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Workshop 9

Unmasking the Social Distance Between Title and the Rest of the World!

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Title and Survey immunization against today's vexing real estate issues. Our interactive discussion will include remote notarization laws, changing uses from retail to medical offices or to multi-family housing, and related mechanics' liens concerns arising out of repurposing such uses. We will also cover certain title endorsements as well as the 2021 Changes to ALTA/NSPS Survey Standards

I. Remote Notarization

Remote online notarization incorporates several security features into the process. First, the signer must successfully complete multifactor authentication before the notary may perform the notarial act. Multifactor authentication ("MFA") requires the signer to complete two different methods to prove they are who they say they are. Generally speaking, there are three ways to identify someone: (1) something they have; (2) something they know; and (3) something they are. The easiest example to understand this concept is your iPhone. We use MFA in our daily lives all the time. To open your iPhone, you need to actually <u>have</u> the iPhone in your possession; and you open the phone by either a passcode (something you know) or a retina scan/finger print scan (something you are).

The standards require a bit more teeth when dealing with notarizations because of the financial implications that could result from an invalid notarization. But, conceptually, the requirements are similar. MFA in the RON context requires the signer to pass two *<u>different</u>* methods of identifying someone. This means simply providing two forms of ID does not qualify as MFA, nor does it provide the security and integrity we'd like to see in order to rely on a remote notarization. The idea being if you can steal or fraudulently produce one ID, you could do so for a second ID. Similarly, if you stole someone's credit history off the dark web, you might be able to answer the "out-of-wallet" questions associated with a knowledge-based authentication (KBA) assessment. But, it's much more challenging

to create a fraudulent ID and have sufficient details on the signer's credit history to answer questions associated with KBA.

In today's world and with today's existing technology, the most common methods of MFA require: (1) credential analysis; and (2) KBA. Credential analysis validates that an ID is a valid ID. KBA consists of a quiz of 5 questions with 5 possible answer choices that must be answered in 2 minutes. The questions are derived from public and proprietary data source (e.g., credit reports). The layering of different layers of identifying something makes it more challenging for a fraudster to dupe a notary. Also remember, the signer must pass MFA before the notarial act. So even if a fraudster can pass MFA, the notary will then have an opportunity to review the ID and look at the signer over a webcam and won't go through with the notarization if the notary still isn't comfortable with the signer's identity.

Another huge fraud-deterrent is that an audio-video recording. The notary is required to keep an audio-video recording of the notarial act, which is retained by for a period that ranges by state but usually is 5 to 10 years from the date of the notarial act. All of these factors reduce the risk of fraud from occurring in the first place.

Hypothetical: The New York commercial building sale is scheduled to close in the morning. The seller and the title insurance company have just concluded that a one tenth fee interest is vested in an individual hospitalized for knee surgery in Florida. Can the transaction still timely close?

II. Changing Uses: From Retail to Medical Offices/Multi-Family Housing

A. **Changing Landscape of malls:** Reading the headlines of the local trade papers regarding the commercial retail and shopping center market, shopping centers across the United States are in flux. In a report by **Coresight Research**, dated September 2, 2020, estimated that:

- One-quarter of US malls could close over the next three to five years;
- Class B, C and D malls are at most risk of closures;
- Department store closures will deprive many malls of anchor tenants;

A report by **Laure Thomas of MSNBC** dated Aug. 27, 2020 estimated that 15 to 17 percent of US malls will need to be redeveloped into other uses longer term. In addition, the report stated that turning shuttered malls into e-commerce warehouses or multifamily structures could reduce property values by 60 to 90 percent.

What does this mean in terms of title insurance? Lenders, equity investors and acquiring developers will be seeking coverage to protect them from mechanics' liens and use restrictions arising out of the redevelopment, repurposing and change of use of shopping centers.

B. **Mechanics' Liens Concerns**: From a title insurance perspective, the repurposing and/or redevelopment of a mall creates underwriting issues when a title company is asked to provide mechanics' lien coverage for a construction lender or incoming equity investor. The mechanics' lien laws vary from state to state but a significant number (and almost all in the Western US) have a "relation back" component where the contractual lien rights attach to the property on the day the project work commenced. As such, when a construction lender requests mechanics' lien

coverage, whether it be full coverage or incremental mechanics' lien coverage, when a title company evaluates whether to insure the priority of a mortgage or deed of trust over mechanics' liens, the title company will treat the "relation back" component as a special risk in underwriting the project.

