

WHAT TO DO WHEN A DEVELOPER GOES UNDER

Kelly A. Cahill
Zukowski, Rogers, Flood & McArdle
50 Virginia St.
Crystal Lake, IL 60014
815/459-2050
kcahill@zrfmlaw.com







100 unit subdivision, only 10 houses built. Some of the public improvements built but not finished and the streets only have the first lift.

Developer informs you that the property is being foreclosed on by the bank. By now the streets are starting to fail.





No Problem: You have a letter of credit, so you call the letter of credit.

Uh oh: Before the bank pays on the letter of credit, you get a letter from developer's attorney stating that they are not in breach. Annexation agreement says they must have a letter of credit and they have one = no breach.



So you look at the letter of credit: No time frame listed for completing public improvements.

So you look at annexation agreement: Similarly no time frame listed for completing public improvements. Just that they have to have letter of credit in place.



So you look at Subdivision Ordinance: Again no time frame listed as to when public improvements should be completed.

Can't call the letter of credit. Stuck with failing roads and other public improvements.



LESSONS:

- Review Letter of Credit
- Utilize Public Improvement Completion Agreements
- Add Provisions to Code
- Review Language of Annexation Agreement



FORM LETTER OF CREDIT

- Create your own form letter of credit or review existing form.
- Don't rely on the developer's bank's form.



FORM LETTER OF CREDIT

- Letter of credit should have time frames of when public improvements should be completed or at a minimum it should refer to another agreement (like a public improvements completion agreement or annexation agreement) so that we can show when they are in breach. (Sample form in your handouts)
- Should include form letter of credit as part of your subdivision code.



TRACK LETTER OF CREDIT SO THAT IT DOES NOT EXPIRE



PUBLIC IMPROVEMENT COMPLETION AGREEMENT

- Agreement which outlines when the public improvements are to be completed signed by developer. (Sample in your handouts)
- Municipality agrees to sign the final plat of subdivision or approve the PUD plan upon the condition that the developer causes the streets, sewers, water mains, stop lights etc. be installed in a workman like manner and within a certain time frame.



PUBLIC IMPROVEMENT COMPLETION AGREEMENT

- Developer agrees to pay all contractors and material suppliers who furnish labor and materials
- Developer agrees to obtain lien waivers from contractors and subcontractors
- Developer agrees to maintain the public improvements until they are accepted by the municipality
- Developer agrees to post a bond or letter of credit



REVISIONS TO YOUR SUBDIVISION CODE

- Include a requirement that a developer executes a public improvements completion agreement.
- Add language stating:

In the event a required improvement does not meet the approved completion schedule or the completed improvements are deemed to be failing by the Public Works Director, the City/Village may draw upon the cash deposit, bond or letter of credit to complete those improvements.

When a schedule of installation dates has not been submitted and the improvements are not completed, or those completed are deemed by the Public Works Director to be failing the City/Village may draw upon the cash deposit, bond or letter of credit to complete those improvements.



ANNEXATION AGREEMENTS

Guarantees and Letters of Credit: It is understood that prior to the construction of any streets or other public improvements, Developer shall execute a Public Improvements Completion Agreement pursuant to the Subdivision Ordinance and shall submit the required plans, final plat, specifications and engineer's estimate of probable cost for approval by the Village Engineer and Public Works Director, as provided herein, after which and upon providing the required letter of credit or surety bond and after final plat approval and the issuance of a site development permit, the Owners/Developer may proceed to construct said streets and utilities. Upon installation of the base and upon completion of other portions of the improvements, the letter of credit or surety bond may be reduced to an amount, which in the opinion of the Village Engineer is sufficient to ensure completion of the work yet to be performed.



ANNEXATION AGREEMENTS

The Developer shall make all public improvements in accordance with the applicable final engineering plans, ordinances of the Village and pursuant to the terms of the Public Improvements Completion Agreement and this Agreement, which will be constructed in accordance with the preliminary and final plan. In lieu of any bond or escrow required by any ordinance of the Village in conjunction with the improvement or development of any portion the Combined Property, the Owners/Developers shall guarantee the performance and fulfillment of any such requirements by submitting a clean irrevocable letter of credit in favor of the Village in form and substance acceptable to the Village, issued by a reputable financial institution having assets in excess of \$100,000,000.00 in the amount of 120% of the cost of the improvements (as approved by the Village Engineer).



ANNEXATION AGREEMENTS

The Village shall reduce such securities within a reasonable time of the Owners/Developer' request and upon approval by the Village Engineer and Public Works Director. Owners/Developer agree not to request a reduction to any one letter of credit more than once every two months. The Village Engineer and Public Works Director will inspect the completed improvements or issue a denial within said period of time, informing the Owners/Developer specifically what corrections are necessary to allow the reductions.

Upon completion of all improvements and acceptance by the Village, the securities shall be released. A maintenance bond equal to 15 percent of the approved estimated cost shall be provided in accordance with the Subdivision Ordinance.



Letter of Credit vs. Surety Bond

Letter of Credit: Easier to collect.

vs.



Bonds: Hard to collect.



BUT

65 ILCS 5/11-39-3. Developer may choose what to submit.



BANKRUPTCY



- Affect Upon Letter of Credit

Courts have held that letter of credit is agreement between bank and municipality so that those funds cannot be touched to pay off developer's debts.

- Affect Upon Annexation Agreement

i.e., as part of annexation agreement, developer is supposed to donate land to municipality but then files for bankruptcy before land is donated.

What Happens?



No authority yet but seems unlikely that a court would allow trustee in a bankruptcy to enjoy the benefits of an annexation agreement, i.e., the zoning, use of municipal facilities, etc. yet not live up to the developer's obligations such as land donation.

Seek a subordination of mortgage signed by mortgagor.



BANKRUPTCY

Commercial Property

Going out of business sales. Your Sign Code/Regulations are out the window.

Bankruptcy Judge can trump local codes and allow:

- Going out of business signage
- Sandwich Boards
- Balloons
- Purple Gorilla, etc.



PROPERTY MAINTENANCE ISSUES

Involved with Foreclosures

- Review property maintenance codes to make sure you regulate everything you are allowed to
 - Weeds/tall grass
 - Accumulation of garbage
 - Dumping possessions out on front lawn
 - Building materials
 - Falling down buildings
 - Unsafe buildings
 - Can demolish. 65 ILCS 5/11-31-1 notices and court proceedings
 - Can acquire/eminent domain



Property Maintenance Issues cont.

● Liens

- Water/sewer (11-139-8)
- Weeds/long grass (11-20-7)
- Removal of garbage (11-20-13)
- Pest extermination (11-20-8)



Typically subordinate to mortgage foreclosures if filed after mortgage – Try to negotiate settlement with the lender.



OPTIONS



- Require builders to post an escrow at time of building permit to cover costs if property abandoned before it is completed. Authority?
- Vacant building ordinance (Part of Property Maintenance Code)
 - Require registry
 - Require vacant buildings be secure/maintained
 - Inspections of vacant buildings
- Create TIF District for blighted or undeveloped areas
- Impose an special service area to pay for unfinished public improvements


