



Landmarks

A PUBLICATION OF BENESCH FRIEDLANDER COPLAN & ARONOFF LLP'S REAL ESTATE & ENVIRONMENTAL PRACTICE GROUP

The Endangered Species Act: New Flexibility for Developers?

On September 29, 2005, the U.S. House of Representatives approved and sent to the Senate a bill that would significantly amend the Endangered Species Act of 1973.¹ The amendment to the Act, if approved by the Senate, would include several

important changes that will affect real estate development and enhance private property rights. The Bill retains the Act's requirement for the

listing of species as endangered or threatened and allows activities that do not "take" any such listed animals or plants. However, a significant provision in the Bill eliminates the "critical habitat" designation of areas, which in the past has been a significant limitation on real estate development.

In lieu of the critical habitat designation, the Bill requires that scientists devise "federal recovery plans" for each listed species which are designed to promote the recovery of the species. The Plans may include an identification of those specific areas that are of special value to the conservation of the species and, if so included, must provide the cost to acquire any such area on a "willing seller basis."

The proposed amendment to the Act allows landowners to request a written determination by the Secretary of the Interior as to whether proposed land use activities or development will violate the taking prohibition. If the Secretary determines that a proposed

The Bill retains the Act's requirement for the listing of species as endangered or threatened and allows activities that do not "take" any such listed animals or plants.

development will comply with the federal recovery plan for species found in that area or if the Secretary fails to make a determination

within a period of 180 - 360 days, the activity or development may proceed as planned.

The most notable proposed change to the Act requires the government to compensate property owners if species protection measures prevent proposed real estate development. This new provision would require the Secretary to award aid to private property owners who receive a written determination stating that the proposed use of their land does not comply with a federal recovery plan. The aid can be no less than the fair market value of the proposed use, including business losses, if the owner has foregone the proposed use and requested financial aid. The "fair market value" is to be determined by two licensed independent appraisers

selected by each the Secretary and the owner. If the two appraisers fail to agree on a value, a third appraiser, jointly approved by the parties, will give the final determination. The aid provided under this section would be paid within 270 days after the request for aid, unless there are unresolved issues of fair market value.

Overall, the Bill is seen as the most dramatic amendment to this environmental law to date. The amendment, as it now stands, eliminates many of the Act's current obstacles to real estate development and provides fair compensation for the loss of an owner's land if an endangered species must be protected.

¹ The full text of the Bill, H.R. 3824 /S. 2110, may be found at <http://thomas.loc.gov/>.

For additional information contact:

Kevin D. Margolis

Benesch, Friedlander, Coplan

& Aronoff LLP

200 Public Square, 2300 BP Tower

Cleveland, OH 44114

216.363.4161

216.363.4588 Fax

kmargolis@bfca.com

IN THIS ISSUE:

Liability for Third Party
Criminal Acts

Get to Know Howard
Steindler

Recent Client Engagements

Liability for Third Party Criminal Acts

A Top Checklist to Reduce Your Risks

On an ever more frequent basis, property owners and tenants are finding themselves being sued for criminal acts by unknown third parties committed against employees and customers. What may have started as an isolated case in the 1970's in Washington D.C. has sufficiently spread that there is now a choice of monthly newsletters that cover the subject.

Although there are a variety of legal theories that are proffered, from state to state, in these types of cases to support the allegation of responsibility, the most common theory is that of "foreseeability" of the criminal act and the failure of the potentially liable party to have taken reasonable precautions in light of the foreseeability. What is foreseeable, however, is often a matter of 20/20 hindsight.

While, historically, most courts generally determined that there was foreseeability based on similar, violent criminal acts at the property site that "should" have placed the property owner or tenant on notice of potential future criminal activity, more recent cases in some states frequently do not require a showing of either prior on site criminal activities or prior on site violent activities, but instead look to off-site incidents, which may or may not have been violent in nature, as forming the basis for demonstrating foreseeability, based on "the totality of the circumstances".

There are a variety of strategies and techniques that can be utilized to attempt to minimize the risk of liability for third party criminal acts. The following are my Top Ten of them.

1. **Don't reduce existing levels of security.** It may be tempting, for a variety of reasons, to reduce levels of security. For example, replacing a 24 hour security guard with a video taped camera may seem to be cost effective. However, reducing the level of security may expose a the

There are a variety of strategies and techniques that can be utilized to attempt to minimize the risk of liability

apartment, office or shopping center owner (hereinafter, the "Deep Pocket") to a claim of detrimental reliance by a

tenant or customer who moved in or was a customer when the higher level of security was in place. In addition, if there is a criminal incident and the Deep Pocket is sued, reducing security for cost or other reasons does not generally go over well in the courtroom.

