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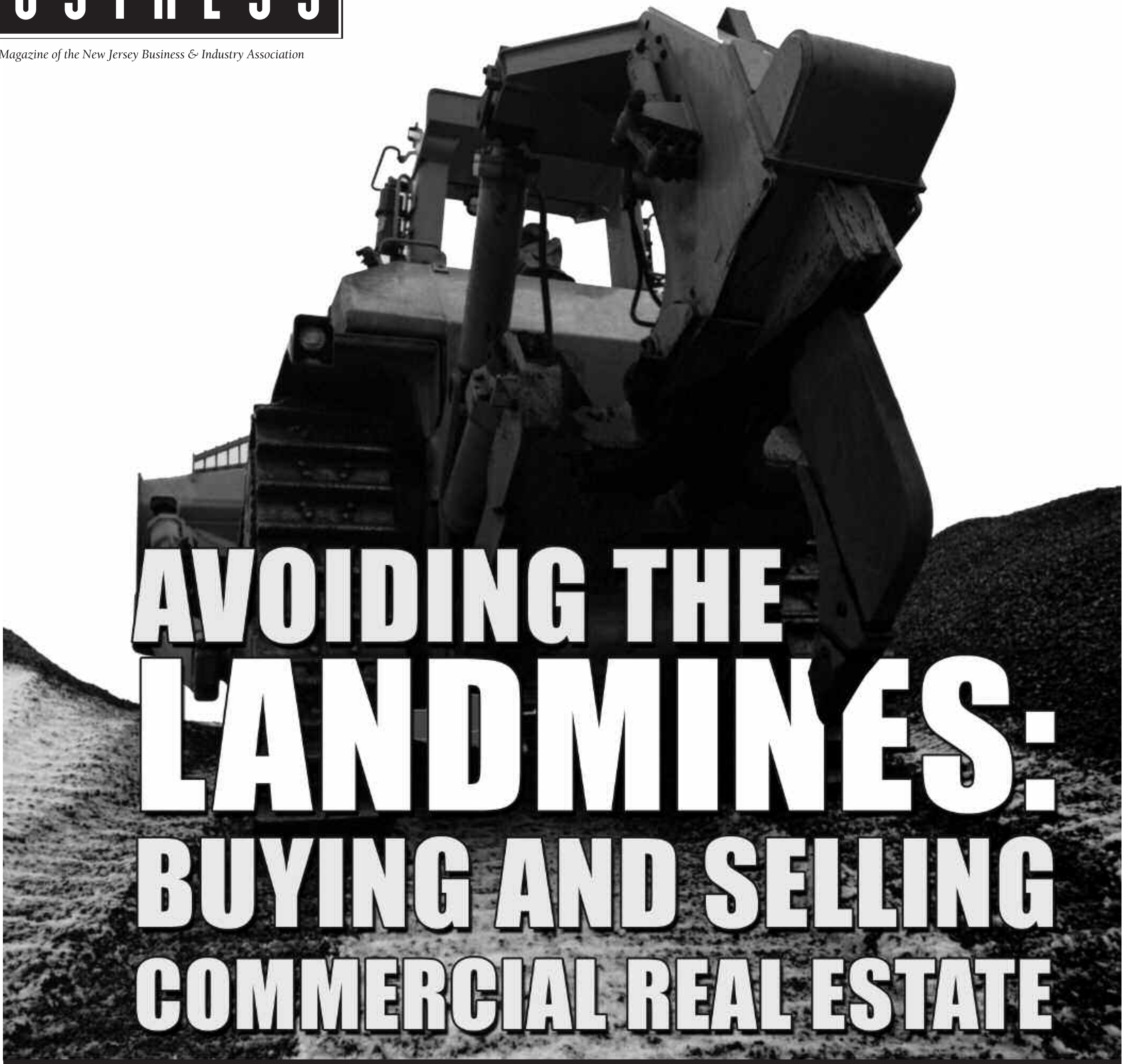

AVOIDING THE LANDMINES: BUYING AND SELLING COMMERCIAL REAL ESTATE

By Ilene Dorf Manahan, Contributing Writer

No matter how attractive and straightforward a commercial real estate transaction appears at the outset, buying and selling property can be loaded with landmines. For even the most experienced of developers, changing and emerging land-use, zoning and environmental regulations, on top of existing mandates, can muddy what appears to be the clearest and cleanest of deals.

Leading real estate and environmental attorneys throughout the state are helping clients navigate the minefields by not only being on top of existing regulations, but also monitoring proposed regulations to ensure developers are well aware of potential problems before a handshake gets translated to a signed contract.

