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Jury Sends Warning Notice to New York Commercial Property Owners: Failure to Properly Secure Property Against Threat of Terrorism Could Prove Costly

By Noelle Lilien, Esq.

As recently as the 1970s, property owners generally had no duty to protect tenants from criminal acts committed by third parties. Owners were treated like any other private person and, as a general rule, private persons had no duty to protect another from a criminal attack by a third person. Gradually, however, a body of law known as "liability for negligent security" evolved. Property owners can now be held liable for injuries sustained by their tenants as a result of third party criminal activity on their premises if the owner knew or should have known about the possibility of a crime occurring and did not do enough to protect against it.

In October 2005, a New York jury pushed the bar further, holding a public agency liable for failing to properly secure its commercial property against the threat of terrorism. The Port Authority of New York and New Jersey, the owner of the World Trade Center, was found primarily responsible for the 1993 car bomb explosion that left six people dead and more than 1,000 people injured. According to the Associated Press, the jurors explained that the Port Authority's failure to heed a warning from one of its security consultants to close the underground garage where the car bomb was detonated was a determining factor in the case. The case, which is on appeal at the time of publication, demonstrates the trend toward increasing liability for property owners, but it leaves many questions about an owner's liability for terrorist attacks unanswered.

Impact of 9/11 on Property Owners

Since 9/11, liability for terrorism has become a major concern for the commercial real estate industry. Although the benevolent human spirit has driven many owners to take proactive measures to protect the lives and property of their tenants, others have been

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Jeremiah Stoldt Interview: Columbia University Expansion

With Michael S. Zetlin, Esq.

Recently, Michael Zetlin interviewed Jeremiah Stoldt, Director of the Campus Plan of Columbia University.

MSZ: Thank you for taking the time to speak to me about Columbia's current expansion efforts. Can you tell me about the genesis of the plan?

JTS: It has been said that Columbia is a space-starved institution and that this anxiety is most tangibly felt in the science and research disciplines. Motivated by the University's need for space, we began discussions on how to rectify this situation in 2002. Under President Lee C. Bollinger's leadership, Columbia announced the proposal for a major expansion into the Manhattanville area in 2003. Around that time, I was named Director of the Campus Plan.

MSZ: What is the scope of the plan?

JTS: In terms of size, the scope of the project is 18 acres. It spans from the south side of 125th Street to the north side of 133rd Street. It is bounded on the east by Broadway and on the west by 12th Avenue, which sits beneath the Riverside Drive viaduct. It also includes an area east of Broadway and Old Broadway between 131st Street and 134th Street.

The scope in terms of time is estimated at 25 years. We describe the project phasing in terms of two "build years": 2015 and 2030.

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Recent Legal Updates

1. A preliminary agreement contemplating the construction of a commercial and residential development is not enforceable as to the ultimate contractual goal contemplated in the document; however, it is enforceable as an obligation between the parties to negotiate in good faith within the framework of the agreement. Brown v. Cara, 420 F.3d 148 (2nd Cir. 2005)

2. Insurance coverage period is not tied to rebuilding a store at its former site in the World Trade Center. The period extends only until a policyholder could resume permanent operations and not until those operations were "functionally equivalent" to the store's pre-9/11 operations. Duane Reade Inc. v. St. Paul Fire and Marine Insurance Co., No. 03-9064, 2nd Cir.; 2005 U.S. App. LEXIS 11965 (June 2005).

Minimizing Premises Liability in the Era of Terror

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more focused on the measures that will minimize their exposure from lawsuits if another attack were to occur. Whatever the motive, owners are increasingly hiring security consultants and implementing their recommended security procedures. Owners in high profile properties have installed bollards, planters, fountains and other vehicle barriers outside their buildings, and even moved their mail rooms to remote locations. Yet, more than four years after 9/11, most owners still do not know whether they are legally required to upgrade security in their buildings or whether such alterations will shield them from liability. This confusion is understandable. Courts are only beginning to focus on whether existing legal doctrines based on negligent security should be adapted to the new environment of terrorist threats and to define the scope of an owner's duty to protect tenants from terrorism.

