

**Thursday, October 24, 2019
8:00 AM – 9:15 AM**

Workshop 12

“IN THE ROOM WHERE IT HAPPENS”: Planning Considerations for Redevelopment and Repositioning

Presented to

**2019 US Shopping Center Law Conference
Marriott Marquis San Diego Marina
San Diego, CA
October 23-25, 2019**

by:

Jason S. Gibson, Esq.
Associate General Counsel
Regency Centers
2700 N. Military Trail, Suite 380
Boca Raton, FL 33431
305.940.3880
JasonGibson@regencycenters.com

Tandy C. Patrick, Esq.
Partner
Bingham Greenebaum Doll LLP
3500 PNC Tower, 101 S. Fifth Street
Louisville, KY 40202
502.587.3512
tpatrick@bgdlegal.com

I. Introduction

The traditional shopping center came into prominence in the 1960's; many baby boomers have vivid memories of their first visit to the brand new "indoor mall." Now, sixty years later, owners, operators and tenants of shopping centers continue to address challenges with the revitalization of existing shopping centers, with the end goal of ensuring that the shopping center is vibrant, competitive and sustainable and meets the public needs. The purpose of this Workshop is to provide guidance in addressing the integration of traditional retail users with online retail, mixed use, non-traditional uses, and public spaces, as well as the impact of technology on the design and functionality of today's shopping centers. We will also discuss solutions regarding practical issues such as dealing with existing REA's, relocation rights, construction obligations, and dramatic changes to the shopping center's original site plan.

"Redevelopment" commonly refers to construction and/or renovation of one or more buildings in an existing shopping center; it may involve demolition of existing buildings, and usually includes reconfiguration of existing access, parking, and signage; and it may involve restructuring of ownership/financing. "Repositioning" commonly refers to changing a brand's status in comparison to that of competing brands; changing the tenant mix in response to changes in the market place; and relocating an existing tenant in the shopping center to a more prominent location (e.g., moving from in-line to an outparcel or moving from "elbow" in-line to end of access drive).

A report released by JLL at the 2019 ICSC RECon, *The Future of Retail*, indicated that consumers still prefer physical retail, with online shopping still only making up about 10% of total retail sales. It is human interaction – i.e., a skilled customer service employee - and not the latest technology that most customers value, according to the JLL report. Shoppers want good food and green space at their retail centers of choice, such as Easton Town Center in Columbus, Ohio.

As the costs of land, labor and construction rise, more developers are focusing on upgrades to existing properties instead of pursuing ground-up developments. Today's retail centers are increasingly focusing on providing consumers with experiences they cannot get elsewhere. Millennials are spending more money on experiences than luxury products, driven in part by mobile lifestyles and technology, as well as shifting values in observing previous generations struggle with economic downturn from the previous decade. Adding density by offering residences or hotels is an attractive option for many shopping center owners. Consumers are also moving towards urbanization, living in smaller spaces with a desire to be close to restaurants, entertainment and public spaces in which to socialize and congregate.

Owners and developers must carefully evaluate demographics and space utilization in strategically redesigning existing centers to incorporate entertainment and experiential trends. Redevelopment to accommodate experiential retail generally requires a significant investment of capital by the owner, so the owner wants to be sure that tenants can quickly generate revenue.

Innovative mall operators who are experiencing a successful redevelopment are often undertaking one or more of the following:

- 1) Incorporating community-based elements, such as concerts, arts centers, spas and fitness centers, farmer's markets, and children's playgrounds;
- 2) Leveraging technology using social media, proprietary apps, loyalty programs, and customized offers. Technology also provides tools for shoppers such as identifying available parking spaces and purchasing movie tickets;
- 3) Changing the design to a town center/open air concept.

Newer REA documents that are being utilized today are much more likely to include flexibility regarding the types of users (including office, residential, and medical), parking, and construction/height restrictions. Parking areas may also be used for on-line pickup kiosks. Modern REA's are likely to address different allocation of CAM charges based on the type of user (i.e., retail tenants do not want to be responsible for costs associated solely with the residential or office component of the development).

