

Leisure Law Insider (Vol. 1) - Fall 2023

Fall 2023



Welcome to the first edition of The Leisure Law Insider, brought to you by Akerman's *Chambers* ranked Hospitality Sector Team! It will be released quarterly, covering the latest news and developments in leisure and hospitality law, regulation, and policy. Expect content on hotels, franchising, labor and employment, licensing, branding, and more, with our insights and analysis on why this news matters to you. If you have suggestions or questions about the newsletter, email us at LeisureLawInsider@akerman.com.

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- [Q&A With Pinnacle Advisory Group's Rachel Roginsky and Gary Avigne](#)
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Make the Case: Anti-Assignment and Anti-Delegation Clauses in Hotel Management Agreements

KEY TAKE

With the increasing number of mergers and acquisitions occurring within the hospitality industry, hotel owners and operators will need to pay attention to the developing caselaw determining the effect of anti-assignment and anti-delegation provisions in HMAs.

Anti-assignment and anti-delegation provisions in hotel management agreements (HMAs), as in other contracts, ensure that the parties to the contract cannot be replaced without consent, preserving the relationship between the contracting entities to be exactly what they bargained for. Such provisions are of paramount importance in the context of HMAs, given these contracts usually involve the provision of personal services. Personal services contracts — i.e., those involving personal skill, trust, or confidence — are generally not assignable without consent from the other party to the contract.

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Maryland Statute Under Fire – Court Substantially Narrows Application in Matter of First Impression

KEY TAKE

The Maryland statute has become an obstacle to

hotel owners seeking to terminate long-term hotel management agreements that incorporate Maryland law.

On January 12, 2022, the Maryland Circuit Court for Howard County dismissed a hotel manager's counterclaim for specific performance of the management agreement and upheld a hotel owner's right to seek rescission of a hotel management agreement limiting – for the first time – the application of Maryland Code of Commercial Law Section 23-102, which states a Maryland court can issue orders of specific performance compelling hotel owners to continue to employ their unwanted hotel managers.

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The Changing Climate: Factoring Sustainability in Hotel Due Diligence

KEY TAKE


Climate change risks should be factored into the underwriting of hotel projects.

Changes in our climate have created drastic increases in flooding, fires, heat waves, and droughts. It seems that so-called “hundred year storms” are being experienced on a yearly basis. Coastal areas have experienced severe damage from flooding and high winds, and extreme heat and drought conditions have devastated California as well as interior states. Unfortunately, current projections suggest that these conditions are bound not only to continue but also to worsen in the coming years.

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How City Planning Commission Special Permits Are Hindering New York's Hotel Scene

KEY TAKE

 *A cumbersome process for special permits is preventing hotel developers from meeting hotel room demand in New York's billion-dollar hotel industry.*

As New York City's tourism and hospitality sectors continue their post-pandemic recovery, the demand for new hotel rooms may be difficult to meet due to changes in the city's zoning laws over the past several years. These zoning text amendments have eliminated most as-of-right transient hotel developments, conversions, or enlargements in all areas of the city. Instead, new hotel projects require a special permit from the City Planning Commission (CPC) – a discretionary land use action that is subject to public review and influence from various civic organizations and interested trade groups.

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Q&A With Pinnacle Advisory Group's Rachel Roginsky and Gary Avigne



Rachel Roginsky, ISHC, is the owner and founder of Pinnacle Advisory Group, with more than 40 years of experience in hospitality consulting.



Gary Avigne is a senior advisor and the director of asset management at Pinnacle Advisory Group, with more than 30 years of experience in the hotel industry.

Ms. Roginsky and Mr. Avigne provide advisory services in all facets of hospitality real estate, including litigation support and expert testimony.

Q: Pinnacle has provided expert witness services to Akerman in the past. Can you give us some insight into what has been keeping you busy lately on the

litigation support side of Pinnacle's advisory services?

A: Pinnacle provides a very broad scope of services under the umbrella of litigation (avoidance) support. Recently, we have provided advisory services in connection with potential dispute resolutions involving hotel managers and hotel owners where both parties wish to avoid significant legal fees. In these types of assignments, we are asked to assess the hotel's operations — from human resources items, to sales and marketing, to accounting — in order to help bridge the gap of the dispute. In fact, it is often the case that the owner's frustrations with the performance of its operator may not rise to the level of a breach of the hotel management agreement but are significant enough to create a lot of challenges between the owner and the operator.

