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GAMBLING WITH CONSTRUCTION PROJECTS



Like many industries which are experiencing substantial growth, the gaming industry is finding itself more and more involved in large-scale construction projects, construction planning, and, unfortunately, litigation

related to defects in construction. Two central issues which drive construction in the gaming industry are the need to expand casino facilities based on volume of business and the desire to update facilities to remain competitive and modern. Both of these factors which motivate increased construction also motivate owners of facilities to try to complete projects as fast as possible. Unfortunately, at times, this need for expediency results in corners being cut by contractors, architects, and subcontractors. This need for speed also results in increasing need for facility owners to rely on a variety of professionals whose credentials are difficult to ascertain.

The avoidance of construction defect litigation begins with good planning in the construction process. Planning requires due diligence regarding the qualifications, experience, and customer references of the professionals a gaming facility may seek to hire. Litigation avoidance can also be accomplished simultaneously with the planning stages of construction by including an experienced construction attorney in the planning process. Just as there are many disputes and losses related to the defects in construction, there are also many lawsuits related to breach of contract during the construction process.

The issues related to construction in gaming facilities on private non-tribal lands are often affected, not only by the terms of the contract between the owner, architects and contractors, but also by local laws and applicable building codes. Construction on tribal lands, however, can require more complex documentation regarding the standards which will be followed in the construction. While it is true that some tribal communities are adopting their own building codes which often mirror governmental building codes, others, in the interest of sovereignty, avoid the adoption of building codes and, instead, seek to explain the building standards to be followed in the contract documents.

If the building standards to be followed in a building project are going to be set forth in the construction contract, something other than a

boilerplate contract from the architect or the general contractor is needed. A specific, detailed contract, other than a form contract from an architectural association or general contractor, is best. A specific contract should set forth in its specification not only materials to be used in features related to the construction, but also standards of care, liabilities, duties, and minimal industry standards to be met in this construction. Tribal organizations are becoming increasingly sophisticated on this subject, but many out of necessity are still more focused on expansion of the facilities rather than on laws related to construction. These groups, like groups on private lands, will benefit from the use of consultants and construction attorneys, not only in the planning process, but the inspection process of construction.

The Stucco Problem

Construction of gaming facilities on both tribal lands and private properties are often, for aesthetic reasons, using stucco exteriors. There is currently an explosive amount of litigation related to water infiltration with the stucco system com-

monly known as EIFS (Exterior Insulation and Finish Systems). EIFS stucco is, in fact, a system for applying stucco to building exteriors, most commonly commercial buildings in the North, Midwest and the West, which applies the use of layers of materials in construction of the exterior of the building. The gaming industry, both private and tribal, is unfortunately becoming a player in construction defect litigation relating allegations of water infiltration and building failure related to EIFS. Quite simply, the typical allegation is that water leaks in, at, or near building openings such as windows, venting sites, etc. Leaks behind the stucco exterior finish infiltrate to the sheathing of the building, which is often made of gypsum, resulting in water saturation, wall failure, and, in some cases, allegations of health-adverse mold. Newer methods for applying EIFS allow drainage behind the surface so that water is not trapped against the building and water damage can be avoided. Property owners of older systems, however, should maintain and inspect the exteriors so that in the event a defect exists, it can be discovered or corrected.

A very important consideration for owners of large facilities which are in the process of planning or constructing new facilities is whether proper methods are being applied in preventing water from being trapped behind the exterior covering of the stucco. Avoiding construction litigation related to water infiltration, whether it is related to EIFS, window failure, or some other construction defect, can be achieved through frank discussions, retention of consultants with experience in water infiltration and water damage issues, and proper inspections throughout the construction process. While it is true that many tribal lands do not require inspections by building officials during construction, even on private lands, the municipality building officials should not be relied upon to identify construction defects which could result in water infiltration. Instead, in a construction project which can often cost many millions of dollars, qualified professionals, independent of the general contractor, should be retained to inspect the work.