The ongoing challenge for developers will be to identify retail uses that will be desirable and in demand in coming decades.

II. Existing REA Documentation

Most older REA documents present significant roadblocks to a redevelopment because the parties did not anticipate the dramatic changes that have occurred. The existing REA may prohibit “de-malling” because the developer is required to maintain an interior mall component.

One of the most challenging aspects of older REA’s are the consents necessary to amend or modify the REA. The primary developer may no longer be in the picture, and the REA may not be clear as to the assignment/assumption of developer rights and obligations by successor owners. Occasionally, the original “shopping center” may have been reconfigured such that obtaining necessary consents from all owners and users/tenants may be a daunting - if not impossible - task.

(A) Changes in Site Plan

As a threshold matter, it is necessary to determine what consents are necessary in order for a new site plan to be adopted to govern the overall development. The new site plan will need to indicate permissible building areas, the footprint for permitted outparcel buildings, “wraps and hugs” footprints and height of the permissible building areas for any residential, hotel, convention or office use, and relocated and reconfigured parking areas and driveways.

The new site plan should include a table indicating the existing and projected floor areas of the various buildings and the number of parking spaces provided on each site, as well as the required parking ratios.

It may be challenging to formulate a new site plan at the outset of the redevelopment, since often a new site plan may be conditioned on events that may or may not occur. However, anchor store tenants may object to receiving multiple proposals for new site plans.

(B) Structure/Definition of “Shopping Center”

Conversion of a traditional retail center into a mixed-use development that includes office and residential components may include the introduction of a condominium regime for a portion of the development, adding another layer of governance and control. The existing REA may define and address outparcels differently than the primary shopping center; the developer may need to incorporate outparcels as an integral part of the redevelopment, so it may be necessary to redefine outparcels.

(C) Use Restrictions

Most REA documents include a laundry list of prohibited uses that are no longer relevant in today’s world, such as massage parlors/spas, gun ranges, medical offices, tattoo parlors, breweries, discount retailers, and special events. The definition of “uses typical of a first class shopping center” has changed dramatically over the past decade.

(D) Permitted Building Areas/No-Build Areas/Critical Areas (access and deliveries)

The developer of a mixed use redevelopment needs to have greater control over no-build and common areas, since easy access to the common areas attracts customers to the development.

(E) Height Restrictions/ In-line Prominence/ Anchor Storefront Alterations

Many older REA’s include height restrictions that limit construction to ground-level components only.

(F) Multiple REA’s

Established shopping centers may have ‘layers’ of REA documents; in addition to the original REA between the developer and the original anchors that own their respective buildings, there may be recorded supplemental agreements between the developer entity and another major anchor which may supersede the original REA with respect to the operation of that later anchor and the areas of the center in close proximity to the later anchor. A supplemental REA may contain different terms and commitments from the developer than those contained in the original REA.

III. Lease Issues

The competing interests of landlords and tenants in a redevelopment are similar to a traditional retail center, where tenants desire to protect their businesses and landlords want to maximize leasing flexibility.

Existing retail tenant leases will likely need to be amended in connection with a major redevelopment. With respect to a repositioning, more often than not the parties will want to negotiate a new lease altogether or amend and restate the entire lease. Some key lease provisions to review including the following:

(A) Operating Covenants and Co-Tenancy Requirements

Landlords may need to utilize pop-up retailers and restaurants to satisfy co-tenancy requirements. Dark spaces become more detrimental than in a traditional retail environment, making on-going co-tenancy and recapture rights particularly significant.

(B) Use Restrictions/Exclusives

In a redevelopment, if the GLA of the retail portion will decrease, a landlord may be more willing to grant exclusive uses; although the landlord may desire to keep a tighter control on the mix of uses and not “share” control with tenants.

