ACREL News

President's Message

Happy 2011 to you and your families. The industry outlook appears to be brightening a bit, finally, and I hope some of that good news is falling on your desk as the year begins.

ACREL's Fellows have started the year on a busy note with considerable activity on many fronts. If you would like to be more involved by joining a committee or task force, please let me know. The reports below do highlight a few opportunities in particular.

Tucson Meeting: How Does 75° and Sunny Sound?

Sounds great to me! I know many more ACREL Fellows than usual have enjoyed the beauty and challenges of snow and ice this winter. Like me, I am sure you are ready for some sun and warm breezes. ACREL's Tucson meeting fills the bill, so make your travel plans today.

You won't want to miss the Thursday afternoon program planned by Ira Waldman. Professor Donald C. Shoup, a well-recognized authority on urban planning, will be our guest panelist for "America's Love Affair with the Automobile: Future Implications on the Development, Use and Reuse of Real Estate." A workshop with Professor Shoup also will follow on Saturday.

Rob Freedman has been tireless in leading the charge on the Programs Committee for this meeting. Program highlights include insights, from ACREL Fellows who are in-house counsel, on how successful real estate companies have managed through the recession. Other very topical themes include buying property out of receiverships; hot issues in lease negotiations; the consequences of the FDIC taking over a bank; tips on workouts and restructurings; and news on the challenges relating to title insurance in this market. The Professors' Corner is also back, by popular demand.

March 17 will be here before you know it. All the details on the meeting are posted on the ACREL website (http://www.acrel.org/Private/). If you need a reminder on your password or have any other questions about the website, please just reach out to Henri at the ACREL office. Please make your hotel reservations directly with Loews Ventana Canyon. And don't forget the sunscreen!

IN THIS ISSUE

continued on page 2

President's Message

continued from page 1

ACREL in the Real Estate Press and A Publishing Opportunity for You

In 2010, BNA's *Real Estate Law and Industry Report* interviewed Kevin Shepherd concerning ACREL and current issues of concern to the commercial real estate industry. In January 2011, I had the opportunity to kick off the year by sharing ACREL developments and plans and my comments on the current state of the commercial real estate industry with BNA. This article offers great exposure for ACREL, and fits well with ACREL's overall outreach programs

Given the prodigious amount of speaking and publishing by ACREL Fellows, it's very likely many of you have an article that is very well suited to BNA's *Real Estate Law and Industry Report*. Good news: BNA invites ACREL Fellows to submit just such material. Articles may cover any topic the author has expertise in, as long as the primary focus is on commercial real estate, or financial markets related to real estate. Outside author submissions generally run between 2000 and 5000 words, however, there is no word limit, and longer pieces will be accommodated as well. If you or your firm would like to submit an outside author article for publication, or would like to inquire about making a submission, please contact Richard Cowden, managing editor, at rcowden@bna.com. To supplement ACREL's outreach efforts and to increase the visibility of ACREL, please make sure to include in your biographical note that you are an ACREL Fellow. Kindly copy Jill and me when you submit, as we'd like to know how many ACREL Fellows take advantage of this opportunity.

Got Committees?

ACREL has eleven governance committees and twelve substantive law committees. I won't list them all here, but both the ACREL Directory and the website include a listing, with leadership, current members and other information about committee activities. Hopefully, each of you has identified at least one that is appealing, whether you are interested in serving ACREL through a committee like Member Development, Member Selection or Programs, or seek a substantive committee that matches your expertise, or an expertise you desire to cultivate. If you would like to join a committee, just send me an email. If you have questions about a substantive committee's current focus, please see the chart on the ACREL website (look for the link under Committees on the right side of the page), telephone or email the committee chair, or just drop in on the committee meeting in Tucson.

ACREL's Amicus Briefs Committee Needs You!

Due to some retirements, the ACREL Amicus Briefs Committee needs a few new members. Chaired by Ted Taub, this committee identifies opportunities for ACREL to advance its mission of improving real property law by preparing and filing amicus briefs and counseling the Board of Governors as to whether filing a brief is advisable. In some instances, ACREL Fellows bring to the attention of the Board or the Committee cases which may merit ACREL's involvement. While this committee typically lays dormant for months and sometimes years, it does spring into action

continued on page 3

STAFF BOX

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President's Message

continued from page 2

when the need arises. If you would be interested in joining the Amicus Briefs Committee, please do let me know. If you have questions about the operation and work load of the Committee, Ted would be happy to discuss that with you.