The Evolving Standard of Care Doctrine

Historically, only certain special relationships, such as between innkeepers and guests, gave rise to a duty to take preventative measures with respect to third-party criminal acts. In Kline v. 1500 Massachusetts Avenue,[1] a seminal 1970 decision in negligent security law, a tenant successfully sued her landlord after she was assaulted and robbed in the hallway of her Washington D.C. apartment building. Since Kline, an owner's duty to take reasonable measures against foreseeable third party criminal acts has been expanded and many courts recognize such a duty in both commercial and residential settings. Jurisdictions differ on when a duty is owed and on what owners are required to do to discharge that duty.[2]

In New York, foreseeability of the third party criminal act is arguably the key element in determining an owner's liability to tenants for resulting injuries. To prove foreseeability, tenants are not limited to evidence of prior, similar crimes in the same building. Instead, foreseeability is determined by weighing the "location, nature and extent of those previous criminal activities against their similarity, proximity or other relationship to the crime in question."[3] In other words, when the plaintiff offers evidence of some prior criminal complaint or act that occurred on or near the vicinity of the owner's property or in similarly situated properties, the court will evaluate how similar that act or complaint was to the act the plaintiff claims the owner should have foreseen.

> *"Courts look to a variety of factors in determining what constitutes the standard of care or reasonable care with respect to a foreseeable risk."*

Several New York cases illustrate this point. In Schaeffer v. Vera Wang Bridal House Ltd.,[4] the Court found that, while there was no evidence of prior crime in a bridal shop, evidence of the owner's awareness of similar crimes in the vicinity was enough to raise an issue of fact for trial. Plaintiffs in that case were shopping in the defendant's bridal shop in Manhattan, when robbers, posing as shoppers, were let into the shop by defendant's employee, drew their guns and attempted to steal one of the plaintiff's rings.[5] Both plaintiffs were shot and critically injured and brought claims against the bridal shop for failure to provide adequate security. They presented proof of a number of crimes in the area surrounding the shop, including evidence of a series of highly publicized robberies on Manhattan's Upper East Side of which shop employees were admittedly aware. The Court concluded that a reasonable jury could find on this evidence that the shop owner had reason to know that, even though there was no robbery on its premises in the past, there was a likelihood that its customers could be imperiled by the criminal acts of others.[6]

Similarly, in cases involving crimes in jewelry stores, the courts have found the risk of criminal activity foreseeable without proof of a prior crime in the building, or even any particular crime in the neighborhood. In one case, Ratanee Jewelry, Inc. v. Art Jewelry Ctr., Inc.,[7] the Court found that criminal intrusions were plainly foreseeable and required adequate security measures given that the building tenants were all in the jewelry business and the building was located in Manhattan's diamond district.[8] Also, in Rudel v. National Jewelry Exch. Co.,[9] the Court held that there was a triable issue on foreseeability and whether the owner breached its duty, based on the fact that the building was located in the diamond district and the owner employed only one security guard on the ground floor.

The Court, deciding a pretrial motion in the In Re World Trade Center Bombing case, used the framework from these cases when it ruled that there was a triable issue of fact as to whether the 1993 truck bombing in the parking garage of the World Trade Center was foreseeable by the Port Authority. The Court rejected the Port Authority's argument that the bombing was not foreseeable because there had never been a comparable event in the complex. The Court emphasized that an owner does not need to have had a past experience with the exact criminal activity, in the same place, and of the same type before liability can be imposed for failing to take reasonable precautions to discover danger, warn or protect its tenants. As the Court explained, foreseeability depends on "the location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question."

Since there are no cases discussing the standard of care in the context of a terrorism case, it is essential to understand how the standard of care is handled in the typical scenario where a tenant is injured as the result of a crime committed by a third party. The law imposes on an owner the duty to provide security for building occupants that meets the "standard of care." The standard of care is a fluid and amorphous concept that is not easily defined.

Courts look to a variety of factors in determining what constitutes the standard of care or reasonable care with respect to a foreseeable risk of criminal attack. Two key concepts are "proximity" and "similarity." Courts consider proximity by analyzing security measures implemented by owners of nearby proper-

ties. For example, an office building in midtown Manhattan will be evaluated in comparison to other midtown office buildings. Courts may also review similar types of property; an urban college complex may be compared to another, even if it is in a totally separate part of town. The factors of similarity and proximity are also referred to as "industry standard."[10]

What does the WTC case mean for Owners?

In negligent security cases involving acts of terror, the question of whether the crime or act or terror was foreseeable and whether the owner met the standard of care will be determined based on the specific facts and circumstances surrounding that case. There are no bright-line rules for owners to follow.

