BURKE, WARREN, MACKAY & SERRITELLA, P.C.

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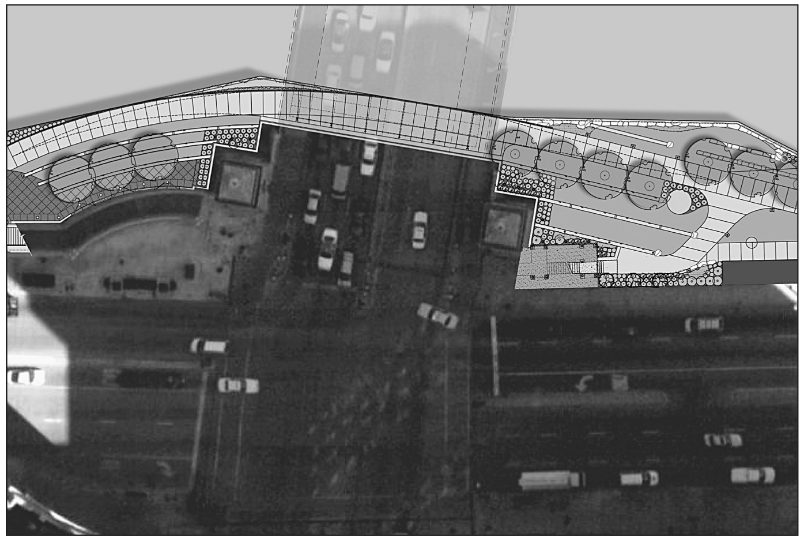
REAL ESTATE

BWMS client Tri-Land Properties breaks ground with Overland Park's first TIF

Jeff Warren

May 5 marked a new era for Overland Park, Kansas, as its governing body unanimously approved creation of the City's first TIF (Tax Increment Financing) district to support firm client Tri-Land Properties, Inc.'s redevelopment of

Continued on page 2



Building the foundations of a little San Antonio in Chicago

The City of Chicago recently announced plans to construct a river walk on the south bank of the Chicago River. This expanded public space featuring new entertainment venues will include under-bridge connections (rendering of bird's-eye view of Michigan Avenue pictured above) along the downtown section of the river. Construction begins this summer. The Firm is supporting this effort.

BANKING/FINANCIAL SERVICES

Bank Directors on the Hot Seat

The firm's Craig McCrohon was a featured presenter at a recent "boot camp" for bank directors. Content from the following article was included in his presentation.

The last 15 years have been smooth sailing for banks and their directors. Borrowers paid loans, earnings remained strong, and bank failures were almost non-existent. Recently, however, matters became choppy as borrowers defaulted, earnings plummeted, and a few banks began to fail.

Craig McCrohon

In good times, bank directors could enjoy a directors meeting as a combination of social hour and civic duty. Director preparation satisfied the lower standard politeness, not the more rigorous goal of thorough professionalism. Now, these directors are discovering that serving on a bank board is more work and possibly more risk than serving on the board of an unregulated private firm.

Plain Old Director Duties

Bank directors must first satisfy the same standards of competence and conduct imposed on all firms in any industry. State courts require that directors satisfy two elements of

Continued on page 4

INSIDE THIS ISSUE:

NEXT ISSUE:
The firm grows again, client success stories, and more…

TRI-LAND *Continued from page 1*

Cherokee South Plaza. The City agreed to provide Tri-Land with $3.5 million to support the development, with the funds to come from the increased property and sales tax revenues that the revitalized center will generate.

For years, in contrast to most of the other towns in metropolitan Kansas City, the City refused to consider using TIF to support redevelopment. The City's 18 months of negotiations with Tri-Land changed that. "We have had a very good partner in Tri-Land," the City's finance manager reported to the City Council before the vote. "They have been forthcoming with every single thing that we have asked for."

Tri-Land's $23 million redevelopment plan for the 118,000-square foot community shopping center calls for demolishing obsolete anchor buildings, adding more than 25,000 square feet of new retail space and giving the project a whole new look and feel. The project features redesigned building exteriors, high impact lighting and extensive landscaping, including outdoor patios, tree-lined walkways and generous public spaces beyond what is found in typical community shopping centers.

"Cherokee South was built in the 1960s and had already long outlived its life cycle when we purchased it in 2004," says Tri-Land founder and President Richard F. Dube. "What we didn't know at the time was that the City would soon implement a comprehensive set of development guidelines that would require significantly more expensive design features and materials than what Tri-Land had planned for this redevelopment. We chose to approach this as an opportunity rather than a problem."