Share Point is Coming to ACREL

Some of you may be familiar with Share Point, a collaborative web-based software program, which facilitates planning, sharing calendars and project development, such as our committees' work. ACREL is adding Share Point to our bag of tech tricks in 2011. Through the leadership of Dan Smith, Norm Gutmacher and Bob Wright of the Practice Technology Committee, aided by Board Liaison Gordon Tanner, we are beta testing Share Point with the Leasing Committee. We plan to then roll it out to other Substantive and Administrative Committees later in 2011.

2011 Calendar of Local Meetings

It's not surprising, given the collegiality which is a hallmark of ACREL Fellows, that our local meeting calendar is a busy one. We invite you to organize an ACREL get-together in your neighborhood What's involved? Not much – just gather ACREL Fellows in your area for whatever gathering suits you – breakfast, lunch, late afternoon, golf, dinner. We've had all of those! While a generous host is welcome, typically it's pay as you go, so there is no financial burden on anyone. The organizer's investment is a few emails. There is no need for a formal program; the focus is purely social. Do let Jill Pace know your plans, including proposed day and time, as early as possible, and perhaps another officer, a Board member or I will join the fun.

Here's the 2011 schedule so far:

January 26, 2011 – Luncheon in Washington, hosted by Steve Teitelbaun of Jones Day and organized by Earl Segal of Newmark Knight Frank. Notwithstanding a threatening weather day in DC, 18 Fellows attended.

March, 2011 – Luncheon in Boston, organized by Kathy Murphy and Paul McNamara.

April 6, 2011 – Jonathan Shils, Jo Anne Stubblefield and Wayne Hyatt are working on organizing an event in Atlanta. Thanks to Mason Stephenson and King & Spalding for hosting the event. Please contact Jonathan if you'd like to be involved in planning, or for more information.

April 13, 2011 - Reception in Philadelphia, organized by Dick Goldberg of Ballard Spahr.

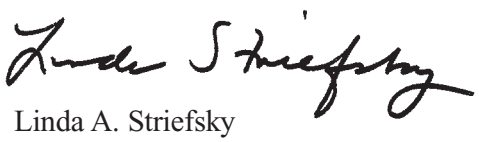
April 28, 2011 – ACREL Gets Together for Drinks at the ABA Real Property Trusts and Estates Section Seminar in Washington, DC.

June 15, 2011 - New York City

Fellows in Los Angeles (Ira Waldman) and Chicago (Alvin Katz) are also planning meetings, so watch for details in the near future. Consider jumping on this bandwagon and planning an ACREL meeting in your city in 2011.

'Til We Meet Again

I do look forward to seeing you in Tucson in March. In the meantime, I am always interested in your suggestions and comments for improving ACREL and the return on your investment in ACREL.



Linda A. Striefsky
President

Extending Easements to Adjacent Property

by Jesse S. Ishikawa, Reinhart Boerner Van Deuren s.c.

Suppose an access easement runs over one tract of land (the "burdened parcel") in favor of another tract of land (the "benefited parcel"). Then, suppose that the owner of the benefited parcel acquires a tract adjacent to the benefited parcel (the "adjacent parcel"). The owner walks across the easement to reach her benefited parcel. From there, she takes a right turn and keeps walking until she is standing on her adjacent parcel. She clearly has the right, under the easement, to walk across the burdened parcel to get to her benefited parcel. How she gets from the benefited parcel to her adjacent parcel is of no concern to the burdened owner, right?

Not exactly. If the terms of the easement document clearly specify whether the owner may use the easement for access to parcels other than the benefited parcel, the terms of the document will control. But if the document is vague, courts rely on rules of construction to determine whether she may do so without overburdening the easement.

The traditional rule establishes a bright line

The traditional rule states: "[a]n easement cannot be made to attach to other land which the owner of a dominant estate may subsequently acquire,"[1] even if the attachment results in no increased use of the burdened property.[2] This bright line is based on contract law. If an express easement states that the benefited property shall have an easement for ingress and egress over the burdened property, the traditionalists say, extension of the easement to other lands would violate the expectations of the parties and create unpredictability in the parties' respective property rights.[3] Additional authority cited for this rule is Restatement (Third) of Property: Servitudes Section 4.11 (2000), which states: "Unless the terms of the servitude . . . provide otherwise, an appurtenant easement or profit may not be used for the benefit of property other than the dominant estate."[4]

As an aside, some benefited owners have tried to get around the traditional rule by fractionalizing a benefited parcel's ownership and conveying the fractionalized ownership interests to owners of adjacent parcels, making them benefited owners. This worked in Alabama.[5] It did not work in Wisconsin.[6]

The bright line is becoming fuzzier

Other courts, also claiming adherence to contract law and citing the Third Restatement, have found no overburden when the benefited owner extends its easement to an adjacent parcel. The Connecticut Supreme Court, for example, in a case finding no overburdening, concluded the parties at the time of the creation of the easement may be found to have con-