To minimize risk, owners should conduct risk assessments of their properties and implement changes that are consistent with the evolving standard of care. Conducting risk assessments, however, will not, as was evident in the World Trade Center Bombing case, minimize an owners' liability risk unless the owner follows up on the recommendations in the assessment by taking reasonable steps to protect its property and its occupants. The Port Authority's experience raises the question of whether owners would be better off not conducting risk assessments at all since they may be penalized for not implementing recommended changes. This approach, however, is also fraught with risk because an owner's failure to conduct a risk assessment could be considered a breach of the standard of care given the number of owners who are opting for risk assessments.

Owners should consider retaining a security consultant who will conduct a formal risk assessment of a building against a terror attack or the risk of collateral damage from an attack that occurs in the proximity of their building. Conducting a risk assessment can help owners determine if a terrorist act on or near their property is foreseeable. If such an attack is foreseeable based on the assessment, owners must consider implementing security changes that are "reasonable," i.e., changes that meet the standard of care. As set forth above, courts will determine the standard of care by considering what security measures were implemented by owners of other properties in proximity to the property in question, and to those properties that serve a similar purpose.

In addition, owners should consider consultants with extensive experience in the risk assessment field, such as firms that have worked on secure facilities for the U.S. General Services Administration or the U.S. State Department. Owners should also be cognizant of the fact that security consultants may suggest changes that are not necessarily warranted in order to generate increased business for their companies. Accordingly, working with a reputable and experienced consulting firm is important.

The ideal time to consider and incorporate security-related design features into a building is in the early stages of building design. Solutions introduced at the beginning of the design process are significantly less expensive and more effective than those incorporated later on. Owners of existing buildings, however, have and must continue to analyze threats and upgrade their buildings to improve building performance in the event of an attack.

"There are no specific rules for owners to follow when it comes to minimizing risk of liability for negligent security in connection with an act of terror."

Risk Assessments

Whether a risk assessment is conducted during the early phases of design or after the building is fully operational, security consultants first analyze the risk of threat to the building. Key factors in this analysis include the profile of building tenants, the location of the building and its proximity to landmarks or other high profile properties or government buildings and actual threats received at the building. Next the security consultant will typically conduct a vulnerability assessment of the building. This assessment focuses on the physical characteristics and potential vulnerabilities of the building to a terrorist act. For example, the security/design consultant will analyze the building's set-back distance, i.e., the distance between the street and the building, underground garages, mailrooms, loading docks, air intake locations and overall access to the public.

Based on these assessments, security/design consultants will work with the owner and engineers and/or architects to recommend operational or structural/design-related changes that are appropriate to the level of threat perceived at the building. The owner will then have to decide what security features to include in the building based on budgetary considerations and, of course, the level of threat at the property.

As a practical matter, buildings without high profile tenants that are not close to attractive terrorist targets will require fewer security features and upgrades than buildings with higher profiles. For example, owners of these lower risk buildings may decide to do nothing or may make operational changes pertaining to lobby security procedures, evacuation plans, and public access to air-intake locations and mechanical systems to protect building occupants. Owners of buildings at a higher risk may consider more significant operational changes such as restricting access to or closing underground parking facilities or moving mailrooms and loading docks to remote locations.

In addition to operational changes, owners of higher risk buildings like high-profile landmarks, corporate headquarters or buildings housing government agencies may also consider making structural or design-related changes. These changes can include passive protection like strategic placement of the building and parking areas and the use of bollards, planters and gates to restrict vehicle access and reduce vehicle speed. Other more active protections include hardening or strengthening key structural supports that may be vulnerable to attack or installing glazed windows that minimize injuries in the event of a bomb blast.

There are no specific rules for owners to follow when it comes to minimizing risk of liability for negligent security in connection with an act of terror. Whether the risk to a given property is foreseeable and whether the owner has satisfied its duty to protect building occupants from injuries

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must be determined by carefully examining the unique characteristics of each individual property. Given the evolving nature of negligent security law as it relates to terrorism and the consequences of being held liable for injuries arising from a terror attack, owners are advised to work with security experts and legal counsel to determine the level of risk at a particular property and the reasonable steps that the owner should take to protect the property and its occupants.

Conclusion

Since New York courts have imposed on commercial property owners a duty to take reasonable steps to protect occupants from injuries stemming from a foreseeable terror attack, New York property owners should actively seek to minimize their exposure to negligent security claims. New York courts are only beginning to focus on these issues and, understandably, there is a great deal of confusion regarding the scope of an owner's duties and what additional security measures would be considered reasonable. At a minimum, New York property owners should consider conducting a risk assessment and should actively seek to determine what security measures are required to meet the standard of care for their particular properties. ■

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[1] 439 F. 2d 477 (D.C. Cir. 1970).

