



**Thursday, October 24, 2019
11:00 PM – 12:15 PM**

Peer to Peer 7

**Scuba Gear Required:
Diving Into Advanced Issues in Purchase and Sale Agreements**

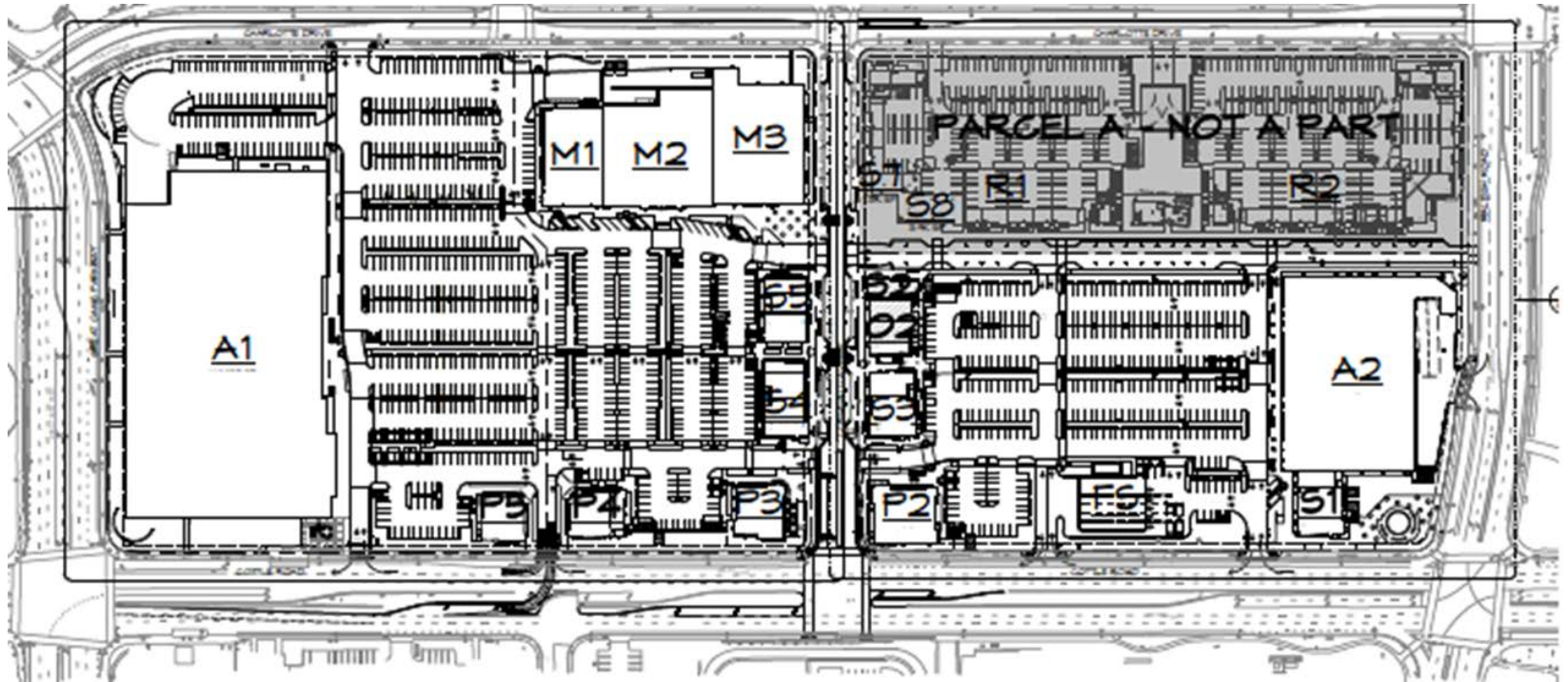
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Fact Pattern 1

Anxious Seller, Inc. (“Anxious Seller”) is in the process of finalizing the development of a 300,000 square foot shopping center commonly known as “Village Grand Shopping Center.” Village Grand Shopping Center is anchored by a 150,000 square foot large box general merchandiser (which owns its own parcel and is a party to an REA with Anxious Seller) and a 50,000 square foot supermarket which leases its building. Village Grand Shopping Center has numerous retail tenants ranging between 10,000 and 30,000 square feet, along with numerous restaurant and fast food tenants, many of which are located on pads. Anxious Seller’s equity participant has determined that Anxious Seller should sell Village Grand Shopping Center despite the fact that four of the retail tenants are still finalizing their tenant improvement work and have yet to begin paying rent, and Anxious Seller is still completing the landlord’s work in connection with the leases with two tenants (the “Landlord’s Work”).