1 2 G. Thompson, Real Property (1961 Repl., Section 322, p. 77, cited in *Carbone v. Vigliotti*, 222 Conn. 216, 610 A.2d 565 (Conn. 1992).
2 *Sicchio v. Alvey*, 10 Wis.2d 528, 103 N.W.2d 544 (1960).
3 *Grygiel v. Monches Fish & Game Club, Inc.,* 2010 WI 93, 787 N.W.2d 6 (Wis. 2010)
4 Cited in *Grygiel, supra*.
5 *Perdido Place Condominium Owners Association, Inc. v. Bella Luna Condominium Owners Association, Inc.,* No. 1080226 (Ala. 2009).
6 *Nettesheim v. S.G. New Age Products, Inc.*, 285 Wis. 2d 663, 702 N.W.2d 449 (Wis. App. 2005)

continued on page 5

continued from page 4

templated, as a matter of law, that its benefits might extend to adjacent property not formally within the terms of the easement document.[7] The Court relied in part on Section 4.1 of the Restatement (which makes the intentions and reasonable expectations of the parties an "overarching consideration" in construing the easement) and Section 4.10 (which permits the benefited owner to make any use of the burdened parcel estate reasonably necessary for the convenient enjoyment of the easement for its intended purpose).

The Supreme Court of New Hampshire went a step further and approved a non-benefited owner's use of an easement because "nothing in the deed's language indicates an intention to prevent nondominant, third-party tenements from benefiting from the easement."[8] In other words, if it's not prohibited, it's allowed.

Even courts that have abandoned the bright line test, however, are unwilling to extend an easement to an adjacent parcel if the extension would unreasonably burden the easement.[9] Which brings us to the next question.

What constitutes an unreasonable burden

> (a) An increase in the use of an easement resulting from normal development of the benefited parcel is not an unreasonable burden.

If the challenged use of the easement is a normal development from conditions existing at the time of the grant, the use is not considered unreasonably burdensome.[10] Reasonableness is always a squishy concept, especially so in easement law. Consider, for example, the guidance given by the Wisconsin Court of Appeals: "[w]hat is or is not reasonable use of the way does not become crystallized at any particular moment of time. Changing needs of either owner may operate to make unreasonable a use of the way previously reasonable, or to make reasonable a use previously unreasonable."[11]

Applying the "normal development from conditions existing at the time of the grant" test, courts have held that the following changes in use did not constitute unreasonable burdens: (a) an increase in boat slips on the benefited parcel from 84 to 280,[12] (b) conversion of the benefited parcel from a 126-acre farm to a residential subdivision,[13] (c) the construction on agricultural property of a 30,000 square foot commercial horse stable,[14] and (d) in the case of an easement for telephone lines, replacement of a static telephone line with a fiber-optics line.[15]

Courts in these cases often distinguish between changes in the *degree* of use and changes in the *kind* of use,[16] finding no burden where the degree of use increases but finding a burden if the kind of use changes. Courts have, for example, held that an easement granted for

7 *Abington Limited Partnership v. Heublein,* 246 Conn. 815, 717 A.2d 1232 (Conn. 1998) ("Abbington II").
8 *Heartz v. City of Concord*, 148 N.H. 325, 808 A.2d 76 (N.H. 2002).
9 *Abington II, supra; Abington Limited Partnership v. Heublein*, 257 Conn. 570, 778 A.2d 885 (Conn. 2001); *Carbone, supra; Lutheran High School Association v. Woodlands III Holdings, LLC,* 2003 Ut. App. 403, 81 P.3d 792; *Perdido Place, supra*.
10 *Heartz, supra.*
11 *Atkinson v. Mentzel*, 211 Wis. 2d 628, 566 N.W.2d 158 (Wis. Ct. App. 1997).
12 *Hayes v. Aguia Marina, Inc.,* 243 VA. 255, 414 S.E.2d 820 (Va. 1992).
13 *Cushman Virginia Corp. v. Barnes,* 204 Va. 245, 129 S.E.2d 633 (Va. 1963).
14 *Regen v. East Fork Farms,* No. M2008-0144-COA-R3-CV, (Tenn. Ct. App. 2009).
15 *Edgcomb v. Lower Valley Power & Light, Inc*., 922 P.2d 850 (Wyo. 1996).
16 *Regen, supra; Hayes, supra.*

continued on page 6

continued from page 5

an electric transmission line could not be used for a cable television line,[17] and that an easement for "access and egress" could not be used for utility lines.[18]

(b) Courts are less likely to find an unreasonable burden if the adjacent parcel and the benefited parcel are both owned by the same party.

