

Thursday, November 4, 2021
8:00 AM – 9:15 AM

Seminar 6

DIGGING DEEP INTO THE GROUND LEASE

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I. Introduction

1. What makes a Ground Lease Unique?
 - a. Ground Lease vs. Typical Commercial Lease
 - b. vs. Reverse Build to Suit
 - c. vs. Sale
2. The Many Types of Ground Leases
 - a. More Diverse Terms than Generally Assumed
 - b. In a Shopping Center Certain Commercial Lease Terms Must Get Re-framed for a Ground Lease

II. The Two Shopping Center Ground Leases: Ground Lease of Outparcel vs. Ground Lease of Shopping Center

1. Entitlement Process
2. Timing of Conditions
3. Control of Adjacent Property
4. Hybrid Development – Ownership of both Land in Fee and Ground Lease Parcel

III. Entitlements; Conditionality of Ground Lease; Timing

1. Due Diligence
 - a. Construction Concerns
 - b. Operation Concerns
2. Entitlement Process
3. Rights to Terminate
4. Designated “Safe Harbor” Parameters

IV. Section 1031

1. Tax Advantages for Ground Leases
2. Buyer Considerations
 - a. Limited Ongoing Obligations and Responsibilities Compared to Commercial Leases
 - b. Tenant Credit Worthiness
 - c. Term

V. Lease Term

1. Longer Term
2. Pre-Term or Due Diligence Period
3. Original Term
 - a. Diminished Termination Rights
 - b. Resultant Flexibility for Use and Alterations
4. Renewal Term
 - a. Rent Challenges
 - i. CPI Escalation
 - ii. FMV
 - iii. Highest and Best Use
 - b. Notice Requirements

- VI. Definition of Demised Premises**
 - 1. Ground Leases Convey Ground (and sometimes more)
 - 2. Deal with Existing Improvements
 - 3. Representations and Warranties
 - a. Title/Zoning, etc.
 - b. Environmental
 - c. Adjacent Land

- VII. Construction Obligations – Landlord and Tenant**
 - 1. Landlord
 - a. Infrastructure (Utilities, Parking, Access)
 - b. Remainder of Shopping Center
 - 2. Tenant
 - a. Building Requirements
 - i. Building to Prototype
 - ii. Build to Specific Use
 - iii. Freedom to Build to Preference
 - iv. Landlord Input and/or Control on Design, Contractors, etc.
 - 3. Future Alterations
 - a. Tenant – Limits on Building Alterations Driven by Reversion Concerns
 - b. Landlord – Limits on Shopping Center Alterations Driven by Co-Tenancy and Support Concerns

- VIII. Delivery Conditions and Timing**
 - 1. Required Landlord Work Pre-Tender
 - 2. Creating Acceptable Deadlines on Landlord's Conditions
 - 3. Tenant Termination and Other Remedies
 - 4. Force Majeure (including COVID-19)

- IX. Covenants to Construct and Open For Business; Landlord Recapture Rights**
 - 1. Construction Obligations for Standalone Parcel
 - 2. Construction Obligations for Outparcel or Inline Lease as Part of Shopping Center
 - 3. Obligations to Open
 - a. Remedies
 - i. Rent Increase
 - ii. Recapture
 - iii. Single Purpose Entity Risks
 - b. Co-Tenancy Concerns

- X. Permitted Use; Use Restrictions**
 - 1. Shopping Center (less limited) vs. Outparcel/Single Tenant (more limited)
 - 2. Tenant Concerns:
 - a. Flexibility for New User
 - b. Change in Nature of Use Over Time
 - 3. Landlord Concerns:
 - a. Co-Tenancy Obligations
 - b. Noxious Uses
 - c. Protecting Value
 - 4. Protection of Tenant's Use -- Exclusives
 - a. Timing of Protection – Term of Lease vs. Term of Anticipated Use
 - b. Rogue Tenant Risks
 - c. Change in Retail Expectations Over Time
 - d. Lining up Landlord Obligation Under Ground Lease to Protect Use vs. OEA Right.
 - 5. Inclusion in Lease vs. Shopping Center Covenant Documents

- XI. Signage**
 - 1. Pylon or Monument Signage
 - a. Protecting Tenant in Permitting Process
 - b. New Sign vs. Panel on Existing Sign
 - c. Ground Landlord Concerns and Municipality Requirements for Existing Signage
 - 2. Building Exterior

- a. Due Diligence Before Signing
 - b. REA Limits
 - 3. Directional and Other Signage
 - 4. Shopping Center Ground Lease Concerns

- XII. Parking**
 - 1. Pad Concerns
 - a. Rights of Cross-Parking
 - b. Interaction of Pad Use and Parking Availability and Requirements
 - c. Existing Leases and Parking Requirements
 - d. Construction Issues
 - 2. Shopping Center Concerns

- XIII. Maintenance and Repair Obligations: Pad versus “Curb In” vs. “Building Only”**
 - a. Who is Required to Maintain?
 - i. Building Components: Structural vs. Leasehold Improvements, Building System
 - ii. “Curb in”
 - iii. Parking
 - iv. Lighting and Other Amenities
 - b. Control
 - i. Meeting a Specific Maintenance Standard
 - ii. Building Only vs. Curb in vs. Entire Parcel

- XIV. Casualty**
 - 1. Obligation to Rebuild (and Insure)
 - 2. Removal of Debris
 - 3. Termination Rights
 - a. Tenant
 - b. Landlord
 - i. Protecting Center (Also Applicable to Going Dark)
 - ii. Diminished Right to Terminate vs. Commercial Lease

- XV. Financing; Non-Disturbance Agreement (both Ground to Term and Lender-Related Lender**
 - 1. Tenant Concerns
 - a. Finance TI Construction
 - b. Protection for its Lender if Tenant Defaults
 - c. Avoid Termination if Ground Landlord defaults
 - 2. Landlord Concerns
 - a. Financeable Ground Lease
 - b. Control Use of Pad
 - c. Non-Disturbance with Subtenants and Allocating Responsibility with Commercial Leases (subtenants)

- XVI. Condition Upon Surrender at End of Term**
 - 1. Tenant Concerns
 - a. Need Rights to Alter Improvements
 - b. No Sudden Costs Obligations on Tenant that is “Walking Out the Door”
 - 2. Landlord Concerns
 - a. Receipt of Operating Building
 - b. No Demolition/Clean up Costs
 - c. Control the Nature of Alterations are Permitted During Term

- XVII. Right to Purchase; ROFO/ROFR**
 - 1. Pad Concerns
 - a. No Right to Purchase Rest of Shopping Center
 - b. Timing and Deadlines
 - c. Calculating Price – “as-is,” highest and best use, etc.
 - d. Preference for ROFO/ROFR

- XVIII. Protection: MOL; REA**
 - 1. MOL Expectations

2. Addressing Transfer and Similar Taxes