The goal of a redevelopment will likely include the incorporation of “compatible” retail to compliment consumers’ needs and lifestyles rather than trying to attract retail shoppers. Typical preferred retail tenants in a redevelopment include restaurants, wellness and beauty services, dry cleaning and fitness centers.

If a redevelopment includes an office component, the office user may require certain retail components such as a fitness center that office workers can attend.

(C) Relocation

Unless the existing lease specifically grants the landlord the right to relocate a tenant’s premises, if the landlord needs to relocate tenants to accomplish the redevelopment, the landlord will likely need to offer some concessions to the tenant (i.e., compensation; rent concessions; tenant improvement allowance). If the lease does include a relocation clause, the relocated premises may be required to have the same access, visibility, parking and frontage. Ideally for retail tenants, there is no gap period during which the store is closed (i.e., close on Friday at old location and reopen on Saturday in the new premises). During construction periods, it is important retail tenants have adequate signage directing shoppers to the retail location, as well as having adequate and tasteful screening of the construction site.

(C) Radius Restrictions

Existing retail leases from national retailers may include radius restrictions that are overly broad with respect to the scope of the exclusive (i.e., prohibiting any “pizza restaurant” instead of prohibiting a restaurant serving “fast fired, fast-casual, create-your-own, assembly-line-type, quick-service pizza”). Also, the concept of the tenant’s core business may have evolved from the effective date of the lease.

(D) Rent Restructuring

Existing retail lease provisions regarding CAM charges may need to be restructured, to accommodate a “town center” that includes community space. Landlords may also elect to move a greater portion of the rent to percentage rent, with possible revisions to the definition of gross sales and reporting requirements.

(E) Maintenance/Repair

The scope of the tenant’s responsibilities may need to be revised to reflect changes in infrastructure and mechanical components following the redevelopment.

(F) Unused TI Allowances

Any unused tenant improvement allowances will likely need to be addressed in an amendment to the existing lease.

(G) Signage Rights (pylon/monument, directory, directional)

Existing retail tenants may need to consent to dramatic changes in signage in connection with the redevelopment.

(H) Quiet Enjoyment

The addition of non-retail users (i.e., residential, office tenants) may trigger quiet enjoyment clauses in existing leases. Retail construction and late-hour entertainment venues can be problematic for an apartment or office user.

(I) Rights of First Refusal

In older centers, the original developer and/or original anchor may have an 'evergreen' right of first refusal to purchase any portion of the original center or outparcels.

(J) Termination Rights

Existing leases may give the tenant the right to terminate the lease prior to the stated expiration date in the event of dramatic changes that arguably have a negative impact on access and/or visibility to the tenant's premises or that significantly change the tenant mix and uses.

IV Operational Issues

(A) Parking Requirements

One of the most significant concerns with any redevelopment or repositioning is parking. The zoning ordinances for the applicable governmental authority will require a certain parking ratio based on the square footage leased by a tenant based on different categories of uses. The owner will need to ensure that there are adequate parking spaces to comply with the zoning ordinances after the completion of the redevelopment and/or repositioning, which includes consideration of any updates to the zoning ordinances since the original development of the shopping center (including, but not limited to, the number of handicapped parking spaces) as well as any leasable square footage that has been added or removed as a result of the redevelopment or repositioning. It is recommended that a parking study be commissioned by owner to ensure compliance with current zoning requirements and any other applicable laws.

In addition to any zoning requirements, certain anchor tenants (and certain national and regional tenants with smaller footprints) within the development may require the landlord to maintain a specific parking ratio or total number of parking spaces for the development or within a certain designated protected parking area within the development. Existing leases and other occupancy agreements at the development may also contain provisions for reserved parking spaces or short-term parking spaces.

Additionally, to improve the attractiveness of the development, owners should consider adding designated ride-sharing areas and/or electric vehicle charging stations as a part of any redevelopment and/or repositioning, understanding that these can impact the number and/or ratio of available parking spaces.