2. **Don't utilize "phony" security devices, such as "phony" video cameras.** SCARECROWS DON'T WORK. The theory of a phony security device is that of utilizing a "scarecrow". In practice, however, if there is a criminal incident, the victim will allege that the phony device was evidence that there was a problem that was not properly addressed. In addition, the victim will likely allege that the victim relied, to his or her detriment, on the phony security device and did not realize that it was not a real device.

3. **Keep all security devices in good operating condition and repair.** Electronic locks that have broken or been deactivated, broken security cameras, alarms that have stopped working and other similar problems increase the risk a criminal activity and the potential of liability for the Deep Pocket. A Deep Pocket who wants to stay that way should promptly investigate any reports of broken security devices and promptly have them repaired or replaced.

4. **Research the area.** The Deep Pocket should talk with the local police department as to whether or not there have been any particular or recurring crimes in the area, particularly violent crimes, auto thefts, and burglaries. If there have been, the Deep Pocket should look into upgrading the security measures to attempt to deal with these issues. A Deep Pocket should not allow security measures to fall below those generally maintained by other businesses in the area or other similar types of businesses.

5. **Educate employees and tenants on safety techniques.** Bring in the local police or, perhaps a security consultant to talk with the Deep Pocket's employees and tenants on how to reduce the risk of violent crimes.

6. **Lighting.** Keep "common areas", such as hallways, refuse disposal areas and laundry rooms well lighted at all times. Keep parking areas well lighted for a reasonable period of time after the last employee, tenant or customer would be leaving the building or shopping center. A poorly lighted area has significant potential for personal attacks.

7. Leases and Promotional Materials.

Do not contractually agree, in a lease, or advertise to provide security as a feature of your apartment building, office building or shopping center. Contractually agreeing to provide security may subject the Deep Pocket to absolute liability. Advertising security is a precursor to a claim for detrimental reliance and/or implied contract by the victim.

8. **Keep Track.** Document any complaints/incidents regarding criminal activity and what was done in response thereto. Keep the list on an ongoing basis, dating back two to three years. If there are serious, numerous or repeated

incidents, consider retaining a security consultant to review existing security practices

9. **Review insurance coverage** as to scope, type and amount. Discuss with the Deep Pocket's insurance agent as to whether the insurance coverage should be written on an "occurrence" basis or a "claims made" basis. If the Deep Pocket is switching insurance coverage from a claims made to an occurrence basis, be sure to purchase "tail" coverage.

10. **Investigate.** When considering building or leasing a new facility, investigate what type of criminal activities have occurred and what

security measures are or should be put into effect. The design stage for new space is when it will be most cost effective to implement security measures. As the old adage goes, "an ounce of prevention, is worth a pound of cure".

Norman W. Gutmacher

Benesch, Friedlander, Coplan
& Aronoff LLP

200 Public Square, 2300 BP Tower

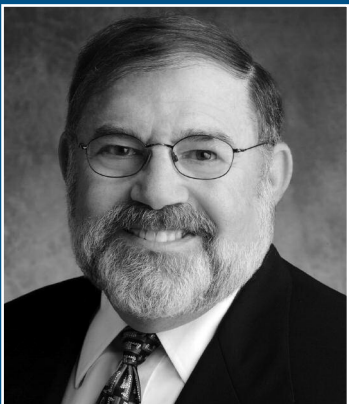
Cleveland, OH 44114

216.363.4591

216.363.4588 Fax

ngutmacher@bfca.com

Get to Know Howard Steindler...



Who: Howard A. Steindler is a partner with the firm's Real Estate and Environmental Practice Group. He focuses his practice on commercial leasing, acquisitions and divestitures, development, architectural agreements, finance and construction, and general business and commercial law. Howard is a member of the American College of Real Estate Lawyers, member and former president of the Board of Trustees of Cleveland Scholarship Programs, a trustee of Downtown Cleveland Partnership, and is active in other civic organizations.

Currently, Howard is heavily involved with the Greater Cleveland Regional Transit Authority, undertaking the real estate legal work in connection with the Euclid Corridor Transportation project. In addition, Howard recently represented Cuyahoga County in its acquisition of the Ameritrust Tower and related buildings at East 9th Street and Euclid Avenue, with respect to the future home of the County offices.