Anxious Seller has found a buyer, Anxious Buyer, Inc. (“Anxious Buyer”). Anxious Buyer has agreed to pay to Anxious Seller \$130,000,000 for Village Grand Shopping Center, which purchase price is based upon a five percent capitalization rate based upon all of the net income generated by the tenants at Village Grand Shopping Center. However, the purchase price is based upon 100% occupancy with all of the tenants paying rent as of the date of the closing. Village Grand Shopping Center is 95% leased. 10% of the tenants will not be paying rent until approximately 6 months following the closing. Anxious Buyer desires that Anxious Seller complete the Landlord’s Work following the closing, which work should be completed within two months following the closing. Anxious Buyer is only requesting that Anxious Seller guaranty the cash flow from the unleased 5% of the GLA for the earlier of one year or the date tenants occupying such unleased space begin paying rent.



Questions for Buyer

- How do you safeguard that Landlord's Work will be completed in a timely basis?
- How do you guarantee that you will receive the benefit of a purchase price based upon 100% occupancy even though Village Grand Shopping Center is only 95% leased?
- How do you make sure that you will get the benefit of your bargain despite the fact that 4 tenants have yet to complete their tenant improvement work and open for business?

Questions for Seller

- How do you assure yourself that you will have access to Village Grand Shopping Center following the closing so that you can complete Landlord's Work?
- How do you provide Buyer with the assurance that it will receive the net income from the 5% of Village Grand Shopping Center that is unleased but incentivize Anxious Buyer to lease the 5% of GLA that is unleased?
- How do you provide a rent guaranty to Buyer for the 4 tenants that have yet to complete their tenant improvements work, but also minimize your exposure in the event of tenant delays or defaults?

Fact Pattern 2

JV Seller LLC (“JV Seller”) has agreed to sell its successful, but dated, grocery anchored center known as Candyland Center (“Candyland”) to Tentative Buyer Ltd. (“Tentative Buyer”). JV Seller has learned from the broker that although Tentative Buyer’s principal is not especially enthusiastic about Candyland, theirs was the only offer that came in at the asking price. Despite having reservations about Tentative Buyer, JV Seller is unwilling to come down from its asking price so has awarded them the deal. Candyland is operated by Asleep at the Wheel LLC (“Operating Member”) who owns a 12% interest in the property. Risk Averse LLC (“Operating Member”), a large institutional investor, owns the remaining 88%. Candyland is 100% leased, thanks to a newly signed restaurant lease, which Tentative Buyer was aware was just executed prior to submitting its bid. In connection with the restaurant lease, a leasing commission is due, and tenant is to receive three months of free rent and a tenant improvement allowance, all of which remains outstanding. Tentative Buyer’s position is that JV Seller should be responsible for these costs.

JV Seller is concerned that Tentative Buyer may reject estoppels as a way to get out of the contract so it has held fast to its position that only estoppels raising claims that constitute material misrepresentation or material defaults under the purchase agreement can be rejected and only so long as the aggregate economic impact of the claims exceeds JV Seller's liability floor.

JV Seller has included the following covenant in the purchase agreement with respect to operation of the property after the effective date:

“From the Effective Date through the Closing Date (the “Contract Period”) Seller will continue to operate and maintain the Property substantially consistent with its standards of operation and maintenance prevailing immediately prior to the Effective Date.”

Tentative Buyer continues to insist that the following be added at the end of JV Seller's operating covenant:

".....including but not limited to the following: such that there shall be no material adverse change in the condition of the Property during the Contract Period; collecting rent and substantially complying with, and enforcing the terms of, the Leases in all material respects; immediately delivering to Purchaser copies of any notices received from the other party under any Lease; making repairs; hiring and firing employees (if any); entering into contracts; and maintaining insurance policies substantially similar to the insurance policies existing on the Effective Date. During the Contract Period, except in the case of an emergency, Seller shall not undertake to perform, or actually perform, any Capital Repairs without the prior written consent of Purchaser, which consent will not be unreasonably withheld, conditioned, or delayed, and such consent to be deemed granted if no response to a request therefor has been received by Seller within five (5) Business Days after a written request for Purchaser's consent is received by Purchaser. As used herein, "Capital Repair" means any repair or replacement which under generally accepted accounting practices is considered "capital" in nature. During the Contract Period, Seller agrees that they will observe all laws, ordinances, regulations and restrictions which affect the Property and its use. Seller will maintain the Property in a good and clean condition and shall perform or cause to be performed routine maintenance and repairs in connection with maintaining the Property."

Questions for Buyer

- What argument can you make to convince JV Seller that it should bear these costs?
- How do you make certain that you'll have the flexibility to reject tenant estoppels in which issues you cannot accept are raised?
- What risks do you see in accepting JV Seller's position regarding operation of the property and what can you do to mitigate these risks?

Questions for Seller

- In light of all the other facts, can you be persuaded by Tentative Buyer's position on the restaurant lease expenses? And if so, how?
- How can you make certain that Tentative Buyer does not have the ability to reject estoppels over minor alleged defaults?
- What concerns do you have about Tentative Buyer markup of the operations provision and how would you address them?



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