

HALL RENDER'S PRACTICAL HEALTH.



□ ILLINOIS HOSPITALS FACE MORE CHALLENGES TO PROPERTY TAX EXEMPTIONS
PAGES 1-2

□ HEALTH CARE CONSTRUCTION - THE POTENTIAL RISKS OF WAIVING CONSEQUENTIAL DAMAGES
PAGES 2-3

□ THE IMPACT OF HEALTH CARE REFORM ON INFRASTRUCTURE DEVELOPMENT PROJECTS
PAGE 3

Illinois Hospitals Face More Challenges to Property Tax Exemptions

An exemption is warranted if property is owned by a “charitable institution” and “actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit.”

On August 16, 2011, the Illinois Department of Revenue (the “Department”) denied property tax exemptions for three Illinois hospitals, sparking renewed interest in hospital-based property tax exemptions. The hospitals receiving denial notices were Decatur Memorial Hospital for its 2006 application, Edward Hospital for its 2007 application, and Northwestern Memorial’s Prentice Women’s Hospital for its 2007 application.

Unfortunately, the Department did not offer a detailed analysis of its reasons for denying the applications. Instead, the Department notified each hospital of the news by issuing denial letters stating that the property identified in each application was not owned by an exempt entity and did not qualify as an exempt use. The letters are likely referring to the requirements set forth in 35 ILCS 200/15-65(a), which states that an exemption is warranted if property is owned by a “charitable institution” and “actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit.”

During an interview conducted by the Associated Press, Mike Klemens, Manager of Policy and Communication for the Department, stated that the Department relied on guidance from the Illinois Supreme Court’s decision (presumably Provena Covenant Medical Center v. The Department of Revenue that was handed down in 2010), along with other court decisions and the Illinois constitution, when analyzing the facts of each application. Klemens noted that the Department is required to determine if each applicant is operating as a charity or a business, and while each of the applicants are not-for-profit corporations, some have for-profit entities in their organizational structures. Klemens stated that no dollar amount or percentage of revenue was used as a threshold to determine if a hospital is charitable or a business. Other than these brief statements, Department officials have been unwilling to provide any additional information about their decisions. [CONTINUED ON PAGE 2](#)





IL Hospitals Property Tax Exemptions (Continued)

Based on the brief explanations provided by the Department, one can only assume that the Department is relying heavily on the determinations made in the Provena decision. If that is the case, then Illinois hospitals should become familiar with the Court's decision. In Provena, a majority of the justices held that a not-for-profit hospital is not a "charitable institution" for purposes of 35 ILCS 200/15-65(a) if it receives nearly all of its funding by treating patients in exchange for compensation through private insurance,

Medicare and Medicaid, or direct payment from patients. The hospital must demonstrate that it derives most of its funding from private and public charity, including charitable donations. While a majority of justices could not agree upon a standard for determining when hospital property is used for charitable purchases, access to charity care was an important factor that was discussed at length. In light of the recent denials by the Department and the guidance issued in the Provena decision, hospitals should carefully

review their charity care policies. The Provena decision suggests that hospitals should make greater efforts to provide charity care to qualifying patients. A greater emphasis should also be placed on generating operating income from charitable donations. ■

Health Care Construction - the Potential Risks of Waiving Consequential Damages

Construction projects are usually exciting times for health care organizations. It typically means the organization is growing and its planning and hard work is coming to fruition. As part of that excitement, there is often ongoing planning regarding what occurs when the contractors turn the building over to the owner and the hard hats are no longer needed on site.