In the event that any owner of a gaming facility is unaware of the financial consequences of poor planning and poor construction, it should be noted that many of the smallest of these cases involve damages in the six figures and the typical cases with larger facilities involve many millions of dollars.

AVOIDING CONSTRUCTION LITIGATION RELATED TO WATER INFILTRATION, WHETHER IT IS RELATED TO EIFS, WINDOW FAILURE, OR SOME OTHER CONSTRUCTION DEFECT, CAN BE ACHIEVED THROUGH FRANK DISCUSSIONS, RETENTION OF CONSULTANTS WITH EXPERIENCE IN WATER INFILTRATION AND WATER DAMAGE ISSUES, AND PROPER INSPECTIONS THROUGHOUT THE CONSTRUCTION PROCESS.

Building Codes on Tribal Lands

As stated above, some tribal communities are adopting Building Codes for implementation on tribal lands (see, e.g., Saginaw Chippewa Tribal Building Code on the Isabella Reservation Community). The benefit of the adoption of Building Code on tribal lands is the security of construction standards and the simplification of construction contracts. If a Building Code has been adopted on the tribal land, it sets forth some minimum standards related to construction that do not have to be implemented, except by reference, in the construction contract. Without the adoption of a Building Code, complete recitation of the building standards must absolutely be included in the construction contract. Unfortunately, many contractors are going forward with multi-million dollar projects on lands that have neither an adopted code nor an explicit standard set forth in the contract materials. This becomes particularly difficult when contractual disputes arise regarding building standards.

Additionally, without the adoption of a Building Code or a provision in the construction contract relating to inspections, there is an absence of independent oversight regarding the construction

methods. If a tribal community makes the determination not to adopt a uniform Building Code, which, in some cases, is certainly reasonable, provisions in the contract for independent inspections as well as minimum standards for construction methods must be included. The most often forgotten aspect of a Building Code is the coinciding inspection process. If a tribal community makes a determination not to adopt any uniform standard or uniform Building Code but, instead, prefers to include said standards in their construction contracts, they can still set forth a procedure for an inspection process funded by the community. If there is not a specific department in the community which will be vested with the authority of construction inspections, independent consultants, typically a structural engineer, are best hired for this process.

One potential motivator to keep a consistent inspection process on tribal land, which includes an inspection official who is employed by the community, is that it insures that the inspection by an official familiar with the concerns of the community will acknowledge any issues related to respect for the land and other cultural considerations. Financing of such an official by the community

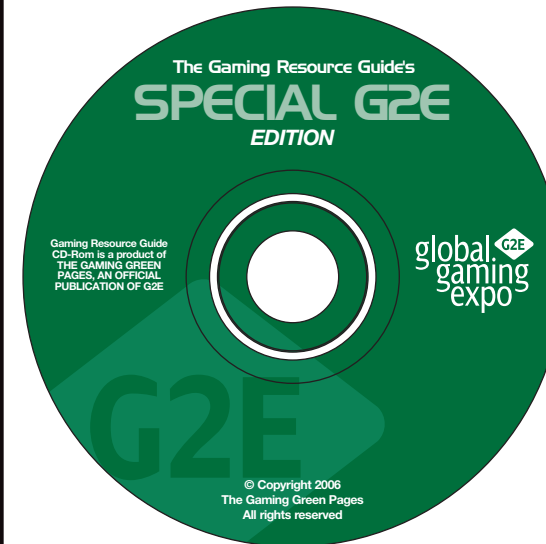
can often be accomplished through permit fees. The most important thing to remember is that each tribal community has different interests and values related to their own lands, different laws which they have adopted in the management of their lands, and different extraneous considerations, such as geography, climate, etc. Because of these differences and increasing litigation related to construction defects or other construction issues, constant stress on the "planning" phase of construction must be emphasized.

While this is just an overview of construction issues facing the tribal and non-tribal gaming communities, it hopefully reflects the complexity of the issue. Organizations faced with these issues are well advised to seek competent professionals for assistance.

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