

# Real Estate Review

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- ISSUES AND INTERPRETATIONS, *Daniel Rose*
- REAL ESTATE DEALING, *Allan Haymes*
- REAL ESTATE FINANCING, *Richard Ridloff*
- REAL ESTATE SYNDICATIONS, *Stephen P. Jarchow*
- ALTERNATIVE MORTGAGE INSTRUMENTS, *Daniel C. Draper*
- THE SHARED APPRECIATION MORTGAGE AND THE SHARED EQUITY PROGRAM, *Stanley L. Iezman*
- A LENDER'S GUIDE TO FORECLOSURE ACTIONS, *Bruce J. Bergman*
- PEOPLE AND PROPERTY: NEGOTIATING ARCHITECTURAL CONTRACTS—PART II, *Emanuel B. Halper*
- BEYOND CORNFIELDS: THE OUTLOOK FOR REGIONAL SHOPPING CENTER DEVELOPMENT, *Douglas D. Abbey*
- DETERMINING THE FEASIBILITY OF ON-SITE COGENERATION, *Paul H. Woods, Jr., Dr. Bernard T. Delaney and Fred C. Hart*
- SHORTER MORTGAGE TERMS ARE BETTER FOR HOME BUYERS, *Richard M. Beers*
- HOW INFLATION-PROOF ARE THOSE RETAIL PERCENTAGE LEASES? *Nathan Schloss*
- ESTABLISHING ECONOMIC MOTIVE IN A NET-LEASE TRANSACTION, *Jack P. Friedman and Roy Vajdak*
- CREATIVE FINANCING TECHNIQUES WILL NOT SAVE THE S&LS, *Jandhyala L. Sharma*
- CHARTING THE FUTURE OF REAL ESTATE PRICES: PICK A THEORY, *Richard A. Lex*

The Real Estate Institute of New York University



*Understanding the role of the architect in the construction process is a vital part of contract negotiation.*

# People and Property: Negotiating Architectural Contracts— Part II

*Emanuel B. Halper*



**S**OMETIMES THIS BUSINESS gets me down. Don't smirk. It's true. Even I, a man with a truly sunny disposition, get depressed and very hostile now and then.

One such rare circumstance occurred last summer. I knew something was wrong when I arrived at my office. My partner, Walter Gumbinger, noticed that I was wearing one brown shoe and one black shoe. He is normally exceptionally tactful, but for some reason he found my misfortune to be

very funny and advised everybody of the circumstances.

Later that morning I attended a closing in the conference room and drank what I thought would

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## REAL ESTATE REVIEW

be the delicious remnants of an open can of Coca-Cola. The taste of the liquid was exceedingly unpleasant; the lawyer for the other side had deposited a lit cigarette in the can.

I searched everywhere for someone to blame for my misfortune. Certainly it must be my wife's fault. No, it must be Walter's. Why not my secretary? The bookkeeper?

No, there was nobody I could blame.

There was only one step left to take. For several years now we've represented the Psychiatrists and Psychologists International Congress (PyPIC), the renowned and prestigious group of psychotherapists. During this period, I've worked hand in hand with the founder and President of PyPIC, Dr. Hermann Dreykopf. Although neither PyPIC nor Dreykopf can be said to have been a conscientious bill payer over the years, Dreykopf has been handy each time a real estate client has had severe depression, menopausal symptoms, or a nervous breakdown. Fearing that my anxiety would get out of hand, I decided to take the plunge myself and undertake psychotherapy with Dreykopf.

I called him at 8:05 A.M. the next morning. Dreykopf took my call despite the early hour.

Dr. Dreykopf: How are you this morning?

I: That's what I wanted to call you about. In fact I had to call you. I'm overwhelmed with anxiety. I'm unusually hostile. I . . .

Dr. Dreykopf: But I paid your last bill just yesterday. Your check is in the mail.

I: No, Doctor Dreykopf. I didn't call you to get you to pay for *my* services. I called you to engage *your* services.

Dr. Dreykopf: Ah that's different. When do you want an appointment? I can see you next Tuesday at 3:30 P.M., next Thursday at 8:00 P.M. or next Friday at 9:50 P.M.

I: Doctor, I can't wait that long. You can't be *that* busy.

Dr. Dreykopf: Well, let me check my calendar again. I may have had a cancellation. Oh yes. Isn't that a fortunate coincidence? I'll see you at 8:30 A.M.

