



DEVELOPERS  
DIVERSIFIED  
REALTY\*



LETTER OF COMMENT NO. 108

August 8, 2008

**By Electronic Delivery to: [director@fasb.org](mailto:director@fasb.org)**

Mr. Russell G. Golden  
Technical Director  
Financial Accounting Standards Board  
401 Merritt 7, PO Box 5116  
Norwalk, Connecticut 06856-5116

**Re: Proposed Statement of Financial Accounting Standards – Disclosure of Certain Loss Contingencies, an Amendment of FASB Statements No. 5 and 141(R) (File Reference 1600-100)**

Dear Mr. Golden:

Developers Diversified Realty Corporation is pleased to have the opportunity to provide our comments on the Proposed Statement of Financial Accounting Standards – Disclosure of Certain Loss Contingencies (the “Proposed Statement”) for consideration by the staff.

Developers Diversified Realty Corporation (“DDR” or the “Company”) is a self-administered and self-managed real estate investment trust (a “REIT”) based in Cleveland, Ohio. The Company is in the business of acquiring, expanding, owning, developing, redeveloping, leasing and managing shopping centers in 45 states, plus Puerto Rico, Canada, Brazil and Russia. At June 30, 2008, the Company had total assets of \$9.3 billion and stockholders’ equity of \$2.9 billion. For the six months ended June 30, 2008, the Company reported total revenue of \$474.1 million.

### **Summary**

The Financial Accounting Standards Board (“FASB”) has requested comments regarding whether the Proposed Statement, which would amend Statement of Financial Accounting Standards No. 5 (“FAS 5”), will “provide enhanced disclosures about loss contingencies.”

As outlined in greater detail below, we have significant concerns about many of the changes contained in the Proposed Statement. Overall, we believe that the perceived benefits of the proposed expansion in disclosure regarding loss contingencies will be substantially outweighed by the cost to many companies. Specifically, we are of the opinion that the proposed additional disclosure will have an adverse effect on the current balance between the differing interests of companies and their auditors and legal advisors under current FAS 5 standards as well as

potentially in the form of an adverse impact on stock prices and shareholder value. We also believe that the proposed disclosures may not be practical to implement due to the ever-evolving nature and uncertainty of litigation matters. For example, it could be difficult if not impossible, for management and its counsel to develop reliable estimates that would be “auditable” by our *independent registered public accounting firm*. While we are supportive of providing relevant, reliable and timely disclosures to the users of our financial statements, we believe the current disclosure framework under FAS 5 provides the appropriate balance between the users of our financial statements and the interests of the legal profession. We would request that the FASB reconsider whether the current disclosure requirements of FAS 5 actually need revision, or whether additional resources should be allocated to emphasize and highlight the scope and standards under the current rules as we believe it is not necessary to make the extensive changes that are being proposed. FAS 5 as currently in effect has, in our experience, provided fair and balanced disclosure to our financial statement users.

Further, we do not believe that it is practical for entities to implement the Proposed Statement in fiscal years ending after December 15, 2008 as discussed in further detail below.

Due to the significant changes which the FASB has proposed, we strongly believe that further analysis and discussion of this sensitive and complex issue is warranted. Furthermore, at a minimum, reconciliation of conflicting guidance from both the legal and accounting professions is necessary before any changes to FAS 5 are adopted. We agree that a series of Public Roundtable Meetings, as referenced in the “Notice for Recipients,” are a critical next step for the FASB to complete its analysis and assess whether the Proposed Statement can and should be issued in its current proposed form. It will be critical for these meetings to include a broad base of representatives from corporations in different industries, law firms, the American Bar Association (“ABA”), and public accounting firms.

### **Concerns Raised by the Proposed Statement**

While we understand the stated objectives in the Proposed Statement, we have significant concerns about whether the Proposed Statement would achieve these objectives and whether the benefits of any incremental disclosures outweigh the costs. Our primary concerns related to the new disclosures under the Proposed Statement include the following:

- We believe that opposing parties in litigation could use the new disclosures against the Company. In particular, disclosures relating to the Company’s litigation strategies, assessments of potential exposure, assessments of likely outcomes, the anticipated timing of resolution, and significant assumptions in estimating the potential exposure and outcome, all provide sensitive and confidential information, which could potentially harm the Company in resolving the contingency. Further, the requirement to provide disclosure of changes in reserve based on our assessment of recent developments in a

legal case could give parties involved in litigation information that could be harmful to the Company's positions.