Courts are more willing to allow an easement to be extended to an adjacent parcel if the adjacent parcel is owned by the benefited owner and used as part of the benefited parcel. Thus, courts have upheld the use of an easement for an adjacent parcel when:

(a) water taken under an easement was used for an adjacent parcel owned in common with the benefited parcel;[19]

(b) the adjacent parcel and the benefited parcel were both part of the same condominium,[20] and

(c) adjacent parcels were combined with the benefited parcel to create a single building site.[21]

Conversely, courts are less willing to do so if the non-benefited parcel and the benefited parcel are owned by different owners.[22]

(c) Other burdensome factors.

Courts, usually in *dicta*, have stated that an unreasonable burden might arise from:

(i) an abrupt change in the development of the benefited parcel and its use of the easement;

(ii) a decrease in the property value of the burdened parcel as a result of the use of the easement;

(iii) an increase in noise and traffic along the easement so as to interfere with the burdened owner's peace and enjoyment of the burdened parcel;

(iv) physical damage to the burdened parcel;

(v) a material increase in vehicular traffic resulting from the extension of the easement to additional property; and

(vi) the unilateral conversion of a joint driveway easement into a public thoroughfare.[23]

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17 *Marcus Cable Associates, L.P. v. Krohn*, 90 S.W.3d 697 (Tex., 2002).
18 *Hunter v. Keys,* 229 Wis. 2d 710 , 600 N.W.2d 269 (Wis. Ct. App. 1999).
19 *Rawdon v. Johnston*, No. M2010-01097-COA-R3-CV (Tenn. Ct. App. 2010).
20 *Perdido Place, supra*.
21 *Carbone v. Vigliotti,* 222 Conn. 216, 610 A.2d 575 (Conn. 1992).
22 *Il Giardino, LLC v. Belle Haven Land Company,* 254 Conn. 502, 757 A.2d 1103 (Conn. 2000); *Cheatham v. Melton*, 593 S.W.2d 900 (Mo. App. 1980).
23 *Perdido Place Condominium Owners Association, supra; Lichteig v. Churinetz*, 9 Conn. App. 406, 519 A.2d 99 (Conn. App. 1986); *Lichteig v. Churinetz*, 9 Conn. App. 406, 519 A.2d 99 (Conn. App. 1986); *Cheatham, supra*.

continued on page 7

Extending Easements to Adjacent Property

continued from page 6

Remedies

Burdened owners who think that their easements have been unreasonably burdened may seek declaratory relief, injunctive relief, damages for trespass, and termination of the easement. Termination is seldom granted, even in states following the traditional rule. In Wisconsin, for example, the Court of Appeals refused to terminate an easement wrongfully extended to an adjacent parcel because the burdened owner failed to demonstrate that the additional burden was such that "continued use of the easement is precluded as a matter of law."[24]

Conclusions

(a) If the easement document states whether an easement may be extended to serve an adjacent parcel, the language of the document controls.

(b) If the easement document is vague, courts following the traditional rule would not allow an easement to be extended to serve an adjacent parcel.

(c) Courts that do not follow the traditional rule would allow the extension if there were no unreasonable burden added to the burdened parcel.

(i) Courts are less likely to find an unreasonable burden if the benefited parcel and the adjacent parcel are under common ownership.

(ii) Courts are less likely to find an unreasonable additional burden if the change in use is a change in degree as opposed to a change in kind. ■

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24 *Millen v. Thomas*, 201 Wis.2d 675, 685, 550 N.W.2d 134 (Ct.App.1996).

Hilton's ADA Settlement with the Department of Justice

Precedent-setting agreement delivers more than removing architectural barriers

by Martin H. Orlick, Jeffer Mangels Butler & Mitchell LLP

On November 9, 2010, the U.S. Department of Justice's Civil Rights Division (DOJ) and Hilton Worldwide, Inc. (Hilton) announced that they entered into a 45-page "comprehensive precedent-setting agreement under the Americans with Disabilities Act of 1990 (ADA) that will make state-of-the-art accessibility changes to approximately 900 hotels nationwide."

More than the usual removal of architectural barriers, the changes include providing disabled guests the same room choices as other guests, guaranteeing accessible rooms will be available when they have been reserved, and making the central Internet reservation system more accessible. The agreement includes not only Hilton-owned properties, but properties where Hilton is the manager or franchisor.

The lawsuit was filed after the DOJ completed ADA surveys of 13 Hilton-related hotels. Hilton denied all allegations, but cooperated with DOJ investigators throughout the extended investigation and agreed to pay a $50,000 civil penalty.