I wasted no time. After a hectic taxicab ride and running one block, I arrived at Dreykopf's office at 8:29 A.M. I expected him to be waiting for me. But I was now the patient, and he was the professional. Hence, he was late. He appeared at 8:45. He was composed and jolly—a marked improvement over his demeanor when he came to me for legal advice and was concerned about *his* money.

He allowed me to decide whether I was going to do my grumbling sitting up or lying down. I was so anxious to grumble, that a standing or kneeling position would also have been acceptable.

I started off telling him how I suffered because of my choice of shoes yesterday morning. He looked carefully at my shoes and did all he could to avoid laughing. He finally commented, "one black and one brown, hmmm!"

Then I complained about my wife, my children and Walter Gumbinger. He took notes and said nothing.

I: I have another problem. Yes, yes, it's terrible. I get so much anxiety from it.

Dr. Dreykopf: What is it that gives you so much trouble?

I: It's complicated. Very complicated, Dreykopf. So is life. Life is . . .

Dr. Dreykopf: Forget about what life is. I want to hear your *feelings*.

I: The deals trouble me. Here's one. I'm negotiating an employment contract with an architect; and, at the same time, I'm writing an article for the REAL ESTATE REVIEW on architectural employment contracts.

Dr. Dreykopf: So what's so bad about that?

I: You should only know.

Dr. Dreykopf: Why should I know?

I: I didn't mean that literally. I'll tell you about the deal. You remember Luciano Tremolo, don't you? He calls himself the world's greatest tenor . . .

Dr. Dreykopf: Sure, I remember him. He owes me \$5,000. In fact, I introduced him to you.

I: \$XLMV?!!!

He's building a house. But before he can build a house, he must have an architect. He won't choose any old architect. Not him. He's got to have a design by the world's most fashionable architect, H. Donald Cumberbund. Now Cumberbund has so much business and makes so much money that he can't be pushed around like normal architects. He has hired the world's most fashionable law firm, Erisa, Milltown, Stonehead & Grumble. And who, there, is assigned to negotiate that contract with me but J. Chapman Erisa, himself.

Dr. Dreykopf: Look, how'd you like to sue that sweet-voiced, fat-tummied bastard for \$5,000. If he can afford Erisa's fees, he can afford to pay his psychotherapist.

I (ignoring him): So I invite Erisa to my office to talk turkey. He doesn't want to come. He wants me to go to his office. I refuse. So we lose about

## People and Property

three weeks in fighting about whose office to work in. Then Cumberbund tells Erisa that it's okay for the meeting to be at my place and hires a chauffeur-driven Cadillac with a bar in the back seat to drive that snob the two-block distance.

Erisa walked into my conference room, drank three cups of coffee, stuffed himself with danish pastry, got into a fight with Tremolo, exploded, and walked out.

One week later we held another meeting and the same thing happened. Two days later it was repeated once more. I have to schedule another meeting, and I can't stand it.



Dr. Dreykopf: Hmmm.

I: To top it all, I've got this problem with the *REAL ESTATE REVIEW*. The senior editor—well, it's not necessary to mention names—I'll call him Norman Butcher.

Dr. Dreykopf: Why Butcher? That may be very significant.

I: Butcher! That's because he keeps cutting words out of my article. I love my words. I love all of my words.

Dr. Dreykopf: I can tell. Believe me!

I: When I say something with twenty words, Norman has to cut out five or six of the words. He can't leave my stuff alone. No matter how well I put it. No matter how poetic. He must cut, chop, censor, excise, delete, omit, subtract, remove . . .

Dr. Dreykopf: It sounds like the ten plagues.

I: He's so compulsive.

Dr. Dreykopf: You mean you aren't?

I: Oh Doctor, I need help. Help me solve my problem.

Dr. Dreykopf: Hmmm.

My session was over. I rushed down the stairs and through the lobby of his building. Fortunately I was able to find a taxicab immediately and got back to the office at 9:45 A.M., which is still before Walter Gumbinger usually gets in.

That night I dreamed of J. Chapman Erisa, Norman Butcher, and Hermann Dreykopf. I realized then that they might be in league with each other and that I hated Hermann Dreykopf.