Owners will need to ensure that any existing parking requirements (including, but not limited to, the types presented above) will also be satisfied during any construction associated with a redevelopment or repositioning. These requirements could be satisfied through the use of phases for construction affecting the parking areas or performing work outside of normal business hours. Alternatively, the owner would need to obtain the prior approval of the tenant or occupant to modify, waive or remove any deal-specific parking requirements.

(B) Construction Issues for Operating Tenants

Of utmost importance during any construction associated with a redevelopment or repositioning is not disturbing or interfering with the quiet enjoyment of any existing tenants or occupants of the development (including, but not limited to, interruptions in utilities and services) and avoiding any potential associated claims of constructive eviction, abatement or termination. Most often, owners can partly allay these concerns by communicating in advance with in-line, small shop tenants that may be affected utilizing on-site “town hall” meetings – regardless of whether these parties have any express approval rights over the work to be performed. More formal meetings or communication would be required for anchor and/or national/regional tenants, especially if any of these parties have prior approval rights regarding matters affected by the redevelopment or repositioning.

Typically, owners will have retained the right to enter a tenant’s premises in its lease or occupancy agreement. Owner would need to understand the scope of this right, and the mechanics of the exercise of this right, for each tenant prior to commencing construction in connection with the redevelopment or repositioning. For example, this reserved right usually allows the owner to enter to make repairs, perform maintenance, inspect and in some instances make alterations; provided, however, such entry would be subject to limitations which might include, but not be limited to, the following: (i) advance notice, (ii) entry only during business hours or, if outside of business hours, entry accompanied by a representative of tenant or occupant, (iii) minimizing interference with business operations, and (iv) restricting the areas where certain alterations can be made (such as, installing utilities above the ceiling or beneath the floor slab). Without further coordination with the affected party, owner could be prohibited from expanding, constructing an additional story on, or building a new façade for an existing building.

Prior to undertaking such construction, owner should determine whether there are any construction blackout dates (i.e., certain periods during which owner is prohibited from undertaking construction at the development). Blackout dates can vary depending on the tenant. For example, a gym or health club owner would not want construction to occur within the vicinity of its building during the month of January, when most consumers have made a resolution to improve their health. On the other hand, most retailers would not want such construction to take place during the holiday season. Phasing of construction, as well as the designation of specific construction staging areas for each phase of the construction, will help to alleviate some of these tensions with existing tenants or occupants of the development.

Sometimes, unexpected environmental issues arise during construction. Environmental issues can be time-consuming and costly. For example, asbestos-containing materials are discovered during the demolition of an existing building. The removal of the asbestos would present unanticipated costs and require a cessation of work until remediated. Depending on the scope of the redevelopment or repositioning, consider performing a Phase I and, if advisable, a Phase II environmental site assessment in an attempt to discover any potential environmental issues. And, if no issues are discovered during such assessment, owner will nevertheless have a report establishing a baseline for environmental conditions at the development going forward. It is likely that new tenants to the development would require confirmation of the existing status of any environmental conditions at the development. Further, this assessment could also inform decisions regarding the redevelopment, such as whether to put green space where a former drycleaner or auto parts store was located.

(C) Outparcels/Long Term Ground Leases/Shared Ownership

Outparcels can present unique challenges in connection with a redevelopment or repositioning and, therefore, require some forethought. If an outparcel is going to be created within the existing development, then owner will need to consider the following, *inter alia*: (i) whether there are any exclusive uses or restrictive covenants that limit the type of tenant or occupant that would be permitted for the outparcel, (ii) whether there are any applicable height restrictions governing the building to be constructed on the outparcel, (iii) whether the outparcel is required to be self-contained for parking, and (iv) whether the approval of any existing tenants or occupants, lender or other third parties (e.g., parties to an REA) will be required for the creation of the outparcel. In the event that an outparcel will be created by adding a new parcel to the development, in addition to the foregoing, owner will need to determine whether any new access, parking, utility or other easements are necessary and/or desirable.