Tri-Land proposed a development that would exceed even the City's new requirements, if the City would agree to partner with Tri-Land by providing some TIF assistance. "We knew the City hoped to use this project as the first step in revitalizing Overland Park's older, northern neighborhoods, where Cherokee South is located. We were willing to assume the responsibility of standard-bearer in that process." says Dube.

"Tri-Land's 30-year track record of repositioning under-utilized, underperforming retail properties, as well as its expertise in forging partnerships with municipal governments and community organizations, were clearly major factors in the City's decision to entrust its first TIF subsidy to Tri-Land," says BWMS partner Jeffrey D. Warren. "Since Tri-Land's inception, our firm has provided the many legal services needed to implement Tri-Land's challenging undertakings. We have seen close-up how Tri-Land has consistently delivered on its commitments to its investors, the tenants in its centers, and the communities served by its projects. It's no surprise to us that Tri-Land won the confidence and support of Overland Park despite intense media scrutiny. Our firm is delighted to be playing a key role in the effort."

Tri-Land is a full-service real estate company based in Westchester, Illinois that acquires, develops, leases and manages shopping centers. In the past decade alone, Tri-Land has developed, leased and managed more than 5.6 million square feet of retail space in 30 properties located in eight states. The company currently owns and manages more than 2.8 million square feet of retail space in 16 shopping centers, ranging in size from 60,000 to 750,000 square feet. Its diverse portfolio includes projects in New York, Milwaukee, Chicago, Kansas City, Minneapolis, Atlanta, Indianapolis and Merrillville, Indiana.

For more information contact Jeff Warren at 312/840-7020 or jwarren@burkelaw.com.

Rendering of Cherokee South Plaza in Overland Park, Kansas.

Firm Promotes Experienced Commercial Litigators to Partner

Burke Warren is happy to announce that Christina Yeager Nelson and Aaron Stanton have been promoted to partner.

Christina is part of Burke Warren's litigation practice representing business clients in Chicago and across the US. She handles matters including employment discrimination and harassment, wage and hour claims, commercial disputes, employee misconduct and insurance coverage.

Christina Y. Nelson

Aaron Stanton

Christina was formerly a Holland & Knight associate in Chicago and Jacksonville, Florida. She attended the University of Florida where she was awarded both her undergraduate and law degrees with honors.

Aaron handles commercial litigation matters for both individual and corporate clients in financial services, real estate, health care, and entertainment. He also serves as general counsel for several companies, including one of Chicago's largest independent real estate brokerages, several real estate developers, a mortgage brokerage and an entertainment production company.

A former federal judge clerk, Jenner & Block associate and *magna cum laude* graduate from the University of Illinois College of Law, Aaron has achieved numerous and substantial victories for his clients since joining the firm in 2005.

Christina can be reached at 312/840-7050 or cnelson@burkelaw.com. Aaron can be reached as 312/840-7078 or astanton@burkelaw.com.

California Bar Looks to Chicago for Help

Mike Martin

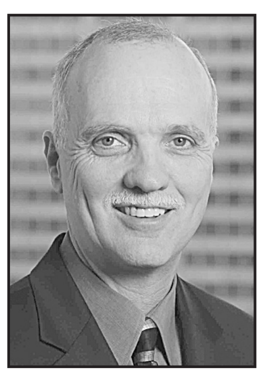
The California State Bar includes multitudes of talented attorneys, but when it came time for the State's Continuing Education of the Bar to publish its official retail leasing treatise, it turned to Chicago for help. Upon request, the firm's Mike Martin was happy to consult on portions of the new 1350-page California publication entitled, "Retail Leasing: Drafting and Negotiating the Lease". "I have had the good fortune of representing retail clients who have leased properties across the country, including several large retail lease transactions in California. These engagements have exposed me to different leasing practices employed in other markets as well as work with other professionals across the country," says Martin.

Mike Martin can be reached at 312/840-7011 or mmartin@burkelaw.com.

LaPointe Presents at Leading Employment Law Seminar

The 2008 DRI Employment Law Seminar took place in Chicago, May 14 – 16. It is considered to be the leading annual national conference in the area of employment law.

