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## Real Estate Law and Practice: Symposium Issue Foreword/ Introduction, 47 J. Marshall L. Rev xxiii (2013)

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# REAL ESTATE LAW AND PRACTICE: SYMPOSIUM ISSUE FOREWORD/INTRODUCTION

VIRGINIA M. HARDING

The articles in this Real Estate Law & Practice symposium issue derive from the extraordinary 13th Kratovil Conference on Real Estate Law & Practice presented by the Center for Real Estate Law “Adaption of the Built Environment to Achieve Resilience to Climate Change” on September 26, 2013. The 13th Kratovil Conference continued the tradition of bringing together both academics and nationally known practitioners to reflect on significant issues that currently face the commercial real estate community. The Kratovil Conferences acknowledge the significance of the law in shaping the environment in which the commercial real estate industry develops, owns, operates, and occupies commercial real estate.

The 13th Conference took place at time when the public was starting to realize that climate change was in fact real; when climatic events such as floods, storms, fires, droughts, and extreme heat were damaging our built environment and infrastructure and when costs to repair such damage were staggering. This is the context in which the Center for Real Estate Law organized a conference to take an interdisciplinary look at what would be needed to adapt the built environment to make them better able to withstand climatic events. The increasing magnitude of the losses sustained has made adaptation a matter of great urgency. This Conference looked to focus attention of real estate attorneys and real estate professionals throughout the country on the increasingly urgent issue of adapting buildings, structures, and infrastructure to be resilient to climatic events.

The day-long Conference featured scholars as keynote speakers. For a Conference grappling with the need to adapt because of climate change, it was appropriate to open with a presentation by a scientist. Thus, we first heard Dr. Rosina Bierbaum, Professor of Natural Resources and Environmental Policy from The University of Michigan, give the scientific perspective, “Adaptation to Climate Change: What is Being Done, What Could be Done and What Is Being Ignored.” The next speakers examined the role of government in adaptation. Robert

R.M. Verchick from Loyola University New Orleans School of Law considered the question of “Is FEMA Climate Change Ready?” Next, Alice Kaswan from The University of San Francisco School of Law looked at “Climate Change Adaptation, Land Use, and the Federal Role. Lastly, Sean Hecht from the UCLA School of Law discussed “Local Governments Feel the Heat: Principals for Local Government Adaption to the Impacts of Climate Change.”

Over lunch the audience heard a presentation on adaption from the European perspective. This segment was introduced and moderated by Rada Doytcheva who arranged for Jorn Walter, the Chief Urban Planner and Architect for the Free and Hanseatic City of Hamburg, Germany, to present “Hamburg: A Case Study of Adaptation of the Built Environment.” Professor Water’s case study was discussed and commented upon by a panel comprised of: Lois Vitt Sale, Wight & Company; Margaret Gallagher, M.G.A.; and Richard A, Redmond, Holland & Knight (Chicago).

One of the unique features of Kratovil Conferences is the participation of practitioners and industry professionals who comment on and add their perspectives on the issues raised by the academic speakers. Panels further help to underscore the national focus of the Kratovil Conferences, but also insure that practical implications are presented.

Conference attendees next heard presentations on financing adaptation (because nothing can be accomplished without money being spent). Jonathan Rosenbloom from Drake University Law School presented “Going Dutch: Public/Private Collaboration in Funding Adaptation of Local Infrastructure to Climate Change” while Carl J. Circo from the University of Arkansas School of Law considered “Using Development Financing Tools to Help Cover the Costs of Adapting to Climate Change in Tornado Alley.” Peter Kochenberger from the University of Connecticut School of Law discussed the issue of adaptation and insurance in his presentation “Insurance and Climate Change: Spreading, Regulating and Avoiding the Risks” Celeste M. Hammond, Conference organizer and Director of the Center for Real Estate Law at The John Marshall Law School, concluded the program by considering the impact that climate change would have on transactional attorneys in her presentation: “Emerging Role for Transactional Attorneys Responding to Client Needs in Adapting to Climate Change.”

The morning panel featured Deborah Rosenthal from the Orange County, California office of Sheppard Mullin, Shari Shapiro from the Cherry Hill, New Jersey Office of Cozen O’Connor, and Carl Adrianopoli from the Chicago office of the United States Department of Health & Human Services. The afternoon panel featured Dan Slone from the Richmond, Virginia office of McGuireWoods LLP, Lorence Slutzky from the Chicago firm of Robbins Schwartz and Janet Johnson from the Chicago

firm of Schiff Hardin LLP. Both panels were moderated by Virginia Harding.

