ventures. Most schools and churches have allowed the surrounding town to think of the facility as its own. Over the years, institutions have permitted town residents use of school and/or church playing fields, golf courses and skating rinks. The town often does not wish to give up what it considers public property—the possibility of increased tax revenues notwithstanding. Zoning battles could be fierce. A similar problem concerns increasingly onerous landmark commission regulations. The legal limits on prohibitions against changing or destroying historic buildings still are being contested in the courts. Many otherwise profitable joint ventures will be stillborn if these structures are approved.

Opportunity Quotient Clarification

When the owner's representative for the non-profit organization and the attorney establish a

professional working relationship, it benefits all concerned. Most importantly, the non-profit is the big winner. On a secondary level, however, the owner's representative—lawyer relationship often leads to close cooperation between these professionals in new ventures, not only for the present client but for new clients either might bring to the table.

Trading on the axiom that nothing succeeds like success, once the first transaction for the non-profit client has been completed to everyone's satisfaction, it is wise for both the owner's representative and the attorney to sit down with the officers and directors of the non-profit organization in order to map out further strategies for future acquisitions, dispositions, new ventures and financing vehicles. Non-profit status can present significant zoning and subdivision advantages. If these benefits are utilized at the outset, the property will be significantly enhanced in value for later joint venturing or disposition.

Conclusion

Non-profit organizations in this country have been awarded a particularly favored status by the lawmakers. Unfortunately only a few with significant real estate holdings have made the effort to employ sophisticated professional assistance to administer these holdings. A sense of responsibility on the part of the non-profits to those who support their organization, either in currency or in kind, should be motivated to seek outside professional help.

There is an equal obligation on those employed for this purpose to respect each other's talents and competencies so the client is best served. This article has described how the owner's representative and attorney can work together to obtain the desired result for the non-profit organization client.

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