

Failure to Provide Notice of AUL Voids Lease

The Real Estate Group

The Massachusetts Superior Court recently held in *Cummings Properties, LLC v. Massachusetts General Physicians Organization* that a lease for real property which fails to incorporate notice of an existing Activity and Use Limitation ("AUL") either in full or by reference is void as against public policy and in violation of the Department of Environmental Protection's ("DEP") regulations promulgated as part of the Massachusetts Contingency Plan ("MCP"). This strict actual notice requirement is in addition to the constructive notice provided by recording the AUL in the Registry of Deeds for the County in which the affected property is located. Although the decision may be appealed, its effect is significant and should be acknowledged by owners of properties subject to AULs.

AULs are issued and recorded on title to contaminated real estate in lieu of requiring costly remediation of soil and groundwater, thus providing flexibility to owners in selling, leasing or otherwise transferring the land. Implementation of an AUL restricts the specific activities and uses that may be undertaken on a contaminated property, effectively narrowing the scope of exposure assumptions used to characterize risks to public health. This process allows a contaminated property to achieve a level of "no significant risk" other than by the reduction or complete removal of contaminants. In addition to the recording requirement, the MCP provides that notice of an existing AUL must be incorporated into all deeds, leases, mortgages, easements, licenses, occupancy agreements and any other instrument purporting to transfer an interest in real property.

In *Cummings*, a dispute arose between Cummings Properties, LLC ("Cummings") and Massachusetts General Physicians Organization ("MGPO") after MGPO became aware of the existence of an AUL on property it had agreed to lease from Cummings. Arguing that it would not have agreed to lease the subject property had it known of the existence of the AUL, MGPO sought to repudiate the lease, moving for summary judgment. Interestingly, the AUL would not have prohibited the proposed use by MGPO. The court ruled in favor of MGPO reasoning that a key objective of the AUL notice regulation is to ensure that prospective lessees are informed of the existence and terms of an AUL prior to committing to lease property which is subject to one. The court held that enforcement of the lease under the circumstances would fail to achieve that

objective.

In his decision, Justice Thomas P. Billings, quoting *Beacon Hill Civic Ass'n v. Ristorante Toscano*, wrote that "'Public Policy' in this context refers to a court's conviction, grounded in legislation and precedent, that denying enforcement of a contractual term is necessary to protect some aspect of the public welfare." In granting summary judgment to MGPO and voiding the lease, the court favored the public policy goals advanced by the MCP, namely protecting the health, safety and public welfare and the environment from releases or threatened releases of hazardous substances. The court permitted Cummings' detrimental reliance claim to advance due to MGPO's failure to notify Cummings timely of its reservations regarding the AUL while Cummings continued to incur expense on the space build out.

Cummings and MGPO had originally been negotiating a lease for space at property owned by Cummings. Attached to the draft lease Cummings sent to MGPO was a rider which referenced an AUL affecting three properties owned by Cummings and its affiliates. The property MGPO intended to lease was not one of the affected properties listed. A revision returned by MGPO struck the paragraph in the rider referencing the AUL since it was inapplicable to the subject property. After a delay in lease negotiations, MGPO decided to execute a lease, at which time it discovered that Cummings had leased the property to another prospective tenant with whom Cummings had also been negotiating.

Subsequently, Cummings suggested that MGPO consider leasing other space owned by Cummings, agreeing to lease such space to MGPO pursuant to the same economic terms the parties had agreed to for the prior space that went to another tenant. Cummings then sent MGPO a draft lease for the new space based on the same form the parties had previously negotiated. The draft failed to include the paragraph in the rider referencing the AUL since it had been stricken from the draft as inapplicable during the prior negotiation. The property Cummings intended to lease to MGPO, however, was one of the properties subject to an AUL that had initially been listed in the original lease draft. The omission by Cummings of the reference to the AUL was inadvertent but went unnoticed until after the lease had been finalized and executed.

As a result, MGPO executed a lease for property that was subject to an AUL without having had knowledge of that fact. Some time later, Cummings realized its error and notified counsel for MGPO. While Cummings proceeded with a build out of the space in accordance with MGPO specifications, the parties communicated about the construction, the AUL, and general environmental concerns. Ultimately, MGPO decided it could not accept the space, refusing to take occupancy or pay rent, notwithstanding that Cummings had incurred \$592,760 in direct costs for the build out. Cummings then brought suit to enforce the lease and recover its construction expenses.

Cummings argued that MGPO became aware of the AUL, though subsequent to signing the lease, and that the parties intended to amend the lease for other purposes and could include the formal AUL reference in that amendment. Cummings also argued that

MGPO's intended use of the premises was not a restricted use under the AUL, implying that the failure to notify MGPO resulted in no ill effect. MGPO planned to use the space to house its LADDERS program, which provides medical and therapeutic care for children with autism and related disorders. MGPO argued that such a use should be considered "child care", a use prohibited by the AUL. Cummings disputed this assertion and the court agreed, holding that health care is a permitted use under the AUL and health care and not child care is what the LADDERS program provides. Nevertheless, the court enforced the strict AUL notice provision the MCP explicitly requires, declaring the lease null and void due the lack of AUL notice in the executed lease.

In light of the *Cummings* decision, property owners should closely adhere to the AUL notice requirement the MCP has mandated. It should also be noted that, although *Cummings* highlighted the notice requirement in a lease scenario, the obligation applies in all other contexts in which an interest in real property is being transferred.



This Real Estate Alert was written by [Raymond C. Estes](#), associate in the firm's Real Estate Department. His practice focuses on commercial real estate acquisitions, dispositions, leasing, financing, securitized loan defeasance, land use, and development. For more information on this topic or other real estate topics, please contact Ray or your attorney at Sherin and Lodgen LLP at 617-646-2000.

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