In the event the development is subject to any long-term ground leases, it can affect the proposed configuration of the buildings after the redevelopment. Other than the actual premises being leased, the redevelopment could be impacted by permissible building areas and height restrictions established by the applicable ground lease. In addition to owner having to maintain this relationship after the completion of the redevelopment or repositioning, in many instances, tenants pursuant to these long-term ground leases will have certain approval rights over changes to the overall site plan of the

development. Oftentimes, the ground tenants are retailers with a business model and/or operations that have not been recently updated or upgraded. Therefore, it may become necessary to negotiate with the ground tenant to update its building (such as, modify its storefront) as well as consider tenants with uses and operations that are complementary to those of the ground tenant. For the foregoing reasons, tenants under long-term ground leases are usually the perfect candidates for repositioning in connection with a larger redevelopment project.

As might be expected, shared ownership (such as, multiple owners of one development pursuant to an REA, condominium or similar documents, or ownership of one development pursuant to a joint venture) adds another layer of complexity when planning a redevelopment or repositioning. Shared ownership would involve determining the documents governing the relationship (i.e., shared ownership structure), identifying the applicable parties and determining what, if any, approval rights exist (such as, architectural approvals or restrictive use covenants). And, in the case of a joint venture, the approval rights could also include an approval for the amount of the capital expenditure.

(D) Common Areas/Shared Services/CAM charges

Aside from the considerations regarding the configuration of the development, it is also important to consider how the Common Areas will be used after the completion of the redevelopment or repositioning. Thinking about, and coming up with practical solutions to, these types of issues in advance will inform the layout and infrastructure of the development – which can be costly to ameliorate after construction has already commenced or been completed. For example, an owner may want to establish one common outdoor seating area to be used by all restaurant tenants. As a result of placing all restaurant operators near one another, it might be prudent for owner to offer valet parking services.

The use of the Common Areas of the development is especially crucial in a mixed use development. The owner would probably want to include green spaces for a playground, esplanade or plush landscape near the residential areas for easy use and enjoyment of residents; however, it is less likely that these common spaces would work well near the retail component due to issues that can be created by long-term parking and visibility of signage associated with these areas. Additionally, consideration should be given to noise generated by entertainment and restaurants uses, as well as early morning or late night deliveries for retailers, which operators should probably not be located near residences.

Grouping tenants/occupants together begs the question of shared services. In the example above, an owner may want to provide valet parking services for restaurant operators, but restaurant operators also require grease traps and additional water services. Another example of shared services would be the creation of an area for shared dumpsters or compactors for larger retailers of soft goods. Offering these shared services will require forethought regarding layout and infrastructure as required for planning the Common Areas for the development generally; it also requires forethought regarding tenant mix and complementary uses.

A corollary from the planning of the Common Areas, and the possibility of providing shared services and utilities, are the billing and reimbursement of certain costs from the tenants and occupants. Owners would have the option to create cost pools (or utilize another equitable allocation of costs) for tenants or occupants using the shared services and utilities. On the other hand, there may be certain owners or tenants that do not want to utilize shared services for a variety of reasons. In these events, separate meters or submeters would need to be utilized and/or other ways of monitoring (and, as a result, billing) these operators will need to be considered. To this end, consider whether it would be prudent to add a provision to the applicable documents or contracts governing the relationships between the parties allowing owner to elect to provide shared services or permitting the operator to opt of a program managed by the owner.

(E) Definition of “Shopping Center”

Consider how the development should be defined and/or delineated. For a multi-use project, it may make sense to define the retail portion as the shopping center and exclude any residential portions. For a development that is composed entirely of retail uses, consider whether to include outparcels as a part of the shopping center – which includes factors such as: (i) whether all parcels have a common owner, (ii) whether the development includes undeveloped parcels for future expansion, (iii) whether there are elements (e.g., green areas, central parking, and/or retention ponds) that are required, and (iv) whether maintenance charges associated with the included areas can be passed through to the tenants or other occupants of the shopping center. If there are certain areas that are not included in the definition of the shopping center, the entire development should nevertheless be governed by one unifying document.

