September 21, 2020

This is suggested guidance to AIA-affiliated design professionals about consenting to design agreement rights being assigned to lenders.

1. Overview of Lender-Mandated Consents

Project lenders are increasingly requiring developers to obtain from design professionals a document variously titled as a “consent”, an “acknowledgment”, or a “certification” (referred to here as a “consent”), designed to govern such professionals’ future potential relationship with lenders, should owner/developers default. Typically, these documents require the design professional to agree to the following essential points, along with a host of more-minor points:

1. That, at the time any consent is executed, there are no defaults existing under the design agreement, and that should any developer defaults arise in the future, that the lender will be provided with an opportunity to cure such a default;
2. That the lender be allowed, though not required, to assume the developer’s obligations and rights, including the developer’s rights to use the design documents to complete the project under the terms set forth in the design agreement;
3. That the design professional will continue to work on the project on behalf of the lender, on condition that they be paid going forward under the terms set forth by the design agreement, to the extent not inconsistent with the loan documents;
4. Often, the design professional is required to not implement any changes to the project design or the design agreement without the lender’s consent;
5. The design professional is required to expressly subordinate any lien rights to the lender’s lien on the project.

These provisions are designed to ensure that should the project owner/developer default, lenders can be assured that the design professional continues work on the project, regardless of whether the developer remains involved.

1. Avoiding Unwarranted Expansion of Design Professional Responsibilities

These consents should be carefully reviewed and considered before a design professional executes one of them. Most importantly, design professionals should avoid executing any consent that expands their responsibilities on a project beyond the scope of the original design agreement, waives the right to made whole in the case of a default by the developer where money is owed to the design professional for past work, or that risks their insurance coverage.

For example, a consent may improperly increase the design professional’s standard of care, which could present a problem with insurance coverage in the event of a claim down the line. Design agreements generally require only that design professionals perform to the normal or recognized standard of care in the geographic area on a project. They generally do not require design professionals to perform above a professional’s standard of care. Any consent requiring a design professional to complete actions outside or above the professional standard of care should be edited and should not be executed until/unless the standard of care is brought back in line with what is set forth in the underlying contract.

A consent may also require the design professional to provide a warranty or a guarantee that would lead to them taking responsibility for the work of themselves or other project team members in such a way that could present insurance coverage issues. For a design professional to assume these types of risks would be outside the scope of the design professional’s services, and could present a coverage problem. For example, a consent may contain a guarantee that requires the design professional to warrant that the project was built exactly as the plans call for.

Similarly, a consent may unjustifiably increase the design professional’s contractual or legal obligations or risk. They may require the design professional to take responsibility for conditions that the design professional cannot easily determine (x-ray vision anyone?). Again, for example, any consent that requires a design professional to inspect and certify a general contractor’s completed work creates obligations and risk that are often problematic.

1. Intellectual Property Rights in Drawings, Plans, and Specifications

A further set of issues involves ownership of drawings, plans, and specifications created by the design professional. Generally, design professionals, in their agreements with developers, should try to the extent possible to retain full ownership of their drawings, plans, and specifications, mainly so they may use these items for future projects without needing to obtain the new owner’s consent. The other option is that if the agreements are completely silent on these issues, the design professional would retain all intellectual property rights to their work product.

Lender assignment agreements take a wide variety of approaches to restricting a design professional’s work. Some lender assignment agreements are silent about ownership of drawings, plans, and specifications by a project developer, or do not require their transfer. These agreements present no issue on this point.

Concerns do arise in situations where a lender’s assignment agreement with project developers requires the transfer of ownership of the design professional’s work/intellectual property. If this is the case, there must be consistency between the lender’s assignment and the design agreement. If the design agreement already transferred or otherwise restricted/transferred ownership of the design professional’s work to the developer, this should not be a problem.

A problem does arise where a lender agreement requires the transfer of ownership of the design professional’s work, but the design agreement does not. In that case, the lender will need to get the design professional to separately consent to the transfer of the design professional’s work.

1. Payment Rights

Design professionals should also specifically ensure that their payment rights are protected by an assignment. Generally, a lender taking control of a project from the developer will comply with the design agreement payment obligations prospectively if the design professional will agree to continue to provide services.

But if the design professional is owed an unpaid balance by the developer, they should ensure that the developer or lender pay off any outstanding balance before the design professional continues their services and make sure that the consent does not waive this right. Otherwise the design professional could be stuck with continuing to work on a project and get paid going forward but be stuck with some large balance on money owed by the developer with no way to be made whole.