[2] See Merriam, Dwight H., Homeland Security and Premises Liability, 21 No. 4 Prac. Real Est. Law 15 (2005).

[3] Schaeffer v. Vera Wang Bridal House Ltd., 64 F. Supp. 2d 286 (S.D.N.Y. 1999).

[4] Id. at 290-291.

[5] Id. at 293-95.

[6] Id. at 294.

[7] 253 A.D. 2d 591, 677 N.Y.S. 2d 878 (1st Dep't 1998).

[8] Id. at 592.

[9] 213 A.D. 2d 301, 623 N.Y.S. 2d 878 (1st Dep't 1995).

[10] Dain, Daniel P. and Brennan, Robert L., Negligent Security Law in the Commonwealth of Massachusetts in the Post-September 11 Era, New England Law Review, 38 New Eng. L. Rev. 73 (Fall 2003).

Developer's Silver Lining to High Energy Prices: Green Building and LEED Green Building Rating System[1]

By Timothy F. Hegarty, Esq. and Jeffrey T. Yick, Esq.

Many in the construction industry have heard of either green design and/or LEED ("Leadership in Energy and Environmental Design") Certification, but until recently the perception was that green design added significant costs. As a result, market interest was less than enthusiastic. However, higher energy costs and government mandates have brought a heightened awareness to green design. The green building movement endorses environmentally conscientious design and construction practices for the purpose of reducing or eliminating a building's negative impact on its occupants and the environment. The movement, also known as sustainable building, promotes energy efficiency, material conservation, and higher levels of indoor environmental quality.

In short, developers are beginning to take a closer look at the benefits of green building: anecdotal evidence that construction costs for green design are approaching the costs of conventional construction; the recent spate of media attention that has led to enhanced project marketability; healthier interior living and working spaces; mitigation, if not elimination, of future renovation due to future government mandates that appear to be inevitable. Moreover, as oil and natural gas prices hit new highs, the economics become more favorable in terms of lower operating costs for energy, water, waste, repairs and maintenance. Also, green building's popularity is improving due to the benefits of increased availability of foundation grants, tax credits and other government subsidies. Due to the better air quality from green design, insurance premiums are often lower than conventional design.

Energy, which is a major cause of climate change, is related to the built environment. The built environment is a major consumer of energy, using 30 percent of all primary energy and 18 percent of potable water usage, and producing billions of tons of solid waste in the U.S. In addition, transportation consumes about 40 percent of the primary energy in the U.S., much of which is linked to the movement of six billion tons of materials needed annually for building. Finally, the built environment has an effect on the health and well-being of its occupants. Recent studies argue that most types of cancer are caused by environmental factors.

In response to the growing environmental concerns, the United States Green Building Council (USGBC), which represents all segments of the building industry, created the LEED Green Building Rating System. LEED is based on accepted energy and environmental ideology using both known effective practices and emerging concepts to develop high-performance, sustainable buildings. LEED was created in an effort to transform the marketplace by providing a national standard for green building, facilitating positive results for the environment, occupant health and financial return, promoting whole-building, integrated design processes, and raising consumer awareness.

Developers seeking LEED certification for their buildings earn points by meeting or exceeding certain technical requirements in each of five categories. There are four levels of certification: Certified Level (26-32 points); Silver Level (33-38 points); Gold Level (39-51 points); and Platinum Level (52+ points). The five categories are Sustainable Sites, Water Efficiency, Energy and Atmosphere, Materials and Resources, and Indoor Environmental Quality. These five categories are further divided into "credits." One or more points are available within each credit, and points are achieved by meeting specified requirements

LEED's first credit category, Sustainable Sites, consists of eight credits and 14 possible points for choosing building locations that do not include sensitive site elements or restrictive land types to minimize site disruption as much as possible. This category encourages developers to choose

building locations in urban areas with existing infrastructure. Sustainable Sites also aims to rehabilitate damaged sites such as brownfields, provide access to public transportation, accommodate alternative means of transportation, and conserve natural areas by sharing building facilities such as parking decks.

LEED's second category, Water Efficiency, is the smallest of the credit categories, consisting of only three credits and up to five points for taking measures to improve water efficiency. This category seeks to limit or eliminate the use of potable water for landscape irrigation, incorporate innovative wastewater technology into the building's sewer systems, and achieve a substantial reduction in the overall amount of water that a building consumes.