Soon I called Dreykopf to tell him off. But that shrewd manipulator told me that the fact that I now hated him was a wonderful forward step. Suddenly I wanted to make another appointment with him more than anything else in the world. But he said that he would not see me again until he had a chance to read a draft of my *REAL ESTATE REVIEW* article on architectural contracts as I submitted it and another copy showing the drastic cuts made by Norman Butcher.

I sent them to him by special messenger.

Here, for your information, is a copy of the original version of my article uncensored, unexpurgated, uncut, and pure. Of course, you must remember reading my earlier article on this subject. That one was the first part of a two-part series, and this is the second part.

### CONSTRUCTION DOCUMENTS PHASE

When an architect has completed detailed specifications and working drawings for a project and the owner (developer) has approved them, the architect and owner should focus on arrangements to construct the building. Before we go on, I just want to note that I'm assuming that the detailed specifications and working drawings comply with the requirements of all concerned governmental bodies and the requirements of the insurance companies which are expected to issue policies with respect to the project.

### *Soliciting Contractors' Bids*

This is the time to prepare a package to submit to construction contractors and to solicit bids to determine which contractor should be the general contractor for the project. From personal experience I can tell you that the choice of contractor may be the most important step the owner and architect take during their entire relationship.

When the detailed specifications and working drawings are ready, the architect and owner generally seek information about general contractors who might be willing and qualified to organize the work. Of course, architects are better able than most own-



ers to judge the quality of the work performed by a contractor's team on a previous job. They are often in a position to recommend reputable general contractors to their clients. On the other hand, few architects have the education or experience to judge the financial strength of prospective contractors.

Thus the contract between the owner and the architect should require the architect to pass on the qualifications of each general contractor who will be invited to submit bids. But the owner should reserve the right to reject any contractor that the architect recommends either because the owner disagrees with the architect about the contractor's qualifications or because the owner determines that the contractor isn't sufficiently responsible in a financial sense.

After the owner approves a list of contractors from whom bids are to be solicited, the architect prepares a set of the documents to be presented to prospective bidders. The bid documents should include the detailed plans and specifications, instructions on where, when, how and to whom proposals should be made, and a proposed construction contract between the contractor and the developer.

When the contractors responded with bids, the architect must review the bids, analyze them, and advise his client as to which bids he feels are most attractive from the developer's viewpoint.

It should be noted that it isn't true that the low bid is always the best. The architect and developer should be influenced by the ability, reputation, and financial status of each bidder. A low bid from a contractor about whom the developer has doubts might well be rejected in favor of a higher bid from a more reliable contractor.

### *Owner-Contractor Contract*

When architects prepare the bid documents for submission to bidders, they tend automatically to include in the package the AIA (American Institute of Architects) form of owner-contractor contract. I have many doubts that this is the best form of construction contract the developer can find.

I even doubt that it is wise or proper for an individual architect or a trade association of architects to be promoting a contract form to deal with so complex a relationship as the one between contractors and developers. I say this despite my respect for the draftsman of the AIA form, who did his work with understanding, a sense of organization, and a good command of the English language. Despite these positive characteristics, the AIA form of

construction contract doesn't deal adequately with many issues that are important to developers.

If the owner is not going to use the AIA form of construction contract, he must think of this when he is negotiating his architectural services contract (discussed in Part I of this article). The reason for this is that the AIA form of construction contract is often prescribed in the form of architectural services contract that architects submit to owner-developers and their attorneys. To achieve the owner's objectives, the architectural services contract should provide that the owner will furnish the architect with a form of construction contract to be submitted as part of the bid documents.

Of course, a developer should ask his architect to review and comment upon the proposed form of construction contract. And a developer would be a fool to ignore his architect's comments. This way a developer can involve his lawyer and his architect in the process of drafting and adopting a form of construction contract.

When the bids are evaluated and a bidder is selected, it is often important for the architect and developer to meet with the contractor to answer any questions he may have about the detailed specifications and working drawings and about conditions at the construction site. Additional negotiations between the developer and the contractor often take place at this point. Sometimes the owner uses these meetings as an opportunity to drive the contract price down a bit or to negotiate other concessions from the contractor.

The architectural services contract should require that the architect attend these meetings and that he represent the owner in these negotiations.

### *Permits and Licenses*

Once the construction contract is executed, the owner, the contractor, and the architect must focus on the governmental approvals that may be necessary before construction actually begins.