1. Proposed Design Agreement Language

To further the protection of design professional rights, we suggest that they place variations of the following language into their design agreements, if possible:

“Assignments

Developer may assign its rights and responsibilities under this agreement only with the consent of the Design Professional, with such consent not to be unreasonably withheld. Any expense incurred by Design Professional arising from the assignment shall be paid for by Developer or Developer’s assignee as an additional service under the terms of this Agreement.”

1. Model Assignment

Attached is a model assignment that we have prepared for potential use by design professionals on future projects. This can be proposed to lenders in response to lender requests, or can be used as a checklist.

Very truly yours,

COLLINS COLLINS MUIR + STEWART LLP

**DESIGN PROFESSIONAL'S CONSENT**

The undersigned (“Design Professional”) consents to the assignment of that agreement titled \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, (“Design Professional Contract”) dated *\_\_\_\_\_\_\_\_* between Design Professional and *\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_* (“Developer”), pursuant to the Assignment of Design Professional Agreement dated as of *[date]* (“Assignment”) by Developer to \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Assignee”), to which reference is made for the definition of capitalized terms not otherwise defined in this Exhibit; and, in order to satisfy a condition of the Assignee to enter into the Loan Agreement with Developer described in the Assignment, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, agrees as follows:

**Section** **1**. **Continuation of Performance.**

On written notice to Design Professional of an Event of Default under the Deed of Trust or any of the Loan Documents and at the request of Assignee, Design Professional will continue performance on behalf of Assignee under the Design Professional Contract in accordance with its terms, provided that Design Professional continues to be paid per the contract and that any default is promptly corrected by either Developer or Assignee with respect to Developer's obligations under the Design Professional Contract.

**Section** **2**. **Right to Perform.**

On written notice to Design Professional of an Event of Default under the Deed of Trust or any of the Loan Documents, Assignee may require Design Professional to continue to work under the Design Professional Contract. If, but only if, Assignee requires Design Professional to continue work under the Design Professional Contract, Assignee will perform the obligations of Developer under the Design Professional Contract, including but not limited to payment obligations. Design Professional will accept such performance in lieu of performance by Developer in satisfaction of Developer’s obligations.

**Section** **3**. **Notice and Cure Rights.**

Design Professional will not terminate the Design Professional Contract on account of any default of Developer without written notice to Assignee and first providing to Assignee a reasonable opportunity, but not less than thirty (30) days, to effect a cure of the default or to declare Developer in default under the Loan Agreement or any of the Loan Documents and cause the completion on construction of the Property. If Assignee elects to complete the Property, Design Professional agrees not to terminate the Design Professional Contract as long as the defaults of Developer are cured by Assignee within a reasonable time. Nothing in this, however, will require Assignee to cure any default of Developer under the Design Professional Contract, but will only give Assignee the option to do so. If the Assignee elects not to cure the default, Design Professional will not be required to continue any work under the Design Professional Contract except work for which it has been paid.

**Section** **4**. **Obligation to Perform.**

Design Professional will diligently continue to perform its services under the Design Professional Contract, regardless of any dispute arising with the Developer or any other person or entity, so long as the undersigned Design Professional is paid for all work in accordance with the terms of the Design Professional Contract and no default exists with respect to Developer’s obligations.

**Section 5. Intellectual Property Rights**

Intellectual property rights shall be handled as set forth in the Design Professional Contract.

**Section** **6**. **Design Professional’s** **Representations, Warranties, and Covenants.**

Design Professional represents to Assignee that:

1. the Design Professional Contract is valid and enforceable, to the best of Design Professional’s knowledge;
2. if a prior assignment, amendment, or modification of the Design Professional Contract exists, Design Professional shall use reasonable efforts, including execution of applicable consents, to cooperate with Developer’s efforts to subordinate such assignment, amendment, or modification to this document; however, Developer hereby agrees and covenants that it shall be solely responsible for obtaining such subordination;
3. neither Design Professional nor, to the best of Design Professional's knowledge, Developer is in default under the Design Professional Contract;
4. all covenants, conditions, and agreements have been performed as required except those not due to be performed until after the date of this Assignment, and
5. Design Professional is duly licensed to conduct its business in the jurisdiction where the construction is to be performed and will maintain the license in full force throughout the life of the Design Professional Contract.

Dated:

|  |  |  |
| --- | --- | --- |
|  | DESIGN PROFESSIONAL: | |
|  |  | |
|  |  |  |
|  | By: |  |
|  | Name: |  |
|  | Its: |  |

Dated:

|  |  |  |
| --- | --- | --- |
|  | DEVELOPER: | |
|  |  | |
|  |  |  | |
|  | By: |  | |
|  | Name: |  | |
|  | Its: |  | |

Dated:

|  |  |  |
| --- | --- | --- |
|  | ASSIGNEE: | |
|  |  | |
|  |  |  |
|  | By: |  |
|  | Name: |  |
|  | Its: |  |