The largest of LEED's five credit categories, Energy and Atmosphere, consists of six credits and 17 possible points. Developers can earn up to 10 points for reducing design energy costs compared to the energy cost budget for systems regulated by ASHRAE/IESNA, two organizations created to promote energy efficiency in heating, refrigerating, air-conditioning and lighting. This category's guidelines distinguish between regulated and non-regulated energy systems, and introduce two methods for architects to separate the energy consumption of regulated systems. The guidelines also encourage project teams to apply for credits if the energy consumption of any non-regulated system is also reduced.

"As oil and natural gas prices hit new highs, the economics [of green building] become more favorable in terms of lower operating costs for energy, water, waste, repairs and maintenance."

LEED Credit Category Four, Materials and Resources, consists of seven credits and awards up to 13 points. Under this category, the building must have an accessible area serving the entire building to separate, collect, and store materials for recycling paper, corrugated cardboard, glass, plastics, and metals. A credit is awarded where salvaged, refurbished, or reused materials, products, and furnishings compose at least five percent of building materials and another credit can be earned if that figure increases to 10 percent.

Points are also awarded for the use of materials with recycled content that constitute five and 10 percent of the total project materials, respectively, and an additional point can be earned when 20 percent of building materials and products are manufactured within a radius of 500 miles of the project site. Credits are also earned for maintaining a minimum of 75 to 100 percent of any one of the existing systems (wall, floor, or roof) of the structure that stand on the new building's site.

LEED Credit Category Five, Indoor Environmental Quality, consists of eight credits and up to 15 points. The category requires developers to prohibit tobacco smoking in the building or have designated smoking areas at a distance from entrances and windows. Credits are earned for a variety of preventive measures, such as installing carbon dioxide monitoring systems, incorporating ventilation systems, maintaining an air quality program, reducing the quantity of indoor air contaminants, taking measures to prevent building occupants from exposure to hazardous chemicals, giving building occupants control over thermal and lighting systems, designing the building to maintain temperature and humidity comfort ranges, installing a permanent temperature and humidity monitoring system, and providing a connection between indoor and outdoor spaces.

LEED's benefits include an establishment of a market value by recognizing leaders using a recognizable trademark. LEED's recognition of third-party validation of achievement, Quality Buildings and Environmental Stewardship consists of qualifying for a growing array of state and local government incentives, a LEED certification plaque to mount on the building, an official certificate, and marketing exposure through the USGBC Web site, case studies, and media announcements. LEED, however, has been criticized for many reasons, the most common of which is that LEED certification is a costly and time consuming process.

The LEED building assessment standard has essentially defined green buildings in the U.S. and also in several other countries around the world. In fact, LEED certifications have been integrated into a number of laws. Recently, a proposed initiative to amend the New York City charter was passed to include a requirement that construction or renovation of any city-owned or city-funded building with an estimated cost of $2 million or more must be designed to achieve a LEED Silver or higher rating. See Proposed Int. No. 324-A. The legislation will take effect on January 1, 2007. (For complete information, please visit http://www.usgbc.org/News/usgbcnews_details.asp?ID=2046.)

The LEED building standard seeks to foster an understanding and awareness of the importance of creating a symbiotic relationship where nature can contribute to the services of a building and the building can reciprocate by providing support for nature. LEED has been instrumental in the green building movement. Currently, the number of green buildings is doubling each year with new products and services that are rapidly growing to meet the demand for environmentally friendly approaches to development. Still, there's more good news. On November 11, 2005, the USGBC unveiled a refined and simplified LEED registration, documentation and certification process.

Green design is looking more and more attractive due to its social, environmental and financial benefits. Maybe it's time for you to consider going green on your next project. ■

[1] The primary sources for the factual information in this article are: Stephen T. Del Percio, *The Skyscraper, Green Design, & the LEED Green Building Rating System: The Creation of Uniform Sustainable Standards for the 21st Century or the Perpetuation of an Architectural Fiction?*, 28-FALL Environs Envtl. L. & Pol'y J. 117 (2004); and Charles J. Kibert, *Green Buildings: An Overview of Progress*, 19 J. Land Use & Envtl. L. 491 (2004).