While many of the development and contract issues today are the same as decades ago, attorneys agree that the process is more expensive and stressful than before because of the amount of government regulations and the number of land-use approvals needed for a project to get under way. Those approvals are not simply on the local level, but can involve a complicated and ever-changing maze of regulations and departments on the state level.

If New Jersey Department of Environmental Protection (DEP) approvals are required, developers are faced with volumes of regulations, including those dealing with wetlands, which are becoming more and more restrictive and can quickly eat into a site's buildable acreage, and therefore a project's financial feasibility. These mandates are "now moving to the next level, not by wetlands regulation, but by policy," reports **Douglas Janacek**, director in the real property and environmental group at Newark-based **Gibbons, Del Deo, Dolan, Griffinger & Vecchione**. "This is both unfair and tough on attorneys, since they provide advice to their clients based on the regulations."

A member of the New Jersey Department of Transportation Highway Access Advisory Committee, Janacek was involved in the formulation and drafting of the New Jersey Highway Access Management Code, one of the most comprehensive highway access regulations in the country. He maintains the DEP's wetlands mandates need to be clear and defined by black-and-white regulation, as opposed to by the gray area of policy. "Fortunately, we (at Gibbons, Del Deo) are involved in multiple projects, so we hear what's going on in the back rooms."

Builders also are restricted by such state development plans as the Highlands, Pinelands, Meadowlands and CAFRA (Coastal Area Facility Review) acts, which supersede local ordinances. One of the more recent regulations to emerge from the DEP, which Acting Gover-nor Codey recently put on hold, would restrict sewer hookups and mandate individual septic systems in all but the state-designated development areas. Aside from the general legal issues, attorneys express concern about where the one million new residents expected to move to New Jersey over the next seven years will live.

Janacek adds, "These new regulations slipped in under the radar, so awareness of them is almost non-existent. They're on the fast track unless something happens. Yet their magnitude and potential impact are staggering, as it appears there are not a lot of exemptions. This essentially will shut down development in New Jersey."

Due diligence extends beyond the state of buildings and property to ownership and tenancy.

If a commercial property is leased, due diligence should include a comprehensive review of all tenant leases and broker agreements, as well as of contracts with such support services as janitors and landscapers. On improved residential property, a "green card" should be obtained confirming state inspections have been conducted, life-safety issues addressed and that the building is habitable.

Purchasers of industrial or office parks need to make sure their due diligence extends to park associations, if any. What fees are the tenants expected to pay – and are they current? Who is responsible for the maintenance of detention basins, for ice and snow removal and for landscaping? Does the association have the right to review and approve – or oppose – any proposed changes in the building? The buyer must be given a reasonable amount of time to obtain needed financing, which can be as long as three to six months. On the other hand, with rising interest rates and some softening of the real estate market, many developers are pushing to obtain financing and close on their deals as soon as possible, before rates climb further. Depending on the size of a project, even an eighth-of-a-point increase in the interest rate can mean a significant increase in the cost of a development, notes **Russell B. Bershad**, who chairs the real property and environmental department at Gibbons, Del Deo.

Bershad says attorneys also can help direct clients to innovative financing options that support redevelopment and remediation, including low- or no-interest loans, tax exemptions, tax-exempt bonds, favorable bond funding, equity-investment loan guarantees, funding loans and guarantees, cost-recovery agreements and the creation of Revenue Allocation Districts within municipal redevelopment areas, where bonds or notes may be secured by a number of special revenue sources.

Douglas Janacek of Gibbons, Del Deo, Dolan, Griffinger & Vecchione.

The Realty Transfer Fee and Farmland Assessment are two high-ticket items attorneys flag for clients. The Realty Transfer Fee is money paid to the state based on the property's sale price. Until about two years ago, the fee was $5 for every $1,000 of the sale price. Today, the fee is $12 per $1,000. While the seller historically paid the fee, attorneys report they are now seeing it as a negotiable item, with the seller and buyer often splitting the fee.

The Farmland Assessment was enacted to encourage continued agricultural land use in New Jersey. If the land is farmed, the property taxes are relatively low – say $500 per acre versus $200,000 an acre for developed property. If the use of the property changes from farming to a developed use, the owner must pay "rollback taxes," the differential between the

Russell B. Bershad of Gibbons, Del Deo, Dolan, Griffinger & Vecchione.

Farmland Assessment and the real property tax for that year – PLUS the two preceding years. This assessment obviously can be significant, so the buyer and seller often negotiate how the fee will be paid.

Bottom line, perhaps the greatest piece of advice to both buyers and sellers – especially in New Jersey, with its complicated, demanding and frequently changing land-use and environmental mandates – is to make an investment in good legal counsel before making an investment in bad real estate.

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