- The new disclosures could jeopardize pending settlement discussions, and could make "nuisance" cases more difficult to settle or otherwise resolve – particularly due to the requirement that the Company estimate its maximum exposure to loss.
- The new disclosures may cause the Company to settle cases simply to avoid disclosure (and the risk of encouraging other claimants), even though the Company has meritorious defenses to the claims.
- The new disclosures would require the Company to place an estimate on exposure and damages even where the adversary has not done so, thereby emboldening adversaries in their settlement demands.
- The new disclosures may result in a waiver of the attorney-client privilege and loss of attorney work-product protection as disclosures may include information that constitutes legal advice the Company has received from counsel. Further, if we provide assessments or evaluations of a litigation matter to our auditors or other parties, we believe this could harm our legal defense by potentially making documents and assessments that were previously protected from disclosure subject to discovery by opposing parties.
- The new disclosures could be used as evidence against the Company in litigation as an admission against interest.
- The new disclosures themselves may actually encourage additional litigation under securities laws in the event that the disclosures are later perceived as inaccurate -- particularly with the benefit of hindsight – due to the inherent unpredictability of litigation.
- The proposed "safeguards" for the omission of prejudicial information are too vague, extremely narrow and difficult to administer, thereby making them of limited practical value.
- Litigation is, by its nature, uncertain, fluid and subject to rapid and unpredictable changes based on a number of factors, such as discovery, expert testimony, etc., any one of which could dramatically change the potential exposure of a contingency. Therefore, any good-faith disclosures are likely to become "stale" shortly thereafter. For these same reasons, counsel is often simply unable to estimate the loss or range of loss in litigation, particularly considering the standard imposed on attorneys by the ABA Statement of Policy Regarding Lawyer's Responses to Auditor's Requests for Information ("Statement of Policy"). The Statement of Policy provides that an attorney should estimate a loss or range of loss only if the probability of an inaccuracy in the estimated loss or range of loss

is slight. Consequently, the Proposed Statement and the Statement of Policy significantly conflict with each other. As a result, any change from the current standards of disclosure under FAS 5 would require changes in the Statement of Policy to reconcile the two disclosure approaches. This clearly cannot occur prior to the proposed effective date of the FASB proposal.

- The expanded disclosure of unasserted claims will likely result in more litigation and potential exposure to the Company by encouraging potential claimants to bring claims of which the potential claimants may not even be aware – except due to the Company’s required disclosure. As a result, the Company’s ability to use important litigation strategies and defenses, such as the statute of limitations, estoppel, waiver and laches would be severely hindered.
- We believe the Proposed Statement would place a significant and unnecessary strain on the relationship between companies and their auditors. Based on the differing duties and responsibilities of each, the Company and its auditors will need to continually evaluate and discuss the risk of waiving attorney-client privilege or work product doctrine and providing auditors with sufficient supporting evidence to complete their audit and issue an unqualified opinion – all at a significant cost in terms of time and resources. Further, if the Proposed Statement is adopted, we believe the “treaty” between the auditing profession and legal profession regarding this type of disclosure would need to be revised as the scope of information that lawyers are currently permitted to provide may be insufficient to meet the additional disclosures required by the Proposed Statement.
- As the stated objective of the accounting rule makers is a movement towards international convergence, we believe the FASB should reconsider the proposal in conjunction with the IASB’s efforts to amend IAS 37.

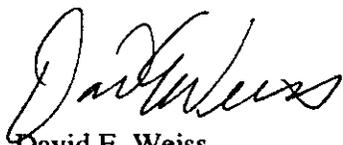
### **Effective Date**

If the FASB were to proceed with the Proposed Statement, we strongly believe the transition period will not be sufficient for companies to appropriately prepare for the expanded disclosure requirements, as well as amend the disclosure guidelines currently applicable to the auditing and legal professions. As discussed above, the ABA will need to revisit and revise its Statement of Policy. The process of renegotiating and reconciling differing disclosure standards by the accounting and legal professions would likely be lengthy. Furthermore, the processes currently undertaken by companies and their in-house and external counsel regarding the analysis of loss contingencies (e.g. auditor response letters, etc.) will require detailed review and revision. Finally, companies will require more lead time to develop the appropriate internal processes to evaluate and prepare the required disclosure, particularly as it relates to the evaluation of potentially prejudicial information. As a result, we recommend that any change to FAS 5 have an effective date of no earlier than one year from the time a final standard is adopted.

\*\*\*\*

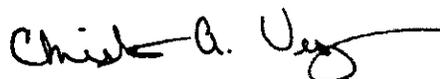
We appreciate your consideration of our comments. If you have any questions regarding the comments set forth in this letter or if we can provide additional information, please contact either David E. Weiss at (216) 755-5650 ([dweiss@ddrc.com](mailto:dweiss@ddrc.com)) or Christa A. Vesey at (216) 755-5697 ([cvesey@ddrc.com](mailto:cvesey@ddrc.com)). We would be pleased to discuss these issues with you and/or participate in a roundtable meeting as suggested above.

Sincerely,



David E. Weiss

Senior Vice President and General Counsel  
Developers Diversified Realty Corporation



Christa A. Vesey

Senior Vice President and Chief  
Accounting Officer  
Developers Diversified Realty  
Corporation

cc: William H. Schafer, Executive Vice President & Chief Financial Officer  
Developers Diversified Realty Corporation

John Gottfried, Partner, PricewaterhouseCoopers LLP, Cleveland Office