Jeremiah Stoldt Interview: Columbia University Expansion

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By 2015, we intend to have two buildings completed – a wet lab research building fronting Broadway between 129th and 130th and a graduate or professional school building to the west of the research building. The Studebaker building at 615 W. 131st Street is being converted into administrative office space. The last piece of the Phase I plan will be the renovation of Prentis Hall on 125th, possibly for art-related uses.

Another important part of Phase I is the creation of "interim" open space. Because of an execution challenge involving our proposal, several levels of basement space between 129th and 133rd streets will be developed for centralized parking, a central plant, loading and unloading, and other support functions. It would be built below the two new buildings in the first phase and these spaces would be phased with the development above-ground going forward. In order for development to move from one block to the next, we would have to take the "interim" open space offline and build underneath. Once construction below ground is complete, we will create one or more permanent open spaces at grade.

MSZ: How will this underground space be developed?

JTS: The first phase would be the building of the central plant roughly below the mid-block academic building as well as support for laboratories beneath the research building.

MSZ: Who has been involved on the creative side?

JTS: The design team is lead by Renzo Piano of RPBW (Renzo Piano Building Workshop) and Marilyn Taylor of SOM (Skidmore, Owings and Merrill). We wanted to pair Renzo's creativity with Marilyn's keen insight into what makes great urban places thrive. I think the project has benefited enormously from this collaboration.

MSZ: Do you have a separate landscape architect?

JTS: Yes, we have James Corner, from Field Operations. He's also the Chair and a Professor in the Department of Landscape Architecture at the University of Pennsylvania's Graduate School of Design. He has done some amazing urban landscape design in places as diverse as the High Line and Fresh Kills.

Jeremiah T. Stoldt

MSZ: What is the vision of the project?

JTS: We want to create an environment in which the University is completely integrated with the surrounding community. We're trying to combine the identity of the University and the opportunity for community collaboration with a campus that is synergistic with the urban elements of New York City.

The goal for the proposed Manhattanville development is to merge the concept of campus with an urban environment. Every street throughout the development, east to west and north to south, will remain open to both vehicular and pedestrian traffic. The idea is not to erect barriers between the school and the community – real or perceived. There will be no gates, bridges, sidewalk bridges, elevated bridges. Comparatively, the Morningside campus has de-mapped streets and has been perceived by some as a more sequestered community.

MSZ: Tell me about some of the architectural components.

JTS: We are proposing commercial/retail and other publicly accessible uses for the first one or two floors of the buildings along Broadway, 125th Street and 12th Avenue in the hopes of creating a real street presence.

The commitment to these ground floor uses and the ability to put support spaces underground allows us to make some very interesting transparent architectural statements that reinforce the concept of permeability and integration. There will be a lot of glass combined with exposed steel to echo the Riverside Drive viaducts. There will be an emphasis on color; the buildings on the street level will be a celebration of color and incorporate the warmth of wood. Ultimately, we want to make a statement that reinforces the urban design principles that the team has developed from community input.

MSZ: Do you have a close collaboration with Renzo and Marilyn in trying to develop what the University wants to accomplish?

JTS: Extremely close. The team is really the entity that interprets the input – both the University's input and the community's input. Knowing what large-scale development means to people in New York City and understanding the University's history in relation to physical development, we wanted to make sure that we were out there early and often to explain our intent and vision in order to incorporate the community's voice into our plan.

MSZ: Do you have a public outreach program in place?

JTS: Yes, the team has conducted extensive research through meetings with Community Board 9, block associations, Manhattanville clergy, tenants' associations and other groups. The community is really very heterogeneous – different interests, different constituents, different income levels – they all need to be addressed and heard, sometimes individually and often collectively.

Initially, our outreach program was very broad. We approached every organization that we thought may have an interest in the expansion and also held meetings with any group that came to us and expressed a desire to know more about the plan. Over time, our approach has become more focused, especially now that the plan is entering the public approval stage. In particular, we've deepened our relationship with Community Board 9. We communicate with the board regularly and the board, often with us, informs the community.

MSZ: What has been the community reaction?

JTS: Development is a polarizing phenomenon. We've been fortunate thus far in that we have received a lot of support from the Harlem business community, the construction trades and a number of elected leaders. In Manhattan, I'm hard pressed to think of an example of a proposed development that was unanimously championed by elected leaders and community groups.

MSZ: And, yet, you expect support from those that appreciate what Columbia University means to this City. After all, this development has a tremendous advantage over projects that are purely economic generators.

JTS: That's absolutely true. Columbia is a major intellectual capital generator for the City – New York's Ivy League school. By seeking to create new facilities to further its mission, I believe Columbia's proposal is very different from typical private-sector development.