If the area designated as the shopping center will change as a part of the redevelopment or repositioning, then there may be issues with respect to the areas affected by exclusive uses and restrictive covenants previously granted. If an adjacent parcel is developed and incorporated into the shopping center, the prohibited uses imposed on the owner in

the existing anchor tenant lease may restrict potential tenant(s) of that parcel – at least for the term of that anchor tenant lease. Even if no new parcels are added to the shopping center, consideration should still be given to the existing exclusive uses and restrictive covenants. For example, a restrictive covenant may only permit a gym in a certain building or outside of a certain radius from the anchor tenant. If the building is demolished and not replaced, or the building is reconfigured, the owner may have effectively precluded its ability to include a gym operator (that is, without having to go to the beneficiary of the covenant first to request permission).

(F) Title/Survey

Prior to undertaking the redevelopment or repositioning, a title report should be ordered and reviewed to confirm ownership and to determine the documents of record encumbering the development. This would also provide a great opportunity to remedy any title defects. Additionally, a survey should be commissioned to: (i) locate the boundaries of the development, (ii) identify the location of all existing and proposed utilities (especially, any underground utilities) and other easements, or (iii) confirm whether there are any encroachments (whether at the boundaries of the development or with respect to any buildings located within the development). The survey should also identify the available parking spaces and confirm the satisfaction of the parking ratio.

(G) Special Issues with Experiential Retail

Most redevelopments are done to provide more opportunities for experiential retail to attract younger generations (primarily, millennials), which is not necessarily the case with repositioning. Operators of experiential retail locations focus on having customers come in and stay a while – such as, interactive art studios, cafés and boutique fitness concepts. Most of these uses are not complementary to traditional retail concepts and quick-serve food concepts, which rely on quick turnover of nearby parking spaces. However, experiential retail provide destinations and do not necessarily rely on visibility from the road. Therefore, good operators of these experiential concepts can occupy spaces that were traditionally harder to market for owners, which can be taken into account if repositioning leads to awkward spaces or spaces with lower visibility. Nevertheless, there can be high turnover with less experienced operators.

V Additional Considerations

(A) Tax Reassessments

Oftentimes with a redevelopment or repositioning, the tax authority will reassess the development. This typically results from the construction of new improvements or the creation of additional square footage, among other things. A reassessment to increase the real estate taxes will create an additional financial burden on the tenants and other occupants of the development, which could be prohibitive or at least an impediment for new tenants/occupants and unmanageable for existing tenants/occupants and thereby adversely affect occupancy rates.

(B) Zoning/Governmental Approvals

In some jurisdictions, the applicable zoning ordinances may not have kept up to pace with the recent developments in retail uses (such as the use of commercial condominiums) and mixed use developments. Therefore, certain uses may require variances, special exceptions or other governmental approvals. Obtaining these special approvals can require significant lead time and are not a certainty. Agreements with potential tenants or other occupants may need to include contingencies (with associated termination rights), which can create uncertainty and complicate what may already be difficult negotiations. Additionally, in jurisdictions with significant development activity, the length of time to obtain building permit(s) can be significant and must be factored in advance.

(C) Financing

If new financing from external sources will be required, significant time will be added to the redevelopment and/or repositioning – which can include time needed to perform due diligence items such as applications, non-disturbance agreements, and estoppel certificates. And, as the old adage goes, time is money. Further, the availability of new financing from external sources is a factor beyond the control of the owner.

With respect to existing financing, a lender may have approval rights over the new leases or changes to the site plan; and some lenders have fees associated with the preparation of documentation to obtain such approvals.