The firm's Marty LaPointe, a featured presenter, shared the podium with Paul Nash from the London, England-based Beazley Group. They helped their audience of more than 400 human resource professionals, insurance specialists, and attorneys better understand the complexities of ethically handling conflicts inherent between insurance carrier, employer, employees and legal counsel.



Martin LaPointe

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BANK *Continued from page 1*

corporate law: first, exercising "due care," and second, fulfilling duties with loyalty. Hundreds of court cases apply the rules to specific circumstances where shareholders have claimed that directors did not use "due care" — that is, being duly diligent, inquisitive and experienced in corporate management. Though the basic standard is generally very low and undemanding for directors in an unregulated business, a bank board member with little banking experience might silently suffer in the board room from the confusing torrent of arcane terms and accounting methods of financial institutions. In addition, courts evaluate directors' loyalty, regardless of industry, most commonly arising in cases of conflicts of interest and self dealing.

The Director Watchdog

For the non-banking firm, the corporate watchdog is often the disgruntled shareholder who files suit. The only venue where shareholders might lodge a complaint is in the courtroom — a notoriously slow and expensive institution. As a result, the discipline of private corporate directors looks less like a boxing match and more like a slow-motion pillow fight. The scrutiny of these directors arises mainly when a company is sold, directors engage in massive self-dealing, or after a truly catastrophic decision.

Enhanced Oversight of the Bank Director

In the world of banking, directors must endure another level of review. Not only are the laws far more specific regarding director standards, but state and federal regulators remain poised with their hand on the legal trigger for violators. When banks slip financially, regulators can act swiftly and unilaterally. In good times, this added layer of oversight results in little more than an inconvenient imposition of a few hours of training and an occasional finger-wagging lecture by a bank examiner. When loans go bad, deposits dry up and bank capital shrinks, these regulators can quickly unpack their legal weapons against lax and self-dealing directors.

Self-Dealing

Federal regulations specifically target insider transactions. In the case of loans, these include Federal Reserve Regulation O; in the case of other non-loan insider deals, these include Federal Reserve Regulation W. These regulations impose the following standards, among others, on insider deals:

Limits on loans to insiders — up to $500,000 or a specified percentage of the bank's capital; limits on the loans to all insiders; demonstrated arm's-length terms not favoring the insider; and approvals of insider deals by the disinterested directors.

Profusion of Policies

Banks operate in a world of debits and credits, along with a very tempting inventory of cash. Therefore, senior management must remain vigilant that banks maintain strong controls — with regulators assisting by prescribing a litany of internal written policies. Directors are accountable for overseeing staff preparation of proper policies; in addition, directors must actually read these things. If regulators find that the policies are poorly written or poorly administered, they may directly take directors to task. Among the most common policies, which usually range from five to 30 pages, are the following:

Anti-money Laundering; Lending; Investment management; Community Reinvestment Act; Regulatory Compliance; Privacy and Security; General Risk Management.

Money Laundering

Banks have operated for decades under the presence of money-laundering regulations. However, with the passage of the Patriot Act following the terrorist acts of 9/11, Congress radically expanded these laws and the penalties for non-compliance. This expanded and detailed set of rules prescribes the following, among other things:

Maintain detailed records of certain cash transactions in Suspicious Activity Reports; review and understand a "Know Your Customer" policy, including awareness of high risk cash-oriented clientele; closely monitor the bank's compliance resources and efforts.

More than any other set of rules, anti-money laundering regulations require that directors become familiar with the details and avoid relying on staff summaries of these policies.

Fast-Track Enforcement

Regulators can ask courts to hold directors personally accountable for mistakes. Laws provide that "institution affiliated parties" — such as executive officers and directors — may be personally liable for non-compliance and negligent management. Congress adopted these rules in the late 1980s to address the savings and loan abuses. If banks now suffer from mismanagement or noncompliance, regulators may sue to hold a director personally liable. Individual fines range

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from a few thousand dollars to $25,000 per day, up to a $1 million. Even if the regulators do not seek full penalties, the specter of personal liability often frightens directors into infusing their personal savings into a troubled institution. In addition, if a bank fails to comply with the letter of a cease and desist order, the regulators may hold the directors personally liable for violations of an earlier regulatory letter or order.