And incidentally, the economic benefits are also significant. The University is proposing to invest $4.6 billion dollars and create

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Subguard Insurance – An Option for Owners?

By: Lori Samet Schwarz, Esq.
and Alexander D. Tuttle, Esq.

With any construction project, property owners shoulder substantial risks of delayed performance, cost overruns, liability, and contractor defaults. Owners can deflect these risks through mechanisms such as contractual penalties/incentives related to timely contractor performance and indemnification provisions for negligence. However, such contractual protection is not always sufficient since a contractor may default, due to bankruptcy or other reasons, leaving an owner without effective recourse. For this contingency, owners often look to surety protection through performance bonds or contractor default insurance.

Performance bonds are considered the standard form of surety protection for both contractor and subcontractor performance. Such bonds provide that if and when a contractor or subcontractor defaults, the surety will step into their shoes and complete the project on time, within budget, and according to specifications. To bond a contract, the contractor or subcontractor must be prequalified by the surety. Among other things, the surety will evaluate the contractor's financial strength and construction expertise. Once a bond is in place, the contractor or subcontractor pays a premium equal to a percentage of the dollar value of its contract amount, payable upon execution of the bond. When the contractor or subcontractor defaults and the surety confirms the default through investigation, the surety has the option of either tendering the penal sum of the bond to the owner or completing that contractor's or subcontractor's work. If the surety elects to perform, it can re-bid the job for completion, bring in a replacement contractor, or provide financial and/or technical assistance to the existing contractor or subcontractor to enable it to complete the work.

In the mid-1990's, Zurich launched an insurance product, Subguard, that has now become a viable alternative to requiring that a subcontractor post a performance bond. Subguard is an insurance policy that can be held by an owner or general contractor to cover the direct and indirect costs of a subcontractor – but not general contractor – default. Currently, there are more than 40 bound Subguard Programs in existence, with policy holders performing over $12 billion in annual construction. While Subguard policies are primarily held by general contractors, there is a recent trend of increased owner participation in the program.

To obtain a Subguard policy, the policy holder is required to compile the subcontractor's financial and background information and submit it to the carrier for prequalification. The information must include the subcontractor's construction experience, trade references, financial strength, and evidence of ownership/management stability. Once the policy is issued, the policy holder pays a premium for coverage. In the event of a subcontractor's default, the policy holder completes the subcontractor's work, initially at its own expense. The policy holder then submits its claim to the carrier, less the deductible, to recover both direct and indirect costs associated with completing the subcontractor's contractual obligations and/or correcting defective or nonconforming work. These costs can include investigating, adjusting and defending disputes relating to the loss claim, accelerating the job, costs for extended overhead, and associated legal expenses.

In essence, Subguard offers an owner the opportunity to exercise an element of control over the subcontractor's work rather than leaving it entirely in the surety's hands. Whether an owner elects to procure Subguard or insist upon a standard performance bond will hinge on the project size and value, the reliability and reputation of the subcontractor, and the owner's general outlook towards hands-on participation and a progressive policy. Subguard is typically less expensive than a surety bond but requires a larger deductible, making Subguard more feasible on larger projects. In terms of owner control, Subguard requires extensive participation by the owner in the subcontractor prequalification process, and offers full control to complete the project in the event of a subcontractor default, allowing for potentially faster completion. In this context, the desirability of Subguard depends on the owner's willingness to incur the administrative burden of gathering the subcontractor's financial and background information, and its ability – both in financial resources and expertise – to take over and complete a defaulting subcontractor's work.

Subguard offers a progressive method of coverage to the owner. Performance bonds have traditionally required the owner to take a passive approach to project completion because the surety retains the right to choose how to complete the work in the event of a default. Subguard allows for a pro-active approach. However, Subguard raises a factor of uncertainty that does not surface with performance bonds. For example, there are no legislative guidelines for Subguard, policy definitions are frequently vague, and its coverage and exclusions have yet to be tested in the courts. Moreover, Subguard provides claims-made coverage only during the policy period, so defective work discovered after the policy has expired or been canceled is not covered. In addition, the insured must select an aggregate limit of liability which may prove insufficient to cover the completion cost. Performance bonds, on the other hand, are defined by state and federal legislation, have been interpreted and clarified by the courts, and remain in force until the time for filing suit has expired under the contractor contract or bond, or the statute of limitations. See, e.g., 24 C.F.R. 805.203(c) (federal bond requirements for contractor assurance in the form of 100% performance and payment bonds); and 49 U.S.C.A. 315 (bond requirements under Interstate Commerce Act); 11 NYCRR 66.0 (surety bond forms).