VI Recent Court Decisions dealing with Redevelopment/Repositioning

(A) *Lord & Taylor, LLC v. White Flint, L.P. (780 F.3d 211, 4th Cir, 2015).*

Lord & Taylor operated a store at the White Flint Shopping Center in Kensington, Maryland for over 38 years, and was an anchor of the center. A 1975 agreement required the landlord to maintain the Rockville Pike Property as a “first-class” mall until at least 2042. The Shopping Center started to decline in the late 1990’s and many stores closed. In 2009, the landlord began negotiating with shop owners to close their stores to enable the landlord to redevelop the property, and spent at least \$14MM buying out tenants.

The landlord obtained governmental approvals of plans for redevelopment of the center in 2012, which redevelopment included 1 million square feet of office space, 2,400 residential units, 1 million square feet of retail space and a 280,000 square foot hotel. Eventually Lord & Taylor was the only remaining open store at the center. Lord & Taylor filed a lawsuit against the landlord for breach of the covenant to maintain the property as a shopping mall, and a 2015 jury verdict which was upheld awarded \$31MM to Lord & Taylor to compensate the store for lost profits and future construction costs that would be necessitated by the landlord’s decision to demolish the shopping mall. The White Flint Lord & Taylor store remains open today.

(B) *Wallington Plaza v. Taher (2011WL 2637199, New Jersey 2011).*

A jewelry store tenant in a small shopping center in Wallington, New Jersey vacated the premises and defaulted on rent payments six months prior to the expiration of the 10-year term of the lease, and the landlord sued the tenant and its personal guarantors for unpaid rent and CAM charges. The tenant noted that when it entered into the lease, it relied on the shopping center manager’s assurances that the center would be a “first class place to do business”; but in recent years, the shopping center’s parking lot fell into a state of disrepair, and many other stores closed (including a Rite Aid drug store, a West Coast video, a Dollar Store, an A&P grocery store, and a Hallmark card store).

The court determined that the landlord breached its implied covenant to operate a “first-class” shopping center, and also noted that the landlord failed to attempt to mitigate its damages by attempting to re-let the premises after the tenant vacated. However, the court upheld judgment in favor of the landlord for two months’ unpaid rent less credit for the security deposit based on the tenant’s failure to provide proper notice to the landlord of tenant’s intent to vacate.

(C) *Frittelli, Inc. v. 350 North Canon Drive (202 Cal. App 4th 35, 2011).*

A gourmet doughnut shop entered into a lease at a shopping center in Beverly Hills, California in April 2006; the lease included a standard “quiet enjoyment” clause for the benefit of the tenant, but also included a provision that permitted the landlord to remodel the shopping center, which provided for an abatement of tenant’s rent in proportion to the extent tenant’s use of the premises was impaired in connection with the remodeling.

In September 2008, the landlord commenced construction of renovations to the shopping center. The landlord met with the tenants to discuss the renovation; arranged for temporary signage identifying the tenants; and relocated the awnings of the tenants to the top of the scaffolding along the shopping center’s façade. When the tenant complained that there was excess dust and dirt in its premises, the landlord directed its cleaning service to clean each tenant’s space daily, and also offered rent concessions to the tenants.

In April 2009, the landlord instituted an eviction action against the tenant for rent payment defaults, and the tenant countered with an action for breach of the lease and negligence by the landlord. The court concluded that the landlord could only be held responsible for “gross negligence” and determined that the landlord’s actions coupled with their remedial measures did not constitute “gross negligence” and ruled in favor of the landlord.

(D) *Safeway Ind. V. CESC Plaza Limited Partnership (261 F.Supp.2d 439, 2003).*

The tenant, Safeway Inc., entered into a grocery store lease in 1967 at the Crystal City Plaza Shops in Crystal City, Virginia (a suburb of Washington, D.C.). The Plaza Shops were constructed as an enclosed, retail mall with approximately 40 stores; the Safeway store opens onto the interior of the Plaza Shops.

