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CONSTRUCTION LAW

The Role of Owner's Representatives

Often construction project owners—such as real estate developers, landlords and tenants—lack the requisite time or ability to oversee their project. As a result, many owners hire a firm or individual with such expertise, known as an “owner’s representative,” to assist and advise them throughout the project. Owner’s representatives are experienced in construction and leverage that experience to ensure the owner’s vision of the project is properly carried out by the design and construction teams.

Customarily, the owner’s representative assists the owner with the project from the earliest design phase through project



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close-out. During the design phase, the owner’s representative will represent the owner in meetings with the design team—assisting in creation of the budget and value engineering of the project. The owner’s representative then monitors the bidding process and aids in the selection of the construction team. Once construction commences, the owner’s representative will attend meetings on behalf of the owner, coordinate the project team, maintain the project schedule, and review the payment requisitions. At the end of the project, the owner’s representative works with the design and construction teams

to prepare and review the punch lists and facilitate close-out of the project.

Agency Relationship

Courts have held that owner’s representatives are agents of their project owners since they act on behalf of their project owners (See *Newman v. Town of York*, 140 A.D.2d 935, 936 (1988)). An agency relationship exists when one person—the principal—authorizes a second person—the agent—to deal with a third person on behalf of the principal. Specifically, “agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act” (Restatement (Second) of Agency §1 (1958)). The relationship between a project owner and an owner’s representative

is therefore governed by the principles of agency law.

One principle of agency law of particular note is that a principal is liable for the acts of its agent when the agent is acting within its scope of authority. In recognition of that liability, many project owners will indemnify their owner's representatives for claims that arise out of actions taken within the scope of authority granted. As indemnities of this sort are standard industry practice, a precise delineation of the owner's representative's scope of authority in any authorizing agreement is critical. For example, authorizing the owner's representative to "take all measures necessary to complete the project" creates a broad scope of authority — increasing the liability to the project owner. Instead, consider authorizing the owner's representative to act only with specific responsibilities to narrow the scope of the agency relationship and limit the project owner's potential exposure.

A project owner can recover damages incurred when its owner's representative acts outside of the scope of its authority, but

an interesting result occurs when the project owner is sued by a third-party for unauthorized acts. In such cases, courts have held that the injured party can maintain a claim against the project owner under a theory of estoppel if the third party reasonably believes the owner's representative was acting within its scope and if it would be

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unjust to not allow the injured party to rely on such a belief.

However, the third-party claim still arises from unauthorized actions by the owner's representative meaning the project owner may still be entitled to relief from the owner's representative. If the agreement between the project owner and the owner's representative is properly drafted (with a strong indemnity and a narrow scope of authority), the owner's representative may be required to indemnify the project owner and

even provide the initial defense against the third-party claim.

Conclusion

The owner's representative is typically hired early in the stages of construction and the agreement creating the relationship is often executed without careful review of scope of authority granted or consideration of the liabilities that authority could generate. When representing the project owner, ensuring the agreement contains both a properly delineated scope of authority and a comprehensive indemnity (covering acts both within and outside the scope of authority) is critical.