Background of lawsuit

The Court-approved Consent Decree and Final Judgment resolved the lawsuit *United States of America v. Hilton Worldwide, Inc.*, filed in the United States District Court for the District of Columbia. The lawsuit alleges that Hilton, Conrad Hotels and Resorts, Doubletree, Embassy Suites, Hampton Inn, Hampton Garden Inn, Hilton Grand Vacations, Homewood Suites, the Waldorf Astoria, the Waldorf Astoria Collection and Home2Suites by Hilton have policies, practices and procedures which discriminate against individuals with disabilities.

The lawsuit also alleges that Hilton either owns, manages, or enters into franchise license agreements with the owners of hotels that failed to design and construct facilities built after January 26, 1993, (the date the ADA was fully effective), that were in compliance with the "new construction standards" of the ADA. The DOJ focused on hotels built after the 1993 date because those properties were required to be constructed without any access barriers. This strategy enabled the DOJ to avoid the more complex litigation issues involved in "readily achievable barrier removal" that is required of properties built prior to1993.

The Complaint alleged that hotels were designed and built without the federally mandated number of accessible guestrooms dispersed among the different categories of available accommodations (suites, deluxe rooms, view rooms, etc.).

Complaints, sweeps, and system-wide investigations

Typically, a DOJ hotel investigation begins with a guest complaint at a particular hotel which is ignored or poorly handled by the owner or operator. Matters commonly escalate if the guest files a formal ADA complaint with the DOJ's Civil Rights Division. All complaints are investigated.

continued on page 9

Hilton's ADA Settlement...

continued from page 8

The DOJ may also institute geographical "sweeps" such as the New York Times Square/Theater District investigations that took place several years ago. This comprehensive ADA investigation of 60 Times Square hotels -- including boutique hotels and international flag properties -- was initiated after a single guest's complaint. A similar sweep of apartment complexes took place in Louisville, Kentucky.

The DOJ has also initiated a number of system-wide investigations against the nation's leading hotels and retailers. Over the years, the DOJ has litigated or otherwise negotiated Consent Decrees with such prominent hotel flags as Ramada Ltd. (2010), Days Inns of America, Inc. (1999), Marriott International, Inc., Courtyard Management Corporation (1996), Motel 6 Operating LP (2004 and 2007) and Bass Hotels and Resorts (1998).

Accessible reservation systems and policies

While the alleged architectural barriers are commonplace in ADA hotel litigation, the inclusion of online and telephonic reservations systems in is one reason the agreement is viewed as "precedent-setting." The Consent Order requires Hilton's on-line reservations system to become accessible and its website to provide timely information about the accessible elements in its hotels.

The DOJ accused Hilton of failing "to provide individuals with disabilities the same opportunity to reserve accessible guestrooms using its on-line and telephonic reservations systems that are available for reserving other Hilton Hotel rooms." Specifically, the DOJ alleged that guests with disabilities are unable to reserve specific types of accessible sleeping accommodations through the Hilton Reservations and Customer Care system, in violation of the ADA. It also alleged that Hilton's central reservations system does not ensure that disabled guests receive the accessible accommodations they reserve -- that upon arrival, disabled guests may not be provided with the accessible sleeping accommodations they reserved, such as a particular room type, a room with a tub or roll-in shower, or a visual alarm for deaf or hard-of-hearing individuals.

Guests will soon be able to reserve and be assured of booking specific types of accessible guestrooms with specific features. Hilton must offer disabled guests free upgrades in a more expensive room class, if available, if the reserved accessible guestroom is unavailable at registration. Hilton will revamp its website to provide access to guests who are blind or of low vision.

Franchisor liability for ADA compliance

Another groundbreaking aspect of the case is that the Consent Order is the first time Main Justice has compelled a franchisor to require all franchisees and all properties under Hilton's management and control, to survey their facilities for ADA compliance and to either certify that each property is ADA compliant, or bring them into compliance. Historically, franchisors which merely license their brands, products and know-how -- but do not actually build or operate the facilities -- have not been held liable under the ADA for the acts or omissions of their franchisees.

The DOJ alleged that, as franchisor, Hilton was substantially involved in the design and construction of its owned, managed and franchised hotels and that these properties are not readily accessible to and usable by individuals with disabilities, as required by Title III of the ADA.

continued on page 10

Hilton's ADA Settlement...

continued from page 9

At a high level, the Consent Decree requires Hilton and its *franchisees* to survey their properties within 12 months after the Consent Decree is effective and bring them into ADA compliance. When Hilton enters into new franchise or management agreements, renews or extends old ones, the owners will be required to survey their facilities, and if necessary, bring them into ADA compliance. They must offer a variety of accessible room types (including at least one suite), provide premium views, assure the required number of guestrooms are available (including those with roll-in showers and permanent or removable tub seats), and provide accessible guestrooms for deaf and hard-of-hearing patrons.

