

Deconstructing Sochi – An Example of Common Commercial Real Estate Problems

By Kristin B. Rowell

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Flags of the Countries-participants Of Winter Olympic Games

As athletes, spectators and the media arrived in Sochi to settle into their final days before the start of the Winter Olympics, thanks in large part to social media, photographs began circulating on the Internet of Sochi's conditions. No, people weren't reporting about the weather conditions or the physical conditions of the athletes – as impressive as both conditions might be. Those arriving in Sochi were focused on a more perplexing set of conditions: the conditions of the hotels and accommodations; streets, stairs, sidewalks, and a variety of bizarre environmental conditions (think water and sewage). One of my favorite tweets about Sochi's conditions in the days leading up to the Olympics was from @DanWetzel at 5:23 p.m. on February 4: "To anyone in Sochi: I am now in possession of three light bulbs. Will trade for a door handle. This offer is real."

Sochi's conditions reveal some typical commercial real estate problems that arise in a variety of complex commercial real estate disputes. Below are three common issues affecting developers, contractors, lenders, brokers and buyers in diverse range of commercial development projects. Based on the conditions shown in the photographs, any of these issues could be at play in Sochi.

Construction Liens

In Minnesota, anyone who contributes labor, skill, material or machinery to improve real estate shall have a lien on the improvement. M.S.A. § 514.01. To be valid, the lien must meet certain statutory prerequisites. For example, in most cases, lienholders have to give notice to the owner, they must have contributed the work less than 120 days prior to filing the lien, and they may only claim the amount actually due and owing for the work. *See* M.S.A. §§ 514.011, 514.08, subds. 1, 2(2).

A lienor's failure to meet these and other statutory prerequisites may create a claim against the lienor for slander of title. Slander of title is the "utterance of false and malicious statements disparaging the title to property in which one has an interest." *Kelly v. First State Bank of Rothsay*, 177 N.W. 347, 347 (Minn. 1920). Stated differently, you can't say something about someone else's property that isn't true. Claims for slander of title require proof of: (1) a false statement concerning the real property owned by



Top view of Krasnaya Polyana, Sochi, Russia.
The mountain cluster of objects of Winter Olympic games

the plaintiff; (2) publication of the false statement; (3) malice; and (4) special damages. *Paidar v. Hughes*, 615 N.W.2d 276, 279-80 (Minn. 2000). In fact, one of my partners and I recovered our client's attorney's fees as special damages when we prevailed on a slander of title claim. See *Bridgeplace Associates, LLC v. Lazniarz*, 2005 WL 1869657, *10 (Aug. 9, 2005).

Construction liens should be carefully reviewed to determine whether they give rise to a claim for slander of title. In any case, statutory compliance is critical.

Environmental Concerns

Depending on the development under construction, activities conducted on the property could result in the release of hazardous substances into the environment. (See Sochi photographs here: <http://www.nydailynews.com/sports/olympics/media-reports-sochiproblems-olympic-village-article-1.1602530>). In Minnesota, such hazardous substances include, among other things, "refuse, sludge, or other waste material . . . in solid, semisolid, liquid, or contained gaseous form." M.S.A. §§ 115B.02, subd. 8(3), 116.06, subd. 11.

The Minnesota Environmental Response and Liability Act (MERLA), much like its federal counterpart CERCLA, creates a private cause of action for a person who incurs response costs to clean up hazardous substances against the persons responsible for releasing the hazardous substances. To establish liability under MERLA, a plaintiff must prove: the defendant was a responsible person for the release or threatened release of a hazardous substance into the property, which caused or significantly contributed to, the plaintiff's reasonable and necessary response costs. M.S.A. § 115B.04, subd. 1; *Musicland Group, Inc. v. Ceridian Corp.*, 508 N.W.2d 524, 531 (Minn. App. 1993).

Many environmental issues can be avoided by obtaining comprehensive environmental site assessments (commonly referred to as a Phase I or Phase II) prior to development and construction. The contractor and developer should work closely with a professional environmental consultant to address any possible environmental concerns.

Warranty Issues

Warranties in commercial construction projects arise in one of two ways – contract or statute. Claims for breach of warranty require proof of: (a) the existence of a warranty, (b) the breach, and (c) a causal link between the breach and the alleged harm. *Peterson v. Bendix Home Sys., Inc.*, 318 N.W.2d 50, 52-53 (Minn. 1982).

A condominium development is an example of a commercial real estate project governed by statutory warranties. In Minnesota, the Common Interest Ownership Act provides causes of action for condominium purchasers when sellers breach express or implied warranties. See M.S.A. §§ 515B.4-112, 515B.4-113. Although the developer must disclose the statutory warranties to the purchasers in the disclosure documents, the developer has the option of either spelling out the statutory warranties within the four corners of the disclosure documents or simply referring the purchaser to the statute itself. See *Tara Hills Condominium Ass'n v. Gaughan*, 399 N.W.2d 638, 642 (Minn. App. 1987).

One commonly litigated issue over warranty coverage in Minnesota is the applicable limitations period. Pursuant to statute, "actions based on breach of an express written warranty . . . [must] be brought within two years of the discovery of the breach." M.S.A. § 541.051, subd. 4.

Consider these commonly litigated issues in your next commercial real estate development – you may just be able to avoid the problems we saw in Sochi.



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