The Regulatory Nasty-Gram

Banking regulators may issue one of several types of letters critical of bank management. Directors might expect the following from their new regulatory pen pal depending on the extent of the mess:

- Informal comment in a report of periodic examination.
- Commitment letter by the bank promising specific correction of violations of bank directors.
- Formal recommendation as part of a separate memorandum of understanding. This letter is often issued following a bank examination that exposed one or more specific deficiencies in management, such as violation of anti-money laundering regulations, poor controls and policies, or prescribed actions to address specific problems such as specific large problem loans.
- A very formal and often very public cease and desist order. This letter is an order from a bank regulator demanding that the bank either cease engaging in a particular action, or more commonly, impose deadlines for correcting specific and significant problems. These cease and desist orders are occasionally publicized by the regulators to make an example out of a non-compliant bank.

Capital Directives

Regulators might issue an order that the bank management, including its directors, raise equity for an undercapitalized bank. These orders may specify the amounts and timing of capital to be raised. In the case of a community bank where the directors are often also significant shareholders, these directives are thinly veiled demands for the directors to personally invest more money in the bank. Failing a director infusion of cash, the regulators might threaten to hold the directors personally liable for money lost by the bank.

All Is Not Lost

Despite the parade of theoretical horribles, the vast majority of banks remain stable, and therefore the vast majority of directors remain safe. The problem is not the frequency of failure, but the magnitude. In the very unlikely event that the bank suffers financial disaster, or the directors and management fail to communicate, then directors will face the prospect of personal liability. However, a director may conscientiously study policies and procedures, and diligently prepare for and attend almost all the director and committee meetings. If so, the director need only glance at legal liability in the rear view mirror, while focusing on the challenges and opportunities of the bank that lie ahead.

For more information, please contact Craig McCrohon at 312/840-7006 or cmcrohon@burkelaw.com.

Wealth & Succession Planning

Firm's Michael presents on challenging personal property issues to estate planning advisors

Jonathan W. Michael

The Illinois Institute for Continuing Legal Education's 51st Annual Estate Planning Short Course, considered the leading estate planning conference in Illinois, took place on May 2 & 3 at Hyatt McCormick Place in Chicago. The firm's Jonathan W. Michael was a featured speaker. His presentation focused on unique personal property issues.

"Collections of personal property, such as artwork, antiques, jewelry, furniture, household furnishings, automobiles or other collectibles, often carry both economic value and great sentimental value," says Michael. "This presentation was designed to address many of the unique issues related to personal property and to offer creative solutions for the disposition of collections and items of personal property."

The Short Course is designed to provide attendees, primarily attorneys practicing in the estate planning field, with an intensive review of important estate planning topics.

Jonathan W. Michael can be reached at 312/840-7049 or jmichael@burkelaw.com.

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REAL ESTATE/TAX LAW

EXCHANGING SECOND HOMES

A 1031 or like-kind exchange is used to move appreciation from one piece of real estate to another tax free. Following a defined set of rules under Section 1031 of the Internal Revenue Code of 1986, as amended (the "Code"), individuals and organizations can sell a real estate asset used for investment purposes and reinvest the proceeds into another real estate investment on a tax-free basis.

Julia Turk

Your primary residence, however, does not qualify for use as relinquished and/or replacement property for like-kind exchanges. But what about vacation homes?

Many use their vacation homes as extensions of their primary residences. Others view their vacation homes primarily as assets, where personal use is limited and rental income is generated. For the latter group, a 1031 exchange option is a possibility. The IRS recently issued Revenue Procedure 2008-16 clarifying whether a "dwelling unit," such as a vacation home, qualifies as "property held for the productive use in a trade or business or for investment purposes" and providing a safe harbor under which the IRS will not challenge whether the property qualifies as such.

Dwelling units fall within the safe harbor under the Revenue Procedure if each of the following requirements is met with respect to both the relinquished and replacement properties. First, the taxpayer must have owned the property for at least 24 months immediately before and after the exchange ("qualifying use period"). Second, within the qualifying use period, in each of the two 12-month periods immediately preceding the exchange, the taxpayer must have rented the property to another person at a fair rental value for 14 days or more. Also, during this period, the taxpayer's personal use of the property does not exceed the greater of 14 days or 10% of the number of days during the 12-month period that the property is rented at fair value.

In the event that a vacation home qualifies as property held for investment purposes, all of the other requirements of Code Section 1031 must be met in order to receive tax-free treatment on the exchange of properties.

If your use of any of your vacation homes was limited over the last 24 months and it was rented much more than occupied by you, then your second home may qualify as relinquished and/or replacement property for like-kind exchange purposes. To find out more, please contact Julia Turk at 312/840-7033 or jturk@burkelaw.com