The generally accepted legal standard has been that a franchisor cannot be held liable under Section 303 of the ADA unless it owns, leases or operates the franchised hotels or retail stores. The two leading cases involved Days Inns of America, Inc. and American Dairy Queen Corporation, and those courts held that a franchisor's right under a franchise agreement to set operating and brand standards for building, equipment or quality control does not make it an "operator." All that may be changing, in light of Hilton's Consent Order.

Ongoing ADA compliance and training

Consistent with many chain-wide Consent Orders, Hilton must hire a national ADA Compliance Coordinator to carry out the mandates of the Consent Order. Each property is required to train a point-person to resolve accessibility complaints. Hilton is also to select an "ADA Inspector" to verify compliance.

ADA training will be mandatory for all staff, whose essential jobs require them to interact with guests. Front desk employees, general managers and chief building engineers will undergo additional training regarding assignment of accessible guestrooms, emergency procedures, policy changes, maintenance of accessible features, use of all accessible features and communications equipment.

Moving forward

The U.S. Department of Justice's Civil Rights Division is aggressively enforcing the Americans with Disabilities Act of 1990 . The DOJ has focused particularly on national and regional hotel chains, individual hotels, national retailers, apartment complexes and transportation facilities. Unlike some private plaintiff's lawyers that we regularly encounter, DOJ lawyers are dedicated, skillful and committed to just one aim: to provide full and equal access to public accommodations, nationally.

Although the DOJ is authorized by statute to file litigation to enforce the ADA and to seek money damages, its lawyers are primarily motivated to obtain barrier removal. Seeking money damages is secondary, if an issue at all.

The DOJ has obtained Consent Orders against such prominent hotels as New York New-York Hotel and Casino, LLC (2001), the Ocean Palms Beach Resort (2009), Sheraton Grand Sacramento Hotel (2010), Crown Plaza Times Hotel (2010) and Norwegian Cruise Line (2010). Consent Orders have also been obtained against such prominent retailers and restaurants such as AMC Entertainment, Inc. (2010), Blockbuster, Inc. (2010), Wal-Mart Stores, Inc. (2009), Sylvan Learning Centers, L.L.C. (2007), Shoney's LLC (2006), Sunoco, Inc. (2005), and Safeway, Inc. (2004).

The Hilton case highlights the fact that the DOJ is not only laser focused on architectural barriers in hotels, but it is equally focused on the new ADA frontier – "cyberaccessibil-

continued on page 11

Hilton's ADA Settlement...

continued from page 10

ity". The case also suggests that it's a whole new ballgame when it comes to franchisor liability for ADA compliance, and companies with franchised properties will need to rethink their exposure in this area and develop strategies to ensure ADA compliance.

The DOJ has been aggressively enforcing the ADA against hotels, restaurants, shopping centers, retail chains, banks, and office building developers. The DOJ/Hilton Consent Order has significant implication for franchisors who, by and large, have avoided ADA exposure.

The DOJ wants to assure -- system wide and nationwide -- when individuals with disabilities check into a hotel, they will receive the accessible features they need to enjoy a good night's sleep. ■

Meetings Calendar

2011 Mid-Year Meeting
March 17-20, 2011
Loew's Ventana Canyon
Tucson, AZ

2011 Annual Meeting
October 20-23, 2011
The Westin Philadelphia
Philadelphia, PA

2012 Mid-Year Meeting
March 8 - 11, 2012
Four Season Hotel
Las Vegas, NV

2012 Annual Meeting
October 18-21, 2012
Renaissance Hotel
Chicago, IL

2013 Mid-Year Meeting
March 14-17, 2013
Naples Grande Resort
Naples, FL

2013 Annual Meeting
October 17-20, 2013
Four Seasons Hotel
Vancouver, BC, Canada

2014 Mid-Year Meeting
March 27-30, 2014
Grand Hyatt Kauai Resort and Spa
Kauai, HI

2014 Annual Meeting
October 16-19, 2014
InterContinental Hotel
Boston, MA

A View from the Rooftops: The Role of Real Estate Occupancy in Not-for-Profit Organizations

by James Hagy, New York Law School

Few not-for-profit organizations would describe themselves as in the real estate business. But once engaged in a dialogue, each has a story to tell about a success or challenge concerning physical space—the one it has now or the one it dreams of having someday. All face decisions about how best to forecast and address their occupancy needs in a way that promotes the organization's core purpose and mission, that provides an efficient, suitable environment for staff, clients, and visitors, and that is consistent with the organization's budgetary resources from both a capital investment and an operating perspective.