In addition, if there is to be an equity investor or mezzanine lender in the project, there will likely be a request for some type of owner's coverage providing mechanics' lien coverage that provides assurance that all contractors, materialmen, laborers and equipment providers have been paid current. Title insurance does not insure that such payments are current.

Because there may be an impending "tidal wave" of mall renovations into a variety of different uses under tight deadlines, transaction parties should understand the information title companies will require to review and assess a project. Unlike underwriting a pure title issue, underwriting mechanics' lien coverage requires an understanding of the financial aspects of the transaction. Because there is some likelihood that lien claimants will have priority over the insured construction mortgage due to the time of commencement and relationship back element of lien priority determination, title companies will analyze the viability and strength of each project to confirm that the developers and general contractors have the appropriate experience and capitalization to complete the project, pay contractors and resolve any issues or disputes regarding work on the site.

As part of this analysis and depending on the mechanic's lien coverage being provided, title companies will analyze the new proposed property use in the context of the current market as well as the financial strength of any loan guarantors providing indemnities to the title companies to protect the title companies against lien claimants.

Typically, a title company will request the following information when considering what type of mechanics' lien coverage (if any) it will provide:

- ❑ Loan Agreement
- ❑ Loan Guarantee
- ❑ Copy of financials for the borrower and guarantor
- ❑ Equity contributions and timing of contributions by Borrower
- ❑ Copy of General Contract
- ❑ List of major subcontractors
- ❑ Copies of current GC's pay application and lien waivers
- ❑ Appraisal
- ❑ Project budget

As part of this analysis, title companies will look to the following:

- Financial strength of borrower and any loan guarantor;
- Strength and experience of General Contractor ("GC");
- Past construction projects of Borrower and GC;
- Terms and amount of the GC contract;
- Whether GC and subcontractors will subordinate mechanics' lien rights to mortgage;
- Whether GC will provide "pay when paid" imdemnity;
- Amount of the construction loan and construction project;
- Local market conditions for new construction of the project;
- Amount of equity borrower has or will put into the project.

These lists are not exhaustive. Every transaction is unique and may require additional items for review.

In addition, when there will be a change of use as part of the property redevelopment, insureds will be looking for coverage to insure that the new use complies with applicable zoning codes and/or any CC&R's that may affect the property.

C. **Title insurance endorsements**: When there is a change of use, compliance with current zoning regulations or the process of completing a zoning change or acquiring a conditional use permit may be an issue. In addition, consideration should be paid as to whether the change of use will comply and not violate any CC&R's or other restrictions that could be recorded against the property. In this scenario the ALTA 3.1 (Zoning Completed Structure), 3.2 (Zoning Under Development) endorsement and/or an ALTA 9 series endorsement may be requested or required by the lender. If there are concerns whether the new use is compliant, attempts should be made to identify and address these concerns as early as possible. Note that title insurance does not insure use; it insures zoning classification and that the structure is in compliance with same. Set forth below is the text of the ALTA 3.2 (Zoning Under Development) endorsement and the ALTA 9.7 – Lender (Land underdevelopment) endorsement:

ALTA 3.2 Endorsement

1. For purposes of this endorsement:

a. "Improvement" means a building, structure, road, walkway, driveway, curb, subsurface utility or water well existing at Date of Policy or to be built or constructed according to the Plans that is or will be located on the Land, but excluding crops, landscaping, lawns, shrubbery, or trees.

b. "Plans" means those site and elevation plans made by [name of architect or engineer] dated ____, last revised ________, designated as [name of project] consisting of ___sheets.

2. The Company insures against loss or damage sustained by the Insured in the event that, at Date of Policy

a. according to applicable zoning ordinances and amendments, the Land is not classified Zone ______________________;

b. the following use or uses are not allowed under that classification:

c. There shall be no liability under paragraph 2.b. if the use or uses are not allowed as the result of any lack of compliance with any condition, restriction, or requirement contained in the zoning ordinances and amendments, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses. This paragraph 2.c. does not modify or limit the coverage provided in Covered Risk 5.