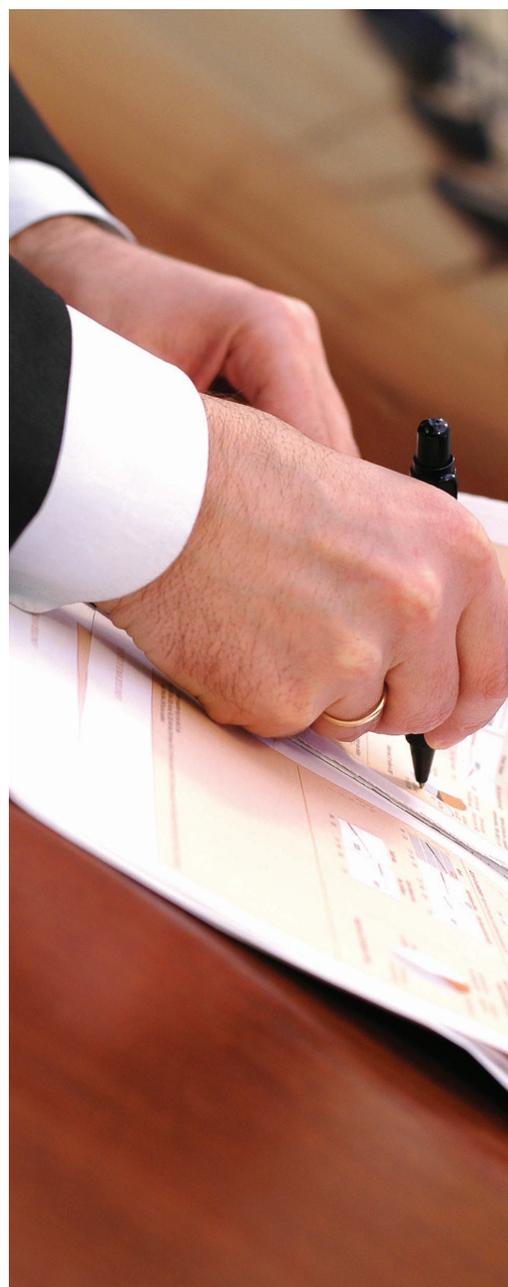
Health care entities become enthused about planning what happens next for their organizations when a building project finishes on time. The organization thinks about the logistics of moving into its new building or facility addition, when and how new services are going to be offered to patients in the new space by the organization, as well as when and how income will be realized to repay project financing.

But what happens if a contractor doesn't finish the project on time or damages occur that are not directly linked to, or flow from, an act of a contractor? Rarely considered, but the reality is there are a number of potential costly consequences a health care organization could face should a project take longer than anticipated or damages occur indirectly from an act of a party involved in the project.

For example, occupancy of a building is often planned far in advance. Changing the occupancy plans may have effects such as escalating moving costs and losing productivity of employees and their services set to occupy the new space. Not being able to use the space as intended may cause the organization to lose income it was expecting to generate by using the new space. An organization may miss out on obtaining medical reimbursement money or any other routine business income. Any loss of ability to generate income by using its new facility may cause problems with an organization's project financing.

Furthermore, being delayed in occupying new space may affect numerous health care specific issues such as facility licensure status and certificate of need (CON) requirements and status, or it may cause an organization to miss deadlines for certain code changes required in areas where particular services are provided. As well, if there is a problem with the building or its infrastructure, there could be resulting damage to expensive medical equipment.

CONTINUED ON PAGE 3





Health Care Construction - Potential Risks (Continued)

The ultimate question becomes who is responsible for these types of costs if they arise?

The answer is the health care organization may ultimately be responsible for these damages if the issue is not specifically or categorically addressed in the construction contract.

Contractual provisions that mutually waive the rights of the owner and contractor to recover consequential damages have become common-place in today's standard construction contract forms. Such express waivers are sometimes broad and other times specific. Either way, it is important for health care organizations entering into a construction project to understand the possible implications

of such contract language and who may be responsible for the myriad of costs that may arise if a project doesn't go exactly as planned. So what can health care organizations do to prevent the potential for loss? Consequential damage waiver language can be removed from the contract to allow state law to govern the issue – although you should understand how statutory and case law deal with the issue. Rather than waiving rights, an organization may consider negotiating the addition or revision of contract language that specifically appoints liability for such damages to the contractor.