The 13th Kratovil Conference was a reality thanks to the sponsorships that the Center for Real Estate Law obtained. The Center is especially grateful to the Alvin H. Baum Family Fund and to Chicago Title Insurance Company, National Commercial Services – Chicago for their gold level support. The Center also received and greatly appreciates support provided by: Clarion and McGuireWoods at the silver level, Rada Architects, The Pape Law Firm, Thomas N. Harding and Associates, Cozen O'Connor, Haddad Law Firm and Robbins Schwartz at the bronze level as well as sponsorships from Wight and Schiff Hardin LLP. The willingness of these law firms and real estate industry professional firms to support and provide sponsorships for the Conference is appreciated.

The seven articles and essays in this symposium issue were submitted by Kratovil Conference keynote speakers and expand upon the presentations given at the Conference. The Center for Real Estate Law does not require that speakers deliver their articles on the day of the Conference, because it believes that the interaction between the participants at the Conference results in published articles that more fully address the issues initially considered at the Conference.

The essay submitted by Professor Rosina Bierbaum, entitled “Adaptation to Climate Change” was adapted from her Kratovil Conference presentation and includes some of the graphic illustrations shown at the Conference. Her presentation and essay enables readers to understand the science behind climate change and how humans are changing the Earth’s climate. Bierbaum points out that climate change resulting in extreme heat and droughts in various places throughout the world has caused food prices in parts of the world to increase. This point, alone, illustrates the interconnectedness of climate change beyond the confines of what we usually include in the characterization of commercial real estate. Bierbaum notes that in the United States adaptation measures are “nascent” but growing at many levels of government and that Americans are not yet dealing well with today’s extreme climate events.

Robert R.M. Verchick and Lynsey R. Johnson (2014 J.D. Candidate and Disaster and Recovery Planner for the State of Wisconsin 2007-2011) in “When FEMA Heads for the Hills: Climate Retreat, Disaster Recovery, and the Biggert-Waters Floor Insurance Reform Act” start with the premise that the traditional human impulse to stay put is eroding in light of FEMA policies that encourage retreat over other alternatives to put humans and their properties out of harm’s way. Their article considers retreat as a strategy of hazard-risk reduction. Attention is also given to FEMA’s evolving retreat strategies as part of the nation’s climate

adaption efforts. After setting forth six principles that should guide retreat implementation and considering ways that FEMA is encouraging retreat based options, these authors conclude that there is still a long way to go.

Alice Kaswan's essay "Climate Change Adaptation and Land Use: Exploring the Federal Role" looks at land-use federalism, which she sees as necessary because the existing reliance on local controls is unlikely to provide a sufficient response to climate change. She identifies functions that are essential to improving the ability of land use law to support adaptation. The federal role she espouses is federal assessment and planning with local implementation because the effects of climate change are local, not national. She, like other authors, makes note of the huge risks and burdens that climate change is imposing on local governments that they are unable to manage alone.

Sean B. Hecht in "Local Governments Feel the Heat: Principles for Local Government Adaptation to the Impacts of Climate Change" begins by recognizing that local governments are on the front lines of addressing the impact of climate change. Hecht proposes seven governance principles to help local governments meet the burdens imposed by climate change. Beginning with understanding the community vulnerabilities and recognizing the uncertainties inherent in planning, he suggests the use of existing evaluation tools with public participation to plan for adaptation. Noting that there is no "law of adaptation to climate change," Hecht reminds us that local governments have an array of useful powers, such as land use planning and building codes that can result in a resilient built environment. This local power can be enhanced by state and federal acts, regulations, and initiatives. Hecht explains that positive synergistic interactions between local governments can advance adaptation. His concluding principle is the need to reduce the vulnerability of those who rely on the local government for health care, transportation, and social services. He, like other symposium authors, makes the point that local governments are uniquely situated to address and deal with the social disruptions of climate change and other disasters.

Jonathan Rosenbloom in "Funding Adaptation" considers the basic but fundamental question of how local governments are going to pay for adaptation. His article begins from the premise that adaptation will cost an enormous amount of money. He notes that while the literature suggests what can be done to make adaptation a reality, very few set forth the strategies to provide the funding. Adaptation projects, unlike the usual projects undertaken by governments, are not intended to result in economic growth and development, but instead are intended to preserve and protect what already exists. This adds complexity to the use of municipal bonds to provide the needed funding. He

suggests that use of public private partnerships to provide new sources of capital and provide incentives for investments in such projects. Performance based bonds are suggested as a possible solution to fund adaptation.