3. The Company further insures against loss or damage sustained by the Insured by reason of a final decree of a court of competent jurisdiction either prohibiting the use of the Land, with any existing Improvement, as specified in paragraph 2.b. or requiring the removal or alteration of the Improvement, because of a violation of the zoning ordinances and amendments in effect at Date of Policy with respect to any of the following matters:

a. Area, width, or depth of the Land as a building site for the Improvement

b. Floor space area of the Improvement

c. Setback of the Improvement from the property lines of the Land

d. Height of the Improvement, or

e. Number of parking spaces.

4. There shall be no liability under this endorsement based on:

a. *the invalidity of the zoning ordinances and amendments until after a final decree of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses;*

b. *the refusal of any person to purchase, lease or lend money on the Title covered by this policy.*

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

ALTA 9.7 Endorsement

1. *The insurance provided by this endorsement is subject to the exclusions in Section 5 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.*

2. *For purposes of this endorsement only:*
   a. *"Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.*
   b. *"Future Improvement" means a building, structure, road, walkway, driveway, curb, lawn, shrubbery or trees to be constructed on or affixed to the Land in the locations according to the Plans and that by law will constitute real property.*
   c. *"Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.*
   d. *"Plans" means the survey, site and elevation plans or other depictions or drawings prepared by (insert name of architect or engineer) dated ____, last revised ________, designated as (insert name of project or project number) consisting of ___ sheets.*

3. *The Company insures against loss or damage sustained by the Insured by reason of:*
   a. *A violation of a Covenant that:*
      i. *divests, subordinates, or extinguishes the lien of the Insured Mortgage,*
      ii. *results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or*
      iii. *causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the indebtedness;*
   b. *A violation of an enforceable Covenant by an Improvement on the Land at Date of Policy or by a Future Improvement, unless an exception in Schedule B of the policy identifies the violation;*
   c. *Enforced removal of an Improvement located on the Land or of a Future Improvement as a result of a violation of a building setback line shown on a plat of subdivision recorded or filed in the Public Records at Date of Policy, unless an exception in Schedule B of the policy identifies the violation; or*
   d. *A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.*

4. *The Company insures against loss or damage sustained by reason of:*
   a. *An encroachment of:*
      i. *an Improvement located on the Land at Date of Policy or a Future Improvement, onto adjoining land or onto that portion of the Land subject to an easement; or*
      ii. *an Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.;*

b. Damage to an Improvement located on the Land at Date of Policy or a Future Improvement:

i. that encroaches onto that portion of the Land subject to an easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or

ii. resulting from the future exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.

5. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

a. any Covenant contained in an instrument creating a lease;

b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;

c. except as provided in Section 3.d, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances;

d. contamination, explosion, fire, flooding, vibration, fracturing, earthquake or subsidence; or

e. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

D. LICENSE AGREEMENTS

For over a century, license agreements have been used to document the concept of a shop within a shop. For example, in a department store cosmetics section, many or all of the brands display their products in close proximity to those of other brands, yet each brand retailer is a separate and distinct business operation. The respective rights and obligations of the store owner and the licensee are memorialized in a license agreement. This is also the case with designer shops within stores such as Bloomingdales, Saks Fifth Avenue or Macys. The designer will sell its products pursuant to a license agreement, and the department store will have the right to terminate the license if, for example, the licensee's branding is no longer compatible with that of the store or if certain sales targets are not met. Often the licensee will invest large sums to fixture and fit out its designated area to capitalize on its exposure in the department store and the department store will want the licensee to remain as long as both parties are profiting from the relationship.

How is a license different from a lease or an easement? According to Freidman on Leases, "a lease is a conveyance of exclusive possession of a specific property for a term less that that of the grantor usually in consideration of the payment of rent, which vests an estate in the grantee." Generally, a lease provides for an exclusive right to use the space for a set period of time. Considerable legislation and case law in each state now define the obligations of a landlord and tenant created by a lease arrangement. In contrast, Friedman goes on to explain that a license merely makes permissible acts on the land of another that would otherwise lack permission. Critical elements of a license are (i) that it is terminable at will, and (ii) it does

not grant the licensee an estate in the land. See Milton R. Friedman & Patrick A. Randolph, Jr., Friedman on Leases § 3, 37-1 -37.3 (5th Ed. 2004).