Every real estate decision has a potentially profound impact on the future of the organization—whether to own or lease; whether to be hosted by others or to operate "virtually" without a fixed location; whether to stay or to move; whether to "dream big" or "stay small"; whether to renovate or build anew; whether to outsource or to self-perform; whether to become "green" or stay whatever that other color is.

Just as with for-profit businesses, real estate is typically one of the largest categories of repeat operating expense for many not-for-profit organizations. It also can require significant capital investments for acquisition and expansion, tenant build-out, and renovations and repairs. Space design and utilization can support, or detract from, its effectiveness for the organization's mission. And flexibility to accommodate changing needs can have a major effect both on program and finance.

It has been my long-standing hope to encourage conversation within the not-for-profit sector about what role the real estate and facilities these organizations occupy plays in the pursuit of their purposes and missions. As part of my second life in teaching and community service after a career in private practice, I now have the privilege of founding and leading The Rooftops Project, a new initiative of the Center for Real Estate Studies at New York Law School.

Through the Rooftops Project, we look forward with enthusiasm to hosting an independent, national dialogue and exchange of ideas about the effective ownership, design, use, maintenance, and funding of real estate in furtherance of social sector missions. With the involvement of talented faculty, experienced volunteer professionals from the private sector, and enthusiastic and able students, our Center hopes to raise awareness of the role of real estate in strategy and organizational performance within not-for-profit organizations.

Our first step was a field study of not-for-profit organizations this past fall. We selected not-for-profit organizations to invite to participate in an electronic survey. Given the enormous audience—there are some 1.9 million registered not-for-profit organizations in the United States—the survey was not envisioned as a scientific sampling, but rather as a means to introduce our field of research and to elicit viewpoints about the role of real estate from the perspectives of a representative cohort of executives and staff, board members, and volunteers of not-for-profit organizations.

We were very gratified by the enthusiastic response. Representatives of 200 not-for-

continued on page 13

continued from page 12

profit organizations from all parts of the United States and its possessions participated in our work. Our study benefited from the perspectives of not-for-profit organizations across a wide range of mission types, from museums to places of worship, from social and human services to advocacy and education. We heard from organizations from Maine to California, from Washington State to Florida, from Hawaii to the Caribbean. Of invited organizations nationwide, more than 60 percent accepted and participated. Organizations offered their experiences coping with circumstances as different as a direct hit from Hurricane Katrina to a myriad of funding challenges—and an increase in demand for charitable services—in an exceptionally difficult economy.

Almost half of the organizations believe real estate to be a strategic asset important to their core mission. Many others understandably view real estate as a merely supporting resource to their primary mission and purpose. Some were even tempted initially to think, often apologetically, that they don't have real estate at all.

But every organization needs to be somewhere (hopefully out of the rain!). Once engaged in conversation, participants quickly launched into animated and engaging stories about their location or physical facilities, those they occupy now or those they may dream about for the future—from the purchase, sale, or lease of a property, to staffing models, board involvement, and funding issues, to that leaking roof or "greening" project.

One of the most surprising results of the survey is the outlook of participating organizations with respect to future space needs over the next three years. Very few organizations (less than 8 percent) expect to need less space, whether due to funding constraints or due to changes in programming unrelated to funding. Another 6 percent responded that they are unsure or do not know what their space requirements might be over the next three years. The vast majority either expect space needs to be the same or to require more space due to changes in programming.

More than 50 percent of responding organizations predict needing more space over the next three years. Given the state of the general economy, widespread declines in donor revenues, and in particular the dramatic cutbacks and payment delays in state and local funding of programs, this confidence in projected, growing occupancy needs is interesting. One possible factor is increased demand, in an economic downturn, for services offered by charitable organizations.

Fifty-two percent of the reporting organizations mentioned that they eagerly await acquiring or constructing a new building, in many cases one that they have already designed but are awaiting funds to achieve and sometimes on land they already own. When invited to indicate how organizations would spend a one-time gift of $50,000 specifically designated for real estate and facilities, 28 percent said that they would choose to direct the money to a fund for the acquisition of a new owned or leased location rather than to invest it in repairs or improvements to existing space.

Some 54 percent of all organizations indicated in narrative comments that if they had sufficient time, professional resources, and funds they would pursue some change to their location strategy (one of the top answers overall in narrative comments, second only to space planning and space utilization). And almost one-half of responding organizations agreed that they have at least one location where they would probably not select the same property or

continued on page 14

A View from the Rooftops:...

continued from page 13

location if they had the chance to start over now, which in some cases reflected the quality or characteristics of the particular property rather than location.

