

perspectives

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Benesch Friedlander
Coplan & Aronoff LLP

MY BENESCH MY TEAM

Trends and topics in not-for-profit management

Not-for-Profit Spotlight



**Downtown
Cleveland
Alliance**

The Downtown Cleveland Alliance (DCA) is a not-for-profit organization dedicated to building a dynamic downtown Cleveland, OH. It works hand-in-hand with downtown stakeholders to enhance the quality of life in Northeast Ohio's urban core by implementing initiatives like the Clean and Safe Program, economic development assistance, marketing and special events, advocacy and strategic projects.

The Clean and Safe Ambassador program is the most visible aspect of Downtown Cleveland's Special Improvement District. The Ambassadors work seven days a week cleaning and patrolling the Downtown sidewalks. From power washing and graffiti removal to assisting stranded motorists and helping visitors with directions, the Ambassadors are on the job.

The DCA also has a City Advocates Program that provides civic education and fosters active engagement for rising leaders in the Downtown Cleveland community. Through this unique program, participants gain access to Downtown Cleveland Alliance's staff and board and engage in open dialogue with many established leaders in the private, public and not-for-profit sectors. In addition, participants work collaboratively on DCA-related projects that support Downtown Cleveland's quality of life and ability to attract residents, businesses and visitors.

To learn more about the Downtown Cleveland Alliance, including how to volunteer or apply to become a city advocate and what events are coming up, please visit its [website](#).

I Just Received Drafts of Construction Loan Documents from My Lender, Now What?



Joy A. Barrist

I have heard the following statement many, many times over the course of my career: "Do I really need to hire an attorney to close a *simple* commercial construction loan?" Needless to say, I cringe each and every time. While everyone loves to keep loan closing costs to a minimum, there are hidden costs of not being represented by counsel that could far outweigh this perceived up-front savings. Below are five examples of standard commercial loan documentation concepts that warrant careful review by borrowers and their counsel before any loan documents are executed.

1. **Interest Reserves.** Many construction loans contain an interest reserve, which allows the interest payments that become due during the construction period to be paid out of loan proceeds. How and when a lender is required to disburse this reserve should be carefully considered. A borrower without access to interest reserve funds could lead to a payment default, resulting in the delay or a freeze on access to construction funds.
2. **Sales/Leasing Covenants.** After completion of the construction project for which the financing was obtained, many commercial construction loans contain a semi-permanent term, during which principal payments commence. Sales or rental requirements during this semi-permanent term are fairly common. These covenants usually require a certain number of sales or amount of space leased during each designated testing period—monthly, quarterly, semi-annually or annually. While initial expectations for project performance always appear attainable, it is not uncommon for issues, problems and market changes to occur. Therefore, creating options in these provisions that allow a borrower to cure a covenant violation before it rises to the level of a default under the loan documents is critical.
3. **Mechanic's Liens.** The filing of mechanic's liens by a contractor or subcontractor can be a routine part of a construction project. It goes without saying that a lender does not want such liens encumbering its collateral (whether superior or subordinate to the mortgage lien). However, it is important that the construction loan documents permit a borrower a period of time to have the lien(s) discharged or bonded over. If the filing of a mechanic's lien in and

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Tax Notes



Martha J. Sweterlitsch

Church Unemployment Tax Audits Require High-level Approval

Prohibitions on government intervention into matters of religion have long meant that churches may not be subject to a tax inquiry

unless a high-level Treasury official has a reasonable belief *“(on the basis of facts and circumstances recorded in writing) that the church ... may not be exempt, by reason of its status as a church, from tax under section 501(a), or may be carrying on an unrelated trade or business (within the meaning of section 513) or otherwise engaged in activities subject to taxation....”* [26USCx7611]

However, the IRS was, until recently, unwilling to extend this protection to unemployment tax audits. This has changed with the issuance of Memorandum SBSE-04-1215-0085, by which the Small Business/Self-Employed Division of the IRS has determined that the church audit procedures set forth in section 7611 of the Internal Revenue Code apply to church employment tax inquiries. Under Code section 7611, the IRS may begin a church tax inquiry only by satisfying statutory “reasonable belief requirements” and “notice requirements.” Code section 7611 also restricts the scope of church examinations and limits the period for conducting them. This [new guidance](#) is effective upon issuance (12/17/2015).