In determining whether an agreement is a lease, a license or an easement, courts will also consider whether the granted use is non-exclusive, whether the owner retains certain controls over the property, and whether the owner provides services essential to the licensee for the use of the property. A license is distinguishable from an easement which, like a license, permits the use of the owner's property or restricts the owner from certain uses of it property; however, unlike a license, an easement transfers to the easement holder an interest that encumbers the property and affects title. Easements are classified as *appurtenant* to the property in which event they benefit the holder and are transferable with the transfer of the property or *personal* to the holder of the easement in which event they do not run with the land. Unless otherwise specified, an easement is presumed to be permanent and non-exclusive, and is generally transferable.

A property owner may prefer a license over a lease because it is easier to remove a licensee than to remove a tenant. With a lease, there can be an expensive, litigious and highly technical gauntlet of legal process to remove a tenant. While the eviction winds its way through court, the landlord can face cumbersome delays, lost income, large tax expenses, lost opportunities to obtain a new responsible tenant, and burdensome legal fees. Even if a lease specifically states that a landlord may use self-help, it is a risky proposition. Section 853 of the New York Real Property Actions and Proceedings Law provides that if a tenant is ejected from real property by force or other unlawful means, the tenant may recover treble damages from the landlord and may be restored to the property if ejected before the end of the lease term. NY CLS RPAPL § 853.

By contrast, it is well settled that a licensor may revoke a license "at will" and can use "self-help" to remove a defaulting licensee, thus foregoing the arduous gauntlet required to regain possession of leased property. Under a license, the licensee has no estate in the property and has no right to possession. Unless expressly contradicted in the license agreement, common law principles generally apply and the licensor has the absolute right to use peaceable self-help to remove a licensee from a licensed premises. However, even though it is easier to remove a licensee than it is to remove a tenant, certain laws apply. New York Real Property Actions and Proceedings Law Section 713, which generally relates to summary holdover proceedings where no landlord-tenant relationship exists, applies to an action against a licensee if the license has expired or been revoked and would therefore require the sending of a ten day notice to quit. NY CLS RPAPL § 713.

Where the distinction between a license and a lease becomes blurred, there can be uncertainty as to how a court might characterize the license agreement despite how it is labeled. Besides the title of the document, a court will look at the elements of the agreement and the equities of the situation in it decision making. In American Jewish Theatre Inc. v. Roundabout Theatre, Inc. 203 A.D.2d 155 (N.Y. App. Div. 1st Dep't 1994), the Appellate Division, First Department wrote "what defines the proprietary relationship between the parties is not its characterization or the technical language used in the instrument but rather the manifest intention of the parties. The nature of the transfer of absolute control and possession is what differentiates a lease from a license or any other arrangement dealing with property rights. Whereas a

license connotes use or occupancy of the grantor's premises, a lease grants exclusive possession of designated space to a tenant subject to rights specifically reserved by the lessor. The former is cancellable at will without cause." Here, the plaintiff theatre company brought an action for injunctive relief that could only be afforded to a tenant in the context of a rental dispute. Because the plaintiff had a six month fixed right to use the space that was not revocable at will, the court found that, even though the agreement between the parties was labelled a license, the relationship was a leasehold one.

In a more recent case, Nextel of N.Y. v. Time Management Corp. 297 A.D.2d 282 (N.Y. App. Div. 2d Dep't 2002), the Supreme Court, Appellate Division Second Department, found that a roof top cellular agreement was a lease not a license because the agreement contained provisions typical of a lease and conferred rights well beyond those of a holder of a license or a temporary privilege.