In 2001, the landlord proposed a \$40MM renovation project to transform and revitalize the Plaza Shops. Safeway’s lease requires Safeway’s consent to the proposed renovations, including removal of the existing parking structure which provides surface level parking. Safeway filed an action in 2002 seeking a declaratory judgment that its withholding of consent to the proposed alteration of the common area was reasonable. The Court noted that “although the question is

a close one”, Safeway’s concerns regarding elimination of the surface parking and shift to underground parking was a reasonable ground for Safeway to withhold consent to the renovations. However, the Court held “in the exercise of its equitable discretion” that it would not issue a permanent injunction regarding the renovations but instead ordered a jury trial on the amount of damages owned to Safeway based on the landlord’s breach of the lease.

(E) *Wisconsin-Newark Neighborhood Coalition v. DC Zoning Com’n.* (33 A.3d 382, 2011).

A developer submitted an application for a planned unit development (PUD) with the D.C. Zoning Commission for a project encompassing a 178,236 square foot area on Wisconsin Avenue in the District of Columbia, which envisioned the replacement of an existing shopping center with a mixed-use development featuring a new grocery store and new residential and commercial uses. Neighborhood associations filed a petition for review of the PUD.

The court determined that the PUD was not inconsistent with the Comprehensive Plan since it included low and medium density residential areas, and because the developer had taken appropriate precautions to minimize any negative impact of the development on the surrounding community and surrounding streets could accommodate additional traffic.

(F) *Clay County Realty Co. v. City of Gladstone* (254 S.W.3d 859, 2008).

A retail development known as Gladstone Plaza Shopping Center in Gladstone, Missouri, was declared “blighted” by the City in May 2003. In May 2004, the City entered into a redevelopment agreement with a developer but subsequently cancelled the agreement. In August 2005, the City began to solicit TIF financing proposals for the property; and in 2005, the City adopted an ordinance designating the property as blighted and approving a TIF plan, which enabled the City to utilize eminent domain for economic development. However, the City did not adopt an ordinance approving a TIF project including the redevelopment to occur at the subject property.

The property owners instituted an inverse condemnation action against the City, claiming that the City’s actions caused significant diminution of the value of the subject property amounting to a taking. The court reversed the City’s motion for summary judgment and held that the property owner would be entitled to prevail if they were able to show “aggravated delay or untoward activity” in instituting or continuing a condemnation proceeding.

(G) *Odyssey (III) DBx, LLC v. PNC Bank, NA* (2014 WL 2050761).

PNC Bank made a loan to a developer for \$7.72MM in January of 2007 to enable the developer to purchase and redevelop the Northgate Village Shopping Center in Gardendale, Alabama, which would attract new tenants to the Shopping Center. The developer secured a commitment from Publix to build a grocery store in a location presently occupied by Dollar Tree. To facilitate the new Publix store, developer entered into an amendment to its lease with Dollar Tree to build a new location within the Shopping Center. The developer failed to complete the construction of the new Dollar Tree store, and in order to resolve ensuing litigation between the developer and Dollar Tree, developer requested PNC’s consent to a second amendment to the Dollar Tree lease. PNC requested changes to the second amendment which were never resolved.

The developer instituted an action against PNC for interference with business relationship, breach of fiduciary duty, and breach of contract arising from PNC’s refusal to sign the second amendment to Dollar Tree’s lease. The court determined that the developer could pursue claims against PNC based on interference with business relationship and breach of fiduciary duty.

(H) *North County Advocates v. City of Carlsbad* (241 Cal.App.4th 94, 2016).

The owner of a shopping center in Carlsbad, California, originally built over 40 years ago, submitted a request to renovate portions of the shopping center. An environmental group, North County Advocates, challenged the approval under the California Environmental Quality Act, arguing that the project’s environmental impact report used an improper baseline in its traffic analysis because it treated the Robinsons-May store as fully occupied even though it was vacated in 2006.

The court determined that there was substantial evidence supporting the City’s exercise of discretion in selecting a traffic baseline that assumed a fully-occupied Robinsons-May building since this was based on the actual historical operation of the space for more than 30 years until 2006, and fluctuating occupancy “which is the nature of a shopping center” was appropriate in accounting for a “temporary lull or spike in operations”.