Transit and Parking Benefits

In an effort to provide parity for employees who use public transit rather than drive cars that need to be parked at some cost, the

Consolidated Appropriations Act, 2016 Public Law No. 114-113 amended section 132(f) (2) of the Internal Revenue Code to increase the income exclusion for a transit pass from \$130 per participating employee to \$250 per employee for the period January 1, 2015, through December 31, 2015. For 2016 the monthly exclusion for both parking and a transit pass is \$255. The IRS is clarifying how the retroactivity will be handled. See [Notice 2016-6](#), IRS, (Jan. 12, 2016)

Private Foundations May Invest to Further Charitable Purpose

The IRS seems to be encouraging private foundations to focus on charitable mission when investing with the issuance of Notice 2015-62. This notice provides guidance on the application of section 4944 of the Internal Revenue Code (Code) to investments that are made by private foundations for purposes described in section 170(c)(2)(B), but are not program-related investments (PRIs) as defined in section 4944(c) and the regulations thereunder.

“Only a jeopardizing investment is subject to tax under section 4944. Under the regulations, an investment made by a private foundation will not be considered to be a jeopardizing investment if, in making the investment, the foundation managers exercise ordinary business care and prudence (under the circumstances prevailing at the time the investment is made) in providing for the long-term and short-term financial needs of the foundation to carry out its charitable purposes. Although the regulations list some factors that managers generally consider when making investment decisions, the regulations

do not provide an exhaustive list of facts and circumstances that may properly be considered. When exercising ordinary business care and prudence in deciding whether to make an investment, foundation managers may consider all relevant facts and circumstances, including the relationship between a particular investment and the foundation’s charitable purposes. Foundation managers are not required to select only investments that offer the highest rates of return, the lowest risks, or the greatest liquidity so long as the foundation managers exercise the requisite ordinary business care and prudence under the facts and circumstances prevailing at the time of the investment in making investment decisions that support, and do not jeopardize, the furtherance of the private foundation’s charitable purposes. For example, a private foundation will not be subject to tax under section 4944 if foundation managers who have exercised ordinary business care and prudence make an investment that furthers the foundation’s charitable purposes at an expected rate of return that is less than what the foundation might obtain from an investment that is unrelated to its charitable purposes.”

This [notice](#) should provide some comfort to private foundations that want to encourage charities to engage in profit-making social enterprises with a goal of self-sufficiency. For more information on this topic, contact [Martha J. Sweterlitsch](#) at msweterlitsch@beneschlaw.com or (614) 223-9367.

Benesch’s Not-for-Profit Team assists not-for-profit and tax-exempt clients in a broad array of matters, ranging from filing for nonprofit status and preparing federal and state tax exemption applications to training in not-for-profit regulatory compliance. Our not-for-profit attorneys are committed to protecting our clients’ assets so that they can continue to drive the missions and goals of their organizations.

For more information regarding this edition or any not-for-profit issues, please contact:

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IT'S THAT TIME AGAIN! Don'ts and Do's for Charities During the Political Season

Don't intervene in a campaign for office

Section 501(c)(3) organizations are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. No emails, no copying, no phone calls on company time.

Avoid voter education or registration activities with evidence of bias that:

- Would favor one candidate over another.
- Oppose a candidate in some manner.
- Have the effect of favoring a candidate or group of candidates.

If a candidate is invited to a charity's event, make sure all candidates for the office are invited to that event or one of equal stature.

Do not permit political fundraising at your events.

Do's

- Presentation of public forums and the publication of voter education guides conducted in a non-partisan manner.
- Activities intended to encourage people to participate in the electoral process:
 - Nonpartisan voter registration.
 - Nonpartisan get-out-the-vote drives.
 - Candidate forums to which all candidates for an office are invited.

Not-for-profit leaders still have 1st Amendment rights to:

- Engage in free expression on political matters speaking for themselves, as individuals.
- Speak about important issues of public policy.

For more information on this topic, please call **Martha J. Sweterlitsch** at mwserlitsch@beneschlaw.com or (614) 223-9364.

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of itself constitutes an immediate default, there is likely to be a delay or a freeze on access to construction funds, and in turn, a delay to the completion of the project.

4. **Retainage.** Retainage is the term used to define the portion of loan proceeds that will not be advanced to a borrower until the project is complete. It is used to ensure that the project is completed and is completed in an acceptable manner. A borrower, as the owner of the project, will in turn withhold the same, or similar, portion of the payments due to each contractor and subcontractor. The percentage of the retainage held back by a lender as the project progresses, as well as the release of the final retainage, should be carefully reviewed and negotiated to fit the particular project being financed.
5. **Permanent Lending Requirements.** Given the short-term nature of a large majority of construction loans, many lenders want an opportunity to provide the permanent, long-term, financing for the project, once completed. The terms of a lender's ability to have a right of first offer or last look at the permanent financing and any fees that could be incurred if a borrower selects a new lender for the permanent financing should be carefully reviewed and negotiated.