Construction contracts often assign the task of applying for building permits to the contractor. But it is unrealistic to expect the contractor to do everything that needs to be done to induce the "powers that be" to issue a building permit. The contractor usually needs the aid and active participation of the architect for this purpose. As you may guess, it is important for the architectural services contract to provide that the architect be required either to be in charge of the application process or to assist the contractor with respect to the application and ex-

## People and Property

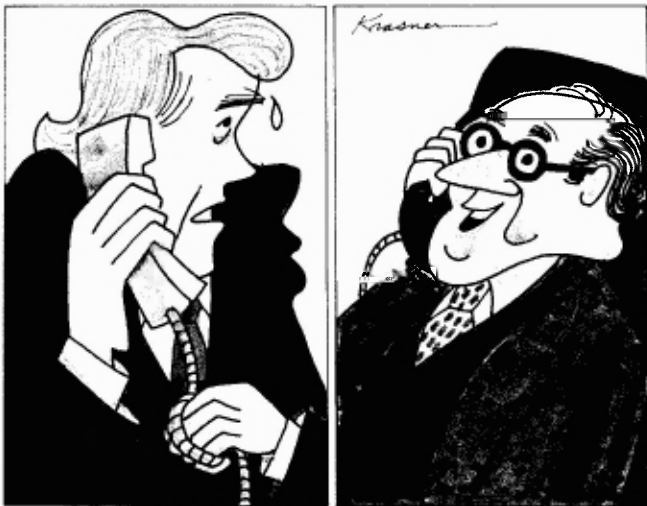
ecute certificates required in connection with the application.

It is not unusual for a municipal building department to require extensive changes in the detailed specifications and working drawings that a developer has submitted in connection with an application for a building permit. Architects normally expect that (without receiving additional compensation) they will have to revise the specifications and drawings to conform to the building department's comments. The architectural services contract should require the architect to do so.

It should be noted that even after an architect has made several attempts to conform to building department requirements, a department may make additional comments and additional requests for changes to the detailed specifications and working drawings.

### CHANGING ROLE OF THE ARCHITECT

Once the detailed specifications and working drawings have been completed, the construction contract has been executed, and the building permit has been issued, the architect has completed most of his effort with respect to the project. Although his association with the project is not over, the nature of his association changes drastically.



During the early stages of the relationship between the owner and the contractor, the architect has served solely as an owner's representative and his sole loyalty has been or should have been to his employer's legitimate interests.

When the work commences, the architect's responsibilities change. As construction progresses,

he is frequently called upon to make judgments about the progress and the quality of the work. Now he can no longer maintain unswerving loyalty to the interests of his client. His professional ethics require that he act objectively so that the owner, contractor, governmental authorities, insurers, lenders, and proposed occupants of the building can be justified in relying upon his judgment.

After construction starts, many disputes arise between the contractor and owner. The AIA form of construction contract requires that the architect act as an arbiter of the disputes although his decisions are subject to appeal. The architect must resolve the disputes between the owner and contractor fairly and without partiality to his client.

Although the owner is the architect's employer and the architect must seek payment of his own fees from the owner, the architect is bound by his professional ethics to deal with the dispute objectively. You're correct if you imagine that architects are often subject to considerable pressure by their employers.

The inexperienced owner finds it strange that although he hired the architect late in the game, he is not in a position to direct all of the architect's activities, and he is just as dependent upon the architect's good judgment and sense of fairness as everyone else. To accept this must be very difficult for real estate developers who spend much of their lives bossing around their assistants and their lawyers.

### PAYMENTS TO CONTRACTORS

A general contractor—and every other construction contractor for that matter—depends upon progress payments from the owner to finance the construction. Accordingly, construction contracts customarily provide that the contractor will be entitled to partial payments on account of the contract price at agreed-upon intervals. The amount of the partial payments is usually determined by the proportion of his contractual obligation that the contractor has fulfilled at the time of payment.

The developer and the construction lender need documentary evidence of the quantity and quality of the work that the contractor has performed. They don't rely on the contractor's word. They ask the architect to confirm the contractor's claim. They require the architect to review the work and the contractor's invoice and to certify whether all or a portion of the invoice should be paid.

Even if the owner were willing to honor the contractor's invoice without the architect's certificate,

## REAL ESTATE REVIEW

the construction lender would probably refuse to disburse the funds unless it were satisfied that the progress payment is justified by the work that has been done and sufficient funds remain available to complete the work. So the owner isn't able to borrow the funds to pay the contractor unless the architect is willing to issue the certificate required by the lender.