In the end, no one can plan or realize every potential consequence that may arise should a health care construction project

not be completed on time. However, your health care organization should realize the potential consequences and plan accordingly, including ensuring that everyone understands the construction contract and its provisions guiding consequential damages. If your health care organization is considering a construction project, contact an experienced construction law attorney to assist you in contract negotiations and administration. By doing so, you'll protect yourself, ensure your organization doesn't get saddled with the burden of dealing with potentially critical consequential damages, and help ensure your project's success. ■

The Impact of Health Care Reform on Infrastructure Development Projects

The American Recovery Reinvestment Act (ARRA) and the Affordable Care Act (ACA) have caused health care organizations to plan for electronic medical records (EMRs), meaningful use, and the elements of an accountable care organization (ACO). Each of these topics could be discussed from many different perspectives, but how do they affect health care infrastructure development projects?

Health care reform can affect many aspects of infrastructure development projects: real estate, financing, design, construction, etc. As a result, this topic should play a significant role in any organization's planning for building new health care facilities or modifying existing structures.

As an example, one issue at the center of health care reform is the use, processing, and communication of information via IT infrastructure. In order for a health care organization to be able to implement changes to achieve the mandates of health care reform, organizations are undertaking infrastructure

development projects that incorporate the needs of IT. It is imperative that your information technology team have a seat at the design and construction table for any project, which can help prevent the need for changes during or after a project. You want to make sure the speed of technology evolution does not cause your IT systems and other health care equipment to be outdated before the project is finished. This can be accomplished via contract language with the architect and contractor to allow for the ability to design and construct

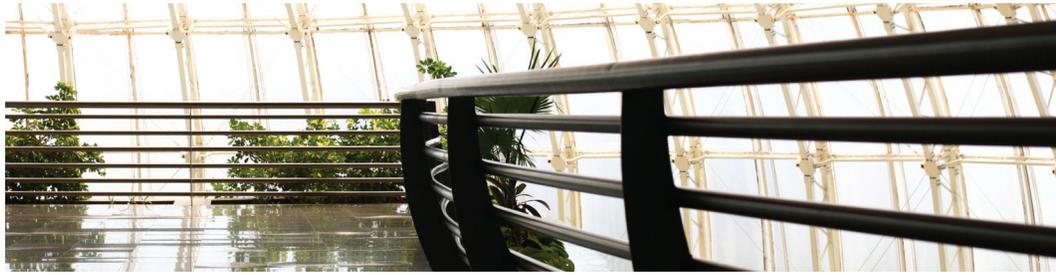
portions of IT infrastructure during the latter stages of projects.

Overall, the best way to account for health care reform in infrastructure development is planning. One of the best ways to plan is to make sure your contracts with your architect and contractor incorporate relevant requirements associated with health care reform and that the appropriate language provides protection to the organization. ■



ABOUT HALL RENDER

With more than 160 attorneys, Hall Render partners with clients to direct them through the ever-changing business landscape of today's health care industry. Health care is our business.



CONTRIBUTING AUTHORS



ANDREW DICK

Andrew's practice focuses on real estate transactions and environmental law. He advises hospitals, health systems, and physician practice groups on matters relating to the purchase and sale of real estate, commercial space leasing arrangements, office condominium developments, zoning matters, easements, and restrictive covenants. Andrew also advises clients on a broad range of environmental law matters, including compliance with regulations for the disposal of medical and hazardous waste, clean air and water permitting, regulatory programs for the clean-up of contaminated property, and the negotiation of environmental insurance policies. Andrew joined Hall Render after completing a Masters of Law in Real Property Development at the University of Miami School of Law in Florida in 2006.



BRIAN VEENEMAN

Brian is an associate in the Firm's construction law practice. He represents public and private construction owners, general and specialty contractors, material suppliers, design professionals, and bonding companies across the country on engineering and construction-related issues. His work involves counsel regarding contract drafting and negotiation and providing advice to project participants prior to commencement of the project. Brian graduated from the University of Louisville School of Law in 2005.



Hall Render has launched a blog providing comprehensive information on all matters relevant to health care, including real estate development, construction, finance, property tax exemptions, and general transactional issues.

The blog is a resource for individuals in and serving the health care sector. The blog can be found at blogs.hallrender.com and will provide timely and relevant legal and practical information.