This article contains a small sampling of terms contained in almost all commercial construction loan documents, which require careful review, consideration and negotiation. If such terms are not properly drafted to fit a particular project, the result could be additional, unexpected costs to a borrower, something we all want to avoid. Being represented by seasoned construction finance counsel could, over the life of a construction project, end up saving a borrower exponentially more than the up-front cost. So, to answer the question raised by the title of this article... call the construction finance team at Benesch!

For more information on this topic, please contact **Joy A. Barrist** at (302) 442-7005 or jbarrist@beneschlaw.com.



The 2016 Ohio Nonprofit Excellence Awards

The Ohio Association of Nonprofit Organizations (OANO) recognizes Ohio nonprofit organizations with the Ohio Nonprofit Excellence Awards. There are two possible awards available, the Ohio Nonprofit Excellence Award and the Outstanding Ohio Nonprofit Volunteer Award.

The **Ohio Nonprofit Excellence Award** recognizes creativity, execution, achievement and overall excellence of a specific project or program completed by an Ohio not-for-profit.

The **Outstanding Ohio Nonprofit Volunteer Award** recognizes a dedicated volunteer who goes above and beyond to support the success and achievements of an Ohio not-for-profit organization. This award will be given to volunteers nominated by their not-for-profit organization's staff and board.

The application form can be found [here](#). Not-for-profit organizations are not required to apply for both, as the awards will be judged separately. An organization does **not** have to be an OANO member to apply for either award. Instructions on how to apply for the Ohio Nonprofit Excellence Awards are noted on the applications.

Opposition to the Department of Labor Proposed Overtime Rules

Anthony S. LaNasa, CPA, CFE is a guest author in this edition of *Perspectives*. He is the Managing Principal in Howard Wershbae & Co.'s Columbus, OH, office.



Anthony S. LaNasa

On June 30, 2015, the Department of Labor (DOL) released a proposal to update the Fair Labor Standards Act's (FLSA's) overtime rules. These proposed changes would increase the number of workers

who qualify for overtime pay by modifying the FLSA's overtime exemptions and increasing the minimum salary for those that are exempt. The DOL is expected to finalize the rule in late 2016.

Last month the Partnership to Protect Workplace Opportunity, a coalition of employer groups that includes a diverse collection of associations, businesses and other

stakeholders representing employers across the country and in almost every industry, sent a letter of opposition to Congress. The letter was signed by many national and state associations, including the Ohio Society of CPAs and many other societies.

The letter reads, "The magnitude of DOL's proposal, coupled with the annualized automatic increases with no feedback from employers, and the changes to the duties test that DOL is considering, threaten businesses, employees, non-profits, state and local governments, and the economy as a whole. According to the Department's own estimate, as a result of the minimum salary increase more than four million employees will need to be reclassified from exempt/salaried to nonexempt/hourly and the rule will affect over ten million workers; that is more than the populations of Maine, New Hampshire, Rhode Island, Montana, South Dakota, Alaska, North Dakota, Vermont, Washington and Wyoming combined."

The letter goes further to say, "The millions of employees converted from exempt to nonexempt status would lose the flexibility that they currently enjoy and have fewer opportunities for career advancement. Hourly employees are not guaranteed any fixed weekly pay—like salaried employees—or guaranteed any specific hours."

The letter concludes for Congress representatives to contact the DOL, Office of Management and Budget's Office of Information and Regulatory Affairs, and other officials within the Administration and urge them to reconsider this rule.

Even though disagreement is increasing, all organizations should, however, analyze the impact these changes will have on their businesses.

For more information on this topic, please contact **Anthony S. LaNasa, CPA, CFE** at (614) 899-4932 or lanasa@hwco.com.

Crowdfunding—Is it Right for You?



Jessica N. Angney

Crowdfunding. Ah, the promise of raising a lot of cash by simply posting a request. What tax-exempt organization would not want to jump on the crowdfunding bandwagon? Think of the success stories.

Individuals who have raised thousands of dollars for silly reasons, like making potato salad. That is right, potato salad. However, when informally polling tax-exempt organizations at a recent speaking engagement, I was surprised to find out that substantially all of the tax-exempt organizations in the audience did not engage in any crowdfunding. How can this be?

It turns out that crowdfunding may not make sense for certain tax-exempt organizations for a number of reasons. First, crowdfunding takes

time. A lot of time. Think of the time involved with picking the appropriate crowdfunding website, researching the policies of such website, determining the appropriate project for funding and the goal, posting content to such website, checking the accounting related to receipts from that website, reviewing donor information from such website, and updating content on such website. If your tax-exempt organization does not have the time to dedicate to crowdfunding, you may consider concentrating on more traditional fundraising methods.