In the past, the forms of architects' certificates that lenders required were as diverse as the personalities and intellectual accomplishments of lenders' attorneys. Since lenders and owners really take the certificates seriously and tend to sue architects when they are disappointed, architects have learned to take their certificates seriously.

To protect the architect, The American Institute of Architects provides its members with another useful crutch—a printed form. The AIA's form of architect's certificate carefully limits the architect's statement about the progress of the work. An architect who uses this certificate does not make a definite statement about the progress, about the conformity of the work to the detailed specifications and working drawings, or about the percentage of the job that has been completed. Instead, the architect's statement is made to the best of his knowledge, information, and belief. (Suppose he has no knowledge or information and has only a belief?)

An owner-developer who feels uncomfortable with such a certificate is free to negotiate for a more definite one. On the other hand, the architect rightly feels that a more definite statement of facts might expose him to a lawsuit if the statement ultimately proved to be untrue. Under normal circumstances, the architect's fee is not sufficient to justify continuous on-site inspection. Unless the architect observes the work continuously and has two eyes for every workman on the job, he is not in a position to make definite statements on his certificate.

### ADMINISTRATION OF THE WORK

Administration of the work does not mean supervising the work. Architects do not supervise contractors. They observe the progress of the work. They check to see whether the work conforms to the contract documents.

It is unusual for architectural firms to keep one of their own people at the site at all times. On smaller jobs, an architect or someone employed by him will inspect the project once each week.

Sometimes they come more often and sometimes less often. The architect is seldom there all of the time, and he can't be expected to know everything that happens at the job site. Even if the architect were to station himself on a flagpole that towered above the work and looked down on the workers with binoculars, he would be able to detect only a few of the serious errors made by plumbers, electricians, or carpenters.



In order to judge the performance of a contractor as effectively as possible, architects do make a special effort to show up at the job site at critical stages of construction. Invariably, architects insist on being present when concrete is being mixed. That's because the correct mix of cement, sand, and water may have a crucial effect on the structural integrity of the building.

Architects are aware that, as construction progresses, each layer of construction hides the previous layer from view. For example, it is obvious that some of the columns and beams of a building won't be readily visible after the walls are in place. Consequently, architects schedule visits to the job site to observe the columns and beams before the walls go up.

Sometimes, an architect will insist that the contractor undo work that has been performed already in order to gain access to work that isn't visible any longer for inspection or to conduct a test.

### Clerks of the Works

Some owners and architects attempt to keep a close eye on the progress of construction by employing a clerk of the works. What is a clerk of

## People and Property

the works? He is an experienced construction worker whose job is to keep an eye on things. The clerk of the works does stay at the job site. He is paid by the owner but is usually supervised by the architect. Thus he is the eyes and ears of the architect.

He reports the progress of construction to the architect. If he spots something strange or dishonest going on, the clerk of the works reports that occurrence to the architect and to the owner.

I've been impressed by the respect that architects have for clerks of the works. These fellows know the tricks of the trade and they can often advise the architect about unsavory practices that would not be discovered otherwise. The presence of a clerk of the works tends to discourage pilferage. Materials that would otherwise have found their way to the trunk of a worker's or neighbor's car tend to stay where they are supposed to be when a clerk of the works is around.

### SHOP DRAWINGS AND SAMPLES

As the job continues, the contractor may need the architect's advice on how to satisfy the requirements of the detailed specifications and working drawings. The contractor may prepare his own drawings to illustrate how he wishes to solve various problems. These drawings are known as shop drawings.

If the architect or owner fails to respond quickly to the contractor's requests for approval of shop drawings, the progress of construction may be impeded. To avoid this possibility, the contract should provide that the architect will review shop drawings promptly.

Construction contracts often require the contractor to submit samples of materials to the architect for his review before the materials are used. Architectural services contracts should also require the architect to review and to approve or disapprove the samples promptly.

### SUBSTANTIAL COMPLETION

As construction nears substantial completion, the architect is expected to review the work and determine (to the best of his knowledge) what part of the work is incomplete and what part is defective. With the aid of representatives of the owner and the contractor, he develops a list of incomplete aspects of the work and of defective parts of the work. This list is called a "punch list" in the argot of the industry.

The punch list guides the owner and contractor as they move from the point at which the work is almost complete (called "substantial completion" by construction people) to the point at which all of the work is finished (or "final completion" in constructionese).

