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Nassau commercial property owners: Submit financial information or pay substantial penalty

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Section 6-30 of the Nassau County Administrative Code requires, upon the request of the board of assessors, that the owner of an income-producing property complete an Annual Survey of Income and Expenses (ASIE). If an owner fails to timely file the ASIE, they were previously subject to a civil penalty of $500 under the law. However, on December 27th, 2013 Nassau County approved a local law that amended the civil penalty associated with the failure to file the ASIE.

The amendment provides for a penalty "not to exceed one quarter of 1% (.25%) of the fair market value of such income producing property as determined by the assessor for the current fiscal year" if the ASIE is not filed by the April 1st deadline. This penalty increases to .5% if the ASIE is not filed by September 30th of that year. The penalty then increases to .75% if the filing is not made by September 30th of the subsequent year.

This means that if Nassau County values a property at a market value of $10 million and that property's owner does not file their ASIE form by September 30Â-th, they will be subject to a penalty of $50,000 and $75,000 if not filed the next year. Further, the law provides that such penalty will be a lien on the property, treated in the same fashion as a tax lien under the law.

The ASIE filing requirement brings to light the competing interests of the assessor and individual property owners. While the ASIE allows the assessor to compile current data regarding individual properties and develop market rates and trends, it places a burdensome and time consuming task upon property owners. In fact, many property owners see the requirement as an invasion of privacy into their company's books and records.

Property owners have further concern that their information will be used against them not only by the assessor to raise their assessment at a later date, but by competitors should the data end up in the wrong hands. Particularly troubling is the requirement that a rent roll be submitted which contains information that is closely guarded by owners, such as the name of the tenant, lease expiration dates, square feet occupied and rental terms. A valid concern exists as to whether a court could be persuaded to allow disclosure of the ASIE forms under the Freedom of Information Law (FOIL). While such a FOIL request should be rejected as it falls within statutory exemptions, such valuable data may very well entice someone to advance an argument that public access is warranted.

This year Nassau County is requiring the ASIE form be submitted electronically. This has raised questions as to where the data is compiled, who has access to it, and the manner in which it is stored. The department of assessment has systems in place to protect this information and use it strictly for their intended purpose, but in an age where companies such as Target and Adobe can have their data breached on a large scale, this fear is far from groundless.

There is doubt as to the value of this data as well. Under the law, the assessor is instructed to value the property in fee simple. This means the property must be viewed free and clear of current encumbrances and an estimate should be made as to what that property would currently generate in today's market. Property owners contend that a snapshot of annual income and expense statements often does not tell the full story of what is occurring at the property. Whether there is a below market lease from 15 years ago or an above market lease signed in 2007, income and expense statements only provide for what has been contracted to a property in a given year and are often not indicative of the property's fee simple value.

For this reason, property owners must make sure to closely examine their books and records and provide explanations for any item that may be an anomaly or incorrectly inflated due to a previous error and subsequent correction. Similarly, owners should not provide a cursory overview of their property's expenses, but rather use this submission as an opportunity to explain and detail the significant expenses involved with owning and operating commercial properties, which can fluctuate tremendously depending on capital costs and other variables.

Onerous tax laws and Orwellian oversight like that described above, whether subject to legal challenge or not, are at a bare minimum an unwelcome burden in the fiercely competitive arena of commercial real estate. While the assessor's intention of providing fair and accurate assessments is legitimate, the method chosen to accomplish this goal is questionable from a political, commercial and legal perspective.

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