Recent trends have shown that Subguard is effective, and in certain situations, may offer an approach that can be less costly, more manageable, and allow for faster job completion in the event of a subcontractor default. However, an owner must balance these benefits against an equally long list of potential risks in making its choice. ■

Jeremiah Stoldt Interview: Columbia University Expansion

Continued from pg. 6

thousands of jobs in the construction sector over 25 years. Over 14,000 permanent new jobs will be created. Over 80% of our construction expenditures will go to New York City firms. It's an asset to a number of different constituencies.

MSZ: Will you talk for a moment about Columbia's medical center and how that factors into the plan.

JTS: To us, Manhattanville is not just an opportunity to relieve space pressure, but also a chance to encourage collaborations through the proximity between Columbia's Morningside and Medical Center campuses. For example, the opportunity to combine the clinical functions of the Medical Center with research functions of the Morningside campus in a single building is extremely attractive to the University. We intend to follow this model during Phase I and throughout the project.

MSZ: Are you using RPBW and SOM for all buildings?

JTS: We've committed to having RPBW involved in the Phase I building design. It's advantageous to have a member of the Campus Plan design team realize and implement the vision that was articulated and planned. We're still thinking about roles for SOM and other firms as the plan moves forward.

We hope to make the architectural guidelines for future development robust but flexible enough to allow contributions from a number of architects. The intention is to realize this plan over a period of 25 years with the contributions of several different architects over the course of a generation.

MSZ: So, there is less concern for consistency and more interest in uniqueness.

JTS: We're looking for unity without uniformity. As we've discussed, we've introduced a number of urban design principles that represent a departure from the University's development historically. We're not going to close streets, we will provide north/south public access, and we've added retail and commercial uses. It will be a challenge for the architects involved.

MSZ: Can you talk about the construction site for a moment?

JTS: Sure. One of the more interesting technical propositions will be the construction of the underground layer. We will have a major civil engineering project layered onto a major large-scale construction project – extremely challenging and unique. The elevation of the land in relationship to the Hudson River requires us to build a slurry wall that will serve as both the roof of the underground layer and the foundation of the buildings.

MSZ: Do you have your engineering team in place?

JTS: Yes. For the initial phase, we have Buro Happold providing structural engineering consulting and Vanderweil for our central plant considerations. Since we're proposing a number of firsts here, we have a few engineering firms involved in different engineering challenges – geotechnical, structural and so on. It's fascinating and challenging.

MSZ: What has been the City/State's stand? Do you foresee any obstacles in addition to perhaps some community opposition?

JTS: We are still very early in the formal public approval process, but overall, we believe that the City and the State recognize the value that Columbia provides as an Ivy League learning institution. Projects of this scale always have their challenges and plans for development/expansion are often modified as a result - generally for the better.

MSZ: Do you expect public funding?

JTS: Columbia's capital funding comes from a variety of sources, most of them from within the University, such as gift funding. Some funding comes from bonds secured through the Dormitory Authority, but there are no public funds like the type that have been committed to the Atlantic Yards project, for example, being sought.

MSZ: So unlike the stadium, to which the City was planning on contributing several hundred million dollars, the University is not looking for a commitment for its expansion.

JTS: That's right. This is another distinguishing feature. The University's commitment is not dependent on huge public subsidies.

MSZ: Do you have a specific type of security program in place?

JTS: Our security, as it exists, has made Columbia the safest school in the Ivy League. We have excellent physical security systems in place. We employ a large security staff – we have found people are a far more effective deterrent than technology – and we have an excellent relationship with the 26th Precinct.

Given that it's very early on in the process, it is difficult to say how security will be addressed. However, the model we employ today has worked well for us, and I expect we will employ the same methodologies at the Manhattanville campus.

MSZ: Tell me about the Minority, Women and Local (MWL) participation initiative?

JTS: By virtue of the MWL participation program that has been in place since 1996, 25% of the construction dollars currently spent on large-scale projects go to minority, women-owned and local companies – 35% of the workforce consists of membership from these groups. When you have a budget estimated at $4.6 billion, the opportunity to make a significant contribution to the local economy is there.

MSZ: It certainly is. Thank you very much. Best of luck in your efforts. ■

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