At that wonderful moment when most of the work is finished, the contractor attempts to obtain a certificate of occupancy or its equivalent. The architect is an important element of the process of applying and processing the application for a certificate of occupancy. These aspects of the architect's duties should also be reflected in the contract between the owner and the architect.

### OCCUPANCY PHASE

The AIA form neatly ends the architect's duties upon completion of the building. And yet everyone involved, including the architect, expects his duties to continue for a reasonable period after completion of the construction.



The architectural services contract should deal with services to be rendered during the occupancy phase. Architects should consider this aspect of their services when they decide how much to charge. The owner-developer should insist that a part of the architect's compensation should be deferred until the services expected to be rendered during the occupancy phase are actually rendered.

### *As-Built Drawings*

Here's what is left for the architect to do. First of all, many buildings aren't built exactly as spec-



ified in the original detailed specifications and working drawings made when the construction contract was executed. Many owners require that the plans be changed right in the middle of construction. When an owner and a contractor agree on a change, they execute a change order that describes the changed work. The change order may provide for an adjustment in the contract price and acts as an amendment to the construction contract.

Sometimes a contractor initiates the request for a change order because he feels that it would be better to depart from the strict requirements of the detailed plans and working drawings. In addition it is not unusual for a contractor to depart from the plans and specifications without getting a change order or even requesting one.

The owner needs some graphic record of what was built as an aid to future maintenance, repairs, and alterations. Given all the changes that have been made, he must ask the architect to modify the working drawings so that they actually represent the building as it has been built. Not surprisingly, the revised drawings are called "as-built drawings." The architectural services contract should establish whether the architect is required to prepare the as-built drawings as part of his regular duties and whether or not he must do so without extra compensation.

## Other Services

These are the architect's continuing responsibilities. During the occupancy phase, the owner or his tenants move into the building and begin to use it. They usually need the architect's advice on how to use the building, various of the building systems, and the equipment located in the building.

As a construction crew packs up its ladders, tarpaulins, and tools and moves on to its next project, a new crew enters the building. The new crew must keep the heating, ventilating, and air-conditioning system running. It operates internal communications systems, conducts fire drills, and deals with many other problems of building operations. Architects often play a role in training building personnel to conduct these operations. Certainly they should be available to answer questions about the operation of building equipment.

General contractors customarily agree to correct faulty materials and defective workmanship that the owner discovers for one year after completion of construction. (Some construction contracts extend the contractor's obligations to correct defects to two years or even longer.) The architect's ser-

vices are necessary during any period in which the construction contractor's obligation to correct defects remains in effect. If not the architect, who will determine whether materials are faulty, whether workmanship is defective, and whether the contractor has actually corrected the faulty materials or defective workmanship?



As the new owner or his tenants begin to live, work, or play in the new facility, problems will arise. There is a need at that time for someone to consult, someone to complain to, and someone who will lend his shoulder to be leaned upon. That's the architect.

## CONSTRUCTION MANAGEMENT

Some developers prefer to dispense with a general construction contract and hire a construction manager to take charge of the construction process. Construction managers are experienced construction supervisors who, hopefully, are experts in coordinating the work of construction suppliers and subcontractors. They act as advisers to developers on cost-cutting techniques and act as the developer's agent in dealing with suppliers and subcontractors.

When a construction manager is involved, the architectural services contract should take the construction management relationship into account. If it does not, the developer might find that the construction manager and architect will be stepping on each other's toes because they will be required to do some of the same things and some things will go undone because neither will be obliged to do them.

## People and Property

Because space is getting short, I can't say too much more about coordinating the architect's and construction manager's roles except that the roles should be coordinated.

### CONSTRUCTION LENDER

Another important figure in the construction process is the construction lender. In good times and bad, money has always been the vital fluid that nourishes the construction process.

Developers tend to execute contracts to purchase land, general construction contracts, architectural services contracts, and permanent mortgage loan commitments before they negotiate construction loan commitments. Because of this, a developer must keep the construction lender's requirements in mind as he negotiates his other contracts.

Many construction loan commitments now require that the architect agree that the construction lender may succeed to the owner's interest under the architectural services contract in case the owner defaults under the construction loan agreement and the lender wants to complete the job. Of course, the lender won't oblige itself to hire the architect in this event; it just wants the option to do so.