In order to assess the hotel operation and figure out the best path forward for both parties, we try to use as many benchmarks as we can find from a factual perspective. This includes evaluating STAR (STR) reports and the position of the hotel within the market relative to its concept. We look at trends using HOST or CBRE statistics in order to determine margins for things like food and beverage revenue and occupied versus available room statistics. This is not an exact science, but, rather, all these data points help to create a story. This story also includes delving into what kind of sales and marketing activity efforts have been pursued by the operator and whether the operator uses the services of a third party marketing company. We look at whether the business practices at the hotel property are industry standard. For instance, is there a monthly performance review meeting between the owner and the operator in order to review the sales and marketing reports and initiatives?

We have been involved in many situations where there is a HMA in place and the HMA is really misaligned as it relates to the objectives of the owner and the operator such that it would be

disproportionately to the advantage of the operator where the performance was disappointing, at best, but doesn't fail a performance test. In that case, the owner often sees no other choice but to live with poor performance because the owner entered into a management agreement that was somewhat ill-advised. This is why it is so important for owners to not just be represented by counsel during HMA negotiations, but that owner's counsel is experienced in reviewing and negotiating HMAs.

However, even in these cases where the HMA disproportionately favors the operator, we are often able to help the parties find a productive path forward. Due to the fact that there are a lot of generalities in HMAs, it can be difficult for an owner to point to anything in detail as it relates to a potential breach. What we are often able to do is expand upon those generalities such as "industry best practices" — which is one of those phrases that isn't usually defined in a hotel management agreement. Our extensive experience in the hospitality industry allows us to opine as to what those industry best practices are and evaluate which of those practices are being done and those that are not. This type of analysis is often sufficient to bring the parties to the negotiating table.

Q: Outside of litigation support, are you noticing any trends among the other advisory services provided by Pinnacle?

A: Litigation support is actually only a small part of our business. On the advisory side, which is the bulk of our work, we are doing market and financial due diligence for new hotels. In contrast, we are not seeing acquisition due diligence (which had been a big part of our business) because there are not a lot of transactions happening.

Interestingly, of the 20 advisory projects we are currently working on (and not including our asset management work), 90 percent of these engagements are for new hotel construction. This is

surprising to many because the cost of construction and interest rates are so high right now. These market studies need to start now, however, because developers want to have the hotel open in three to four years. Our work is all part of the planning process. These developers are not going to go get financing today, but have to start somewhere.

There are other reasons why we are currently so busy with market study engagements. The timing of the COVID-19 pandemic plays a role. For two years developers were sitting on the sidelines. Now that the pandemic is behind us, hotel developers want to get started on new projects.

Another reason for the interest in new hotel construction is spurred by the fact that the major hotel companies have added many new brands to their portfolio. For instance, Marriott now has approximately 35 brands and both Hyatt and Hilton have 20+ brands. When these hotel companies announce a new brand, they also hire a development person to help grow the brand. In three to four years, we should expect to see many more new hotels open.

Q: As it relates to the market study work that you are doing, is there one specific type of hotel that your clients are asking you to evaluate?

A: Yes. There is a tremendous amount of interest in hotels that service leisure markets — and these clients are most interested in independent boutique hotels and soft brands. Leisure travel is what helped the hotel industry recover from the COVID pandemic and many of these trends are here to stay. Room rates in many leisure markets have doubled from what they were pre-COVID, although we are now beginning to see some pullback. In any event, the leisure market remains top of mind and it is an exciting time for new construction and the expansion of new hotel brands.

The Lounge

Trivia Question:



Can you guess the hospitality term? The first five readers who guess correctly will receive a special Akerman gift.

Please send your answers to LeisureLawInsider@akerman.com by Wednesday, November 1st.

Upcoming Events

- [Akerman Sponsors the Georgetown Hotel and Lodging Legal Summit \(October 25-27, 2023\)](#)

The Leisure Law Insiders – Issue #1



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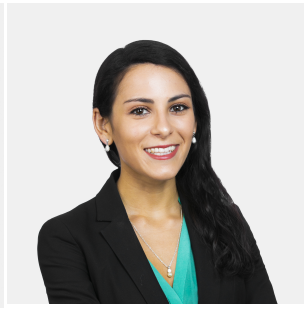
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