Lowndes

Insights

Industry News Briefs: The Multi-family Sector Ends With a Bang In 2019

Article
01.15.2020

Happy New Year! Did I Miss My Chance at Opportunity Zones?

Opportunity zones were introduced in 2017 as part of President Trump's tax reform bill. Taxpayers with capital gains can receive several tax benefits if the taxpayers take those capital gains and invest them in a qualified opportunity fund. These tax benefits include deferring recognition of the capital gains and potentially avoiding recognizing any gain on exiting the opportunity fund investment. Another benefit is that 15% of the deferred gains is excluded from recognition when the deferred gains are triggered on December 31, 2026 if the qualified opportunity fund investment has been held for at least 7 years. More simply, to receive the maximum tax benefit of an opportunity fund investment, taxpayers needed to have made the investment by December 31, 2019. This has resulted in a common misconception that an opportunity zone investment has to be made by December 31, 2019 to receive any tax benefit. I am happy to say that this is not the case. Investments made after 2019 will receive the tax benefits of qualified opportunity zones except that when the deferred capital gains are triggered on December 31, 2026, a taxpayer will exclude 10% (as compared to 15%) of the deferred gains if the investment has been held for at least 5 years (if less than 5 years, the capital gains will be deferred but no portion of the gains will be excluded from recognition). In other words, if you have capital gains in 2020 that you are looking to reinvest, it is not too late and qualified opportunity zones continue to be a powerful tax investment vehicle.

New Year, New Insurance

Transfer of risk through insurance has become an increasingly important and complex part of construction and development in Florida. The US. Courts have shown an increased willingness to find that contractors' General Liability (GL) policies cover latent defects and warranty type claims that manifest as a construction defect causing resulting or ensuing property damage. As a result of a number of unfavorable court decisions

Related Attorneys

Alexander Dobrev
Michael R. Gibbons
Jon M. Gibbs
John D. Ruffier

Related Expertise

Commercial Leasing
Property Tax Appeals
Senior Housing
Tax

expanding coverage on General Liability policies, insurers have become more aggressive about modifying and limiting coverage through Endorsements issued to General Liability policies. These Endorsements frequently refer to contract terms in the underlying construction contract. Essentially, under such Endorsements, if the underlying construction contract doesn't have the "magic language" required in the Endorsement, then coverage will be lost or reduced from the optimum level expected by the Owner additional insured.

By way of example, many GL Endorsements now provide that if the underlying contract does not contain a term stating that the additional insurance is primary and non-contributory, then the contractors' GL insurance is considered excess and will not apply to provide a defense and indemnity for the additional insured until the additional insured's own coverage is exhausted. This frequently operates to frustrate the coverage expectations of both Owners and General Contractors who require others to name them as an additional insured. There are other similar insurer mandated contract terms that pose significant traps for the unwary additional insured in the construction world. If you have not had your construction related insurance provisions reviewed recently, the New Year is a good time to have us make sure your contract language is properly aligned with your expectations for insurance.

Medicare Will Affect Senior Housing Communities

Since the 1970s, Medicare beneficiaries have had the ability to receive Medicare benefits through private health plans (mainly Health Maintenance Organizations) as an alternative to the traditional Medicare program administered by the federal government. The Medicare Modernization Act of 2003 updated the program's name to its current moniker: "Medicare Advantage."

While the majority of people on Medicare remain in the traditional, government-run program, as of 2017 roughly 1/3 of those receiving Medicare (totaling 19 million people) were enrolled in Medicare Advantage plans. Further, Medicare Advantage plan enrollment is growing rapidly, with a tripling of Medicare Advantage participants in the 12 years between 2004 and 2017.

In April 2018, the Centers for Medicare & Medicaid Services finalized a policy allowing Medicare Advantage plans to cover certain non-skilled in-home care as supplemental benefits, paving the way for Medicare Advantage to become a payer for senior living services. In the wake of this policy change, several insurers that offer Medicare Advantage plans expressed a willingness to work more closely with senior living providers — including Anthem and Humana.

Ultimately, the benefit to senior housing owners and operators is still unclear as this new benefit rolls out, but a recent article in Senior Housing News suggests a surprising possible consequence: the entry of insurance companies into the senior housing sector in order to offer Medicare Advantage directly to customers. While only time will tell if such a tectonic change will occur, there is no doubt that the change to rules governing Medicare Advantage will affect senior housing communities.

The Multi-family Sector Ends With a Bang In 2019

The multifamily sector had another very strong year in 2019, with approximately 300,000 new apartment units delivered nationwide, which puts the year at or near the top of the current cycle. While 2020 is expected to be comparable in terms of deliveries, the overall demand and some leading indicators (such as permits for new construction) are expected to taper off. There is some concern that multifamily valuations and rent growth are

unsustainable at their current levels, as they have far outpaced income growth in the populations they serve.

The "new construction" condominium market in Florida has remained largely tepid during this cycle, with the exception of certain pockets popular with foreign cash buyers, as well as the super-luxury (millions of dollars per unit) type product. While in prior cycles condominium conversions have served as exit strategies for peak-valuation multifamily properties, it is unclear (and unlikely) that we will see much of that this cycle.

As we look towards 2020, all stakeholders should keep an eye on the Florida Legislature, which meets early (staring in January) due to the election, and is expected to take up a number of initiatives which may affect the multifamily and condo/HOA sectors. Stay tuned for more on this front from us as the legislative session gets into full gear.

I Need Licenses?

Businesses of all types make great efforts to enhance the consumer experience by providing entertainment in the nature of radio or television. What is generally intended to be a value-add for customers can actually be copyright infringement.

Music is generally protected by copyright. Composers of music also hold the right to the public performance of their works. Because it is difficult to individually monitor use of compositions, performing rights organizations (PROs) such as ASCAP, BMI, GMR, and SESAC, represent composers to police and license public use. While a composer may generally only be affiliated with one PRO, not all composers are signed to the same PRO, and some compositions require the license of more than one PRO.

If a business is displaying a television or playing music (via radio, internet, or even TV) in its establishment — even if it is paying for the signal, stream, or other content — the general rule is that a license is required as it is often considered a public performance. Note that a PRO can only license the works contained in the music catalog that it manages and no PRO has rights to license ALL music. Accordingly, a license may be needed from each of the relevant PROs.

There is some good news in that there are certain exceptions to the general rule requiring licensure, but the exceptions are very limited in application and require an analysis of the type of business, the square footage, the number of speakers and/or TVs being used. Sometimes a quick call to an attorney with knowledge in music licensing is all that is needed to determine whether there may be an exception.

If approached by a PRO seeking a license, the PRO should not be ignored. Avoiding a PRO could lead to legal action and adverse consequences could result. Statutory damages as well as attorney's fees and costs for the PRO are all a real danger.