One possibility that many lenders fail to consider is that if the owner fails to comply with his obligations under the architectural services contract, the architect may have the right to cancel that contract. To protect its loan in such a situation, the lender should insist upon the right to cure the owner's default under the architectural contract before any right of the architect to cancel

arises. The lender might also ask for the right to employ the architect on the same terms and conditions of the contract between the owner and the architect in case of a cancellation of the contract by the architect.

### ASSIGNMENT

One thing for an owner to watch out for in the AIA form is the assignment clause. That clause prohibits assignment of the owner's interest under the contract without the architect's consent.

#### *Assignability of the Architect's Contract*

Owners should always be in a position to sell their property either before or after completion of the project. An owner who seeks to sell before construction is complete will find that a covenant against assignment of the architectural services contract can stand in the way of the sale. If the architectural services contract can't be assigned, the prospective purchaser may refuse to buy because he may feel it is impractical to change architects in the middle of construction. In addition, the seller might be concerned about facing a lawsuit by his architect.

The restriction against assignment is one of the reasons why construction lenders insist that in case the developer defaults under the construction loan documents, the architect must agree to complete the services contemplated by contracts for the account of the lender. When a developer has a free right to assign the architectural services contract, the lender's needs can be satisfied by an assignment of the developer's interest under the architectural services contract to the lender and an agreement by the architect to allow the lender to cure any default by the developer under the architectural services contract.

A restriction against assignment of the architectural services contract by the developer can also make it difficult for him to establish joint venture relationships. Many developers discover after they have started a project that they do not have sufficient equity capital to complete the project. When this happens, they must seek joint venturers who will contribute the needed equity capital. The joint venturers may form a partnership or a corporation or they may choose to develop and own the project as tenants in common. If the property is to be conveyed to the partnership or corporation, all contracts, including the architectural services contract, should be assigned to the partnership or

corporation. If the parties will function as independent tenants in common, the new party will be entitled to an undivided interest in the property and in each of the contracts including the architectural services contract. Of course, the objective of cutting the new party in on the deal can't be accomplished if the developer is prohibited from assigning any of these contracts.



Few architects care much about assignment clauses and probably even fewer are aware that their beloved AIA form makes an issue out of assignment in the first place. However, the owner's need to be able to assign is important, and an owner should insist upon this right.

### *The Architect Can Delegate*

On the other hand, an architect should not be able to assign his interest under the contract. It is a general principle of contract law that an obligation to render personal services can't be delegated unless the parties so specify. The owner should not agree to allow his architect to assign the contract to another architect, except for special circumstances.

Architects do need the right to delegate some of their duties. But the architect should be responsible for all of the services rendered pursuant to the architectural services contract even if some or many of the duties are delegated.

Accordingly, the contract should outline the extent to which the architect is authorized to delegate design or architectural services to anyone other than his own staff. Some owners insist that the contract specify the members of the architectural

firm that are to work on the project. On the other hand, architects customarily engage structural, mechanical, and electrical engineers for their projects; owners are seldom concerned about which engineer should be chosen.

### **TERMINATION PROVISIONS**

If a developer has engaged an architect and has executed the AIA form of owner-architect contract, he is not in a position to fire his architect without taking it on the chin for some extra money.

Developers have grown accustomed to the privilege of firing lawyers, leasing agents, and surveyors whenever they want to. Usually when a lawyer is fired, he's lucky if he actually gets paid for work he has actually performed. On the other hand, if the developer has blindly used the AIA form, the architect is entitled to damages that would (in theory) permit him to recover all the profit he would have made if the contract had not been cancelled.

My experience is that many architects are quite flexible about termination arrangements and they are willing to agree that, if the owner is dissatisfied at any time, the owner can terminate the relationship without extensive damages.

Other architects are less generous. They believe that their most important contribution to the project is made at the project's early stages. They regard their design work and the development of the detailed specifications and working drawings as the most valuable aspect of their work. They are suspicious of the possibility that a developer will engage them for the entire project only to dismiss them when the detailed specifications and working drawings have been completed. They believe that a developer who can do that without paying damages ends up paying the architect less than the real value of the plans and specifications.

To complete the picture, there are still other architects who are quite content with arrangements that limit their services (and their fees) to the design aspects of the work. These architects prefer not to be involved in the construction process at all—not even for money.

### *Who Owns the Plans and Specifications?*

The printed AIA form says that the plans and specifications developed for a project belong to the architect.