Howard has been selected as a Best Lawyer in America® for 17 years straight, beginning in 1989, and was selected for recognition in Chambers USA Guide for the years 2004, 2005 and 2006.

What Howard wants you to know about the Real Estate Industry: "Interest rates will continue to edge up, apartment units will correspondently increase in value as apartment occupancy levels increase. And, in Cuyahoga County, residential will remain flat, especially at the \$500,000+ levels."

When Howard is not practicing Law: He may well be studying history; he is a Civil War buff with a corollary interest in the American Revolution. Howard is an avid skier and enjoys spending time with his family at their vacation home in Chautauqua.

Howard resides in Beachwood with his wife Terri, who is associated with the Jewish Community Federation of Cleveland. He has 3 children, Rebecca, Allison and Daniel.

Recent Client Engagements

- a publicly-held REIT in the assemblage of over 100 acres of vacant land in connection with the development of an 800,000 square foot retail shopping center. Our representation continues to include all aspects of the development phase of the project.
- a publicly-held REIT in the disposition of numerous shopping centers located throughout the United States through a sealed-bid sale.
- a publicly-held REIT with respect to the acquisition of 17 properties throughout Ohio as part of the purchase of an approximately \$1 billion portfolio of industrial real estate assets.
- The Greater Cleveland Regional Transit Authority in connection with real estate matters associated with the Euclid Corridor Transportation Project, an approximately \$168 million project involving improvements to the public transportation infrastructure and the redevelopment of over 7 miles of roadway in the heart of Cleveland
- The cleanup and disposition of multiple contaminated “legacy” properties owned by a multi-national public company.
- a national bank in connection with a \$12,000,000 construction loan for the development of a university housing project.
- a real estate investment fund in connection with the acquisition and financing of a 200,000 square foot shopping center in Northeast Ohio.
- a large regional retail developer in connection with the leasing of in-line and big-box stores at lifestyle centers owned by the developer in the Midwest.
- a real estate investment fund in connection with the acquisition of an apartment building complex in central Florida.
- a landfill owner with significant federal and state regulatory issues.
- an owner of a large office building in a deed-in-lieu of foreclosure transaction.
- a national bank that is serving as the Trustee of a trust that owns a parcel of land that is being investigated by the U.S. Army Corps of Engineers for violating the Clean Water Act and wetland regulations. The Corps and U.S. EPA have threatened the responsible parties with significant civil fines and criminal prosecution.
- a state pension fund in the sale of an office building in Columbus, Ohio for over \$11,000,000.
- the sale and cleanup of one of the largest brownfield sites in Cleveland, Ohio.
- a nationwide retailer on all leasing matters around the country, including leases for inline spaces and for stand alone stores on out parcels owned by regional and national developers.
- a property owner in the sale of a regional shopping center for in excess of \$17,000,000.
- a client in the acquisition and/or leasing of multiple locations in the Midwest for construction of free standing restaurants.
- a client with respect to real estate aspects of asset acquisition of multiple restaurant locations in the Midwest.

For more information about our Real Estate & Environmental Practice Group, please contact one of the following:

Kevin Margolis, Co-Chair

216.363.4161 | kmargolis@bfca.com

Mike Swearengen, Co-Chair

216.363.6139 | mswearengen@bfca.com

Rachel Cohen

216.363.4519 | rcohen@bfca.com

James Friedman

216.363.4663 | jfriedman@bfca.com

Bernard Goodman

216.363.4662 | bgoodman@bfca.com

Norman Gutmacher

216.363.4591 | ngutmacher@bfca.com

Howard Steindler

216.363.4560 | hsteindler@bfca.com

Jeffrey Wild

216.363.4544 | jwild@bfca.com

Frank Reed

614.223.5304 | freed@bfca.com

Lee Korland

216.363.4189 | lkorland@bfca.com

Gary Yashko

614.223.5337 | gyashko@bfca.com

Pass this copy of *Landmarks* on to a colleague, or email jgurney@bfca.com to add someone to the mailing list.

Cleveland

2300 BP Tower
200 Public Square
Cleveland, Ohio 44114
Phone: 216.363.4500
Fax: 216.363.4588

Columbus

88 East Broad Street
Suite 900
Columbus, Ohio 43215
Phone: 614.223.9300
Fax: 614.223.9330

Benesch Pacific LLC

Foreign Representative Office
15F One Corporate Avenue
222 HuBin Road
LuWan District Shanghai 200021
P.R. China
Phone: 86 21 6122 1098
Fax: 86 21 6122 2418

www.bfca.com