Second, crowdfunding raises certain legal issues. Depending on the circumstances, your online fundraising could require you to register in other states under charitable solicitation laws. You need to ensure that you have protected your intellectual property before you post it online. You need to provide accurate information about your organization and avoid

misrepresentations. You need to ensure that your donor information is protected and that your donors receive receipts or appropriate acknowledgements of their donations so they can support the deductibility of their donations. You have to be prepared to deal with these issues if you want to participate in the crowdfunding craze.

Notwithstanding the foregoing, some tax-exempt organizations have jumped into crowdfunding with great success. Crowdfunding allows you to reach more people. It also allows you to reach a younger audience. This can result in more donations. After all, your mission is likely more important and compelling than making potato salad.

For more information on this subject, contact **Jessica N. Angney** at jangney@beneschlaw.com or (216) 363-4620.

Events

The United Way of Central Ohio's Capacity Building Series

The United Way of Central Ohio recently announced the 2016 monthly Capacity Building Series with the Ohio Association of Nonprofit Organizations (OANO). These sessions will enable United Way of Central Ohio agencies to improve the efficiency and effectiveness of their operations in order to realize and sustain their missions.

For more information and to register for any of these events, email info@OANO.org or Call (614) 280-0233

March 1, 2016 – Outcomes and Impacts – Turning Data Into Dollars

What gets measured gets done. You know your programs are changing lives and changing circumstances, but can you prove it? Learn how to quickly and painlessly select and define your best measures. Discover how to use data and outcomes to generate new sources of funding.

Presenter: Sheri Chaney Jones, Measurement Resources

April 5, 2016 – Advanced Leadership Workshop

As the leader of your organization, you have a lot riding on your shoulders. You are the face of your organization; clients, customers, employees, stockholders, Board members and all other stakeholders are depending on you to lead your enterprise to greatness. To thrive in an ever-changing environment takes strong executive leadership. It takes leaders who are great team builders, who are focused on results, who never stop learning, and who embrace a culture of worthiness. These are personal characteristics that transcend time and circumstance; characteristics that are evident in the leaders of organizations that thrive in flush times, in lean times, and in changing times. In this session, you will get the opportunity to develop your leadership skills.

Presenter: Nancy Ball, Summit Solutions Consulting

May 10, 2016 – Financial & Legal Workshop – A great opportunity to “Ask the Experts” your financial and legal questions

Legal topics covered: Not-for-profits must be aware of and comply with applicable federal, state and local laws regarding Fundraising, Financial Accountability, Human Resources, Licensing and Registration, Taxation, and Lobbying and Political Advocacy.

Presenter: Meredith Rosenbeck, Rosenbeck Law

The Ohio Association of Nonprofit Organizations (OANO) Ask The Expert Featuring Martha J. Sweterlitsch

Date: Monday, February 29, 2016

Time: 12:00 P.M.–4:00 P.M.

What is Ask the Expert?

It's a free service for current members to talk with an expert, and get advice on specific topics such as accounting, legal, human resources, fundraising, marketing...

How does the program work?

Ask the Expert allows current OANO members to make an appointment to discuss issues pertaining to their organization.

Appointments:

- Must be scheduled in advance
- Last a maximum of 25 minutes
- Are conducted over the phone

How do I make an appointment?

- You must contact OANO in advance to schedule an appointment: (614) 280-0233, (888) 480-6266, info@oano.org
- At the time of your call you will be assigned an appointment time between 12:00 p.m. and 4:00 p.m.
- Appointments will be made on a first-come, first-serve basis

Once all appointment times are booked, any further callers will be added to a waitlist and will have first priority the next time the same topic is covered during Ask the Expert.

This Month's Expert: **Marty Sweterlitsch** from Benesch Attorneys at Law

Save The Date: Benesch's 30th Annual Labor & Employment Conference

Please join Benesch for our 30th Annual Labor & Employment Conference at the Cleveland Metropolitan Bar Association. This conference is pending 3.0 hours of CLE and SHRM credit. More details to follow. For more information regarding this conference, contact Megan Pajakowski at mpajakowski@beneschlaw.com.

Date: May 5, 2016

Time: 8:00 A.M. Registration

8:30 A.M.–12:00 P.M. Program

12:10 P.M.–1:00 P.M. Lunch/Networking

Location: The Cleveland Metropolitan Bar Association
1375 East 9th St., Floor 2, Cleveland, OH 44114



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