I can certainly understand that an architect would like to own his act of creation. On the other

## People and Property

hand, the owner is paying for the act of creation, why shouldn't he own it?

The issue isn't important if the building involved is unique to the site and the exclusive use of the owner or his tenant. On the other hand, many developers try to duplicate the same building many times when site conditions permit. While it is true that conditions are seldom, if ever, identical at two sites, a set of plans and specifications can be re-used in a number of locations with relatively few changes.

If this is the case, a developer would want to own the plans and specifications instead of paying the architect his full fee a second, a third, a fourth, or many additional times.

Many developers and many users insist upon building similar and sometimes virtually identical buildings in all of their locations. In some cases the building itself is perceived of as part of the company's image. Howard Johnson's restaurants are a good example of such buildings. In other circumstances, a company may view the similarity of its buildings as part of its plan of corporate efficiency. Such companies strive to standardize their training programs and their operations, and they feel that having everything where people expect everything to be is an efficient management tool.

There's no easy answer to this problem. The architect may feel, with some justice, that he should be treated like a successful songwriter, actor, or singer. The owner feels that he's paid for the stuff once; why should he have to pay again?

The problem will be resolved, if at all, by negotiation. The main thing an owner should keep in mind is that if he uses the AIA form, that form resolves the issue in favor of the architect.

### THE JUDGMENT OF DREYKOPF

Finally Dreykopf completed review of the second half of my article. He called me to set an appointment. Once again, I begged for the earliest possible moment. He said he'd squeeze me in at 11:15 P.M. on the following Sunday.

I arrived a few minutes late figuring that Dreykopf would never come on time for anything. But he was standing at the door and waiting for me impatiently at 11:22.

I: Dr. Dreykopf, what shall I do?

Dreykopf: Come on time next time. I can't spend my whole life waiting for you.

I: But, Dr. Dreykopf, I've been waiting to hear

your reaction. How can I handle Norman Butcher? What am I going to do about J. Chapman Erisa?

Dreykopf: These are good questions.

I: So what's the answer?

Dreykopf: Hmmm.

I: Don't keep me in suspense!

Dreykopf: What are your associations?

I: I had a dream last night that might be relevant. I was sitting in a beautiful tropical garden. There were so many exotic plants and streams that it could have been the enclosed mall of a modern shopping center. There were beautiful women everywhere, and they all looked like Ingrid Bergman. I was sitting at a marble table which had all the Colombo Yogurt a man could ever want—and every flavor too.

J. Chapman Erisa sat down at the table. He was so cheerful and pleasant that you wouldn't recognize him. He told me that he enjoyed reading my articles in *REAL ESTATE REVIEW*, but something was always missing from them—always a few words that could have made them so much better were missing. I complimented him on his literary taste and offered him some honey vanilla yogurt. He declined, and we called a waiter to order something for him.



The waiter was Norman Butcher. He came with three cups of coffee, a plate of prune danish, my most recent article on architectural contracts, and a pair of scissors.

Erisa started drinking the coffee and eating the danish. Norman started cutting up my article. He cut one word out of every sentence. Sometimes it was the subject and sometimes it was the verb. It

didn't matter to him as long as words were cut. Then he started cutting words from the labels of the yogurt containers.

That seemed to enrage Erisa. He jumped to his feet and left.

Dreykopf: Then what happened?

I: I woke up.

Dreykopf: Hmmm.

I: Say something already. Why am I paying you?

Dreykopf: Why don't you tell me where we've been?

I: Please, I must know how to deal with . . .

Dreykopf: You seem to have a morbid fear of people leaving you and a compulsive desire to have people visit you or your office. They are probably related to trauma of your early childhood. It's a tragic combination of compulsive desires. You are setting up the scene for the destructive circum-

stances. Without your own active connivance, these things could not happen.

I: How shall I correct this, doctor?

Dreykopf: Well, you see, Erisa himself has a compulsive wish to leave your office after he drinks three cups of coffee and eats your prune danish. Why this is so lies in his profoundly mysterious psyche. Refuse to invite him to your office and meet in his.

I: How will that help?

Dreykopf: It is an infallible solution to the problem. How can a man walk out of his own office?

I: You mean that's all you have to say?

Dr. Dreykopf: No, as a matter of fact. I must point out that your time is up and that you owe me \$250. Please let me have a check now. I don't like to waste my valuable time in preparing bills.