Carl J. Circo in "Using Development Financing Tools to Help Cover Costs of Adapting to Climate Change in Tornado Alley and Beyond" writes from the perspective of someone who lives and works in the section of Middle America known as "tornado alley." Circo, like other authors, recognizes that while adaptation is possible, the ultimate question is *how will communities find the money to pay for adaptation?* In this article he discusses whether communities can use development fees such as impact fees and linkage fees to pay some of the costs of adaptation. A major part of his discussion is an examination the prospects for disaster impact and linkage fee programs in light of two lines of judicial limitations. The first is the exaction branch of the U.S. Supreme Court's land use cases, and the second is the rational nexus standard of state land use law. He concludes that use of these fees will pose a quandary since they will need to avoid or survive heightened judicial scrutiny.

Joseph MacDougald and Peter Kochenberger in "Insurance and Climate Change" write at a time when climate change challenges the insurance industry's willingness and ability to insure businesses and properties most likely to be impacted by climate change. They begin with a discussion of the recently decided first generation of climate change cases noting that more climate change cases have been brought in the United States than in the rest of the world. They further note that the United States alone holds greenhouse gas emitters liable for the harms caused.

The stated goal for the article is to synthesize the developing world of climate law with insurance industry practice and policy. To do this, they discuss a variety of the roles, risks, and opportunities insurers confront today. The insurance industry confronts climate change in two very different ways. First, insurers own and rent much real estate to house their employees throughout the world. In their role as property owners and as tenants, the structures they own and occupy are subject to climate related risks including hurricanes, tornados, blizzards, hail, and floods. Second, as insurers, it is their business to underwrite and provide property insurance coverage. Climate change challenges the risk calculations underwriters make by injecting uncertainty as to when, where and how losses will be caused by climatic events. On the other hand, it is the underwriters' ability to insure or not insure risks or structures that gives insurance companies the ability to play a major role in climate change adaptation. While a property owner may decide not to provide insurance coverage for themselves, insurance is a prerequisite for loans secured by real estate thus making insurance mandatory for

almost all property owners. Concluding with a review of insurance company websites, MacDougald and Kochenberger comment on the significant difference between the positions taken by European and American insurers. American companies, unlike their European counterparts, frequently avoid the matter of climate change entirely.

Celeste Hammond in “The Evolving Role for Transactional Attorneys Responding to Client Needs in Adapting to Climate Change” focuses on what the transactional attorney must know and then do in response to climate change. This article is written from the perspective that climate change and adaptation to it are topics that transactional attorneys have just started to recognize as being significant for the real estate industry. Hammond first examines and defines the distinct role of the transactional attorney and later uses a case study to illustrate how the role of the transactional attorney is evolving and expanding.

This article provides a road map for the transactional attorney who has come to realize that climate change is another item that must appear on transaction checklists. The article includes a description the impacts of climate change, the identified risks that transactional attorneys must take into account and a working definition of adaptation that transactional attorneys will find helpful.

Like other symposium authors, Hammond considers the costs and barriers to adaptation and the impact that the insurance industry will have on adaptation as the real estate industry undertakes to manage the risks of climate change. She also discusses climate change as a catalyst to thinking about emerging law. Like other authors she recognizes that the local role will increase but she also sees that attorneys will need to be more collaborative and nimbly work as part of teams. Hammond includes a transactional case study that illustrates the impact of taking adaptation to climate into account when developing a project in the post Hurricane Sandy world. Working her way through the many checklists that a project requires – acquisition, financing, and leasing – it becomes clear that climate change will impact on all aspects of project development. Her transactional case study underscores just how important it is for transactional attorneys to learn about climate change adaptation. Hammond’s final point is simple to state but not easy to answer: “How Will Transactional Attorneys Learn About the New Climate Change Adaptation Law?”

The Center for Real Estate Law hopes that the ideas raised at the 13th Kratovil Conference and in the articles published in this symposium issue will initiate discussions within the real estate industry about adaptation to climate change. The Center further hopes that the ideas in these articles will enable transactional attorneys to be better prepared to work with real estate clients –

clients that are just beginning to recognize that they must adapt their buildings, structures, and infrastructure to be more resilient to climatic events.