For every organization (for-profit or not-for-profit), matching available facilities and space commitments to operational needs can be a constantly moving target. Space design was prominent in the narrative comments of respondents. More than 30 percent indicated that if they had additional access to outside resources they would hope for space planning advice. And when asked what they might do with a one-time gift of $50,000 designated specifically for physical space, an amazing 25 percent replied that they would invest it in space planning, redesigning, or reconfiguring space to suit better their programmatic and operational needs. This percentage approached the number (30 percent) that would invest in maintenance, repairs, upgrades, or renovations of existing facilities.

At locations where the responding organization has responsibility for maintenance and repair, only 9 percent reported that maintenance and repair is done solely on a "preventive" basis in accordance with a scheduled plan. Twenty-five percent use a solely "reactive" approach (where maintenance and repairs are performed on an "as-needed" basis when something is broken or worn out). Most organizations (65 percent) reported using a mix of these two approaches.

Naturally, having an unexpected need for repairs and no available source of funding can be an unwelcome strain on any organization (or household). Only 46 percent of responding organizations reported having reserved or special funds set aside for property repairs. This leaves 54 percent to cope with an unexpected maintenance or repair cost through other means (general operating funds, solicitation of donations, or bank borrowing) or not to make the needed repair at all (23 percent).

While about one-half of the organizations reported taking real estate legal advice on a paid basis and one-half on a pro bono basis, almost a quarter indicated that they get real estate legal advice on real estate transactions or projects "from informal comments by board members who happen to be lawyers" and 11 percent say they sometimes make do without legal review or are unsure of how they access advice. It is easy for real estate lawyers to imagine the potential for mismatches in expectations, for example where a not-for-profit staff member regards the presence of a lawyer on the board as sufficient while the board member lawyer is not even aware of the organization's assumption that he or she is acting in the capacity of counsel. All of these topics deserve further exploration!

We would like especially to thank the many ACREL members who have responded enthusiastically in supporting our work and in nominating not-for-profit organizations for our study. We always seek suggestions of additional not-for-profit executives and staff to include in the distribution of our future content.

The next steps for our project include the announcement of Rooftops Conference 2011, the Center's first symposium regarding the role of real estate—physical facilities—occupied by not-for-profit organizations in connection with their charitable purposes. This conference will be held on May 20, 2011 at New York Law School in TriBeCa, Manhattan. We welcome ACREL members to attend.

You can follow our project on our Web site at www.nyls.edu/The_Rooftops_Project. By visiting the site, you'll find our mission

continued on page 15

A View from the Rooftops:...

continued from page 14

statement and ongoing news about the project, as well as access a electronic version of the report with the results and commentary on our fall 2010 survey. We hope that you will join our community and that our upcoming programs and resources may engage you.

James Hagy is Distinguished Adjunct Professor at the Center for Real Estate Studies at New York Law School. He also serves as Affiliated Transnational Professor at Peking University School of Transnational Law and as Adjunct Professor at Case Western Reserve University School of Law and at The Real Estate Center of John Marshall Law School. Prior to his life in teaching and community service, he practiced for almost 30 years with Jones Day where he co-led its real estate practice worldwide. He has been a member of ACREL since 2002. He can be reached at james.hagy@nyls.edu

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ACRELades

Edward M. Bloom has been elected the 2011 President of the Real Estate Bar Association for Massachusetts.

ACREL Past President **John W. Daniels, Jr.**, was selected to Wisconsin *Super Lawyers* 2010.

The Pape Law Firm, with its principal attorney, **Art Pape**, has been selected Small Real Estate Law Firm of the Year – North America by London-based *InterContinental Finance Magazine*.

Stanley P. Sklar was elected President of the College of Commercial Arbitrators.

The Real Property Law Section of the New York State Bar Association presented **Joshua Stein** with its Professionalism Award at their annual luncheon in January.

Charles W. Trainor has been named as *Best Lawyers'* 2011 Sacramento Real Estate Lawyer of the Year. ■

Notwithstanding the anticipation of unpleasant weather conditions, on January 26th eighteen ACREL fellows gathered in Washington, DC to enjoy each other's company. ACREL Fellow Steve Teitelbaum and his firm, Jones Day, graciously hosted Fellows from as far south as Richmond, as far north as Baltimore, and as far west as Cleveland. With a spectacular view of the US Capitol, the group dined while ACREL President, Linda Striefsky, shared with them some of the initiatives currently being undertaken by the College.

Similar events are presently being planned for other cities and any Fellows interested in the rewarding effort of organizing a gathering in their area should contact Jill.

-Earl Segal