Further, it seems the courts will look at the equities of a situation to come to its decision. In Blenheim LLC v. Il Posto LLC, 827 N.Y.S.2d 620 (N.Y. Civ. Ct. 2006), the Civil Court of the City of New York County found that a provision in a lease giving a restaurant a license revocable at will to use a vault space could not be revoked at will. The Court concluded on the facts of the case that the landlord knew that the tenant needed the vault for its compressors, hot water heaters and elevator machine equipment and, as such, the use of the vault space was necessary and essential for the use of the space as a restaurant and was therefore appurtenant to the lease between the parties and thus irrevocable. Accordingly, where a license is viewed as coupled with an interest or where there is reliance on the license, a court might equitably rule that there should be greater protections for the user.

Most recently, in February 2014, in Union Sq. Park Community Coalition, Inc, v. N.Y. City Department of Parks and Recreation, 97 N.E.2d 142 (N.Y. 2013) the New York Court of Appeals affirmed an Appellate Court decision that found that a fifteen year agreement between the NY Department of Parks and Recreation and a restaurant was a license and not a lease. Here, even though the document was entitled "License"; it had a fifteen year term and a payment structure that resembled a lease. Although in this case the use of the indoor pavilion was exclusive, the outdoor space was available to non-restaurant patrons except in certain designated areas where liquor was served. In addition, in the agreement, the Department of Parks and Recreation retained the right to terminate the relationship at will on twenty five (25) day written notice as long as its reasons were not arbitrary or capricious. In examining the distinction between a license and a lease, the New York Court of Appeals stated:

A document is a lease if it grants not merely a revocable right to be exercised over the grantor's land without possessing any interest therein but the exclusive right to use and occupy the land. It is the conveyance of absolute control and possession of the property at an agreed rental which differentiates a lease from other arrangements dealing with property rights (Feder v. Caliquira, 8 NY2d 400,440 [1960]). A license, on the other hand, is a revocable privilege given to one, without interest in the lands of another, to do one or more acts of a temporary nature on the lands. (Trustee of Town of Southampton v. Jessup 162 NY 122, 126 [1900]; see also Lordi v. County of Nassau, 20 Ad2d 658, 659 [2nd Dept 1964] affd without opinion 14 NY2d 699 [1964]). Generally, contracts permitting a party to render services within an enterprise conducted on premises owned or operated by another, who has supervisory power over the method of rendition of the services, are construed as licenses. That a writing refers to itself as a license or lease is not determinative;

rather the true nature of the transaction must be gleaned from the rights and obligations set forth therein. Finally a broad termination clause reserving to the grantor the right to cancel whenever it decides in good faith to do so is strongly indicative of a license as opposed to a lease, (Miller, 15 NY2d at 38).

Although its analysis of the law was not so novel, the *Union Square* decision may indicate a critical turning point since it underscores the willingness of the Court of Appeals to find a license rather than a lease, even though: (i) the term was fifteen years, (ii) the user was required to invest $700,000 in capital investments that were not refundable upon termination, (iii) the annual fees were substantial starting at $350,000 and increasing to $400,000 or more if percentage rent was greater, and (iv) the owner was required not to be arbitrary and capricious in exercising its at will termination right. Further, in deciding Union Square, the Court of Appeals ignored its earlier precedent in Miller v. New York, 203 N.E.2d 478 (N.Y. 1964) where, under similar facts, it found that an agreement by New York City's Parks Commissioner allowing a private corporation to use a golf-driving range was a lease not a license.

As the referenced cases indicate, there can be benefits to characterizing an agreement as a license agreement rather than a lease, but the instrument must be drafted carefully and, *caveat emptor*: the title of the agreement may not be dispositive. Courts seem apt to find a document is (i) a lease, if it is for an exclusive use for a set period of time and (ii) a license, if it for a non-exclusive use which is terminable at will. Further, there may be an element of equity which influences the courts' decision. Skilled real estate lawyers will assess which form of agreement—license or lease—will best serve their respective clients' needs.

Since one indicia of a license is a broad licensor termination right, a licensee may resist its use where a significant financial commitment is needed to prepare the space for its use. However, licensors are increasingly using creative financing arrangements whereby they agree to return an unamortized portion of the licensee's installation investment upon termination to encourage the use of a license rather than a lease. Licensors are agreeing to these provisions where they want the flexibility of an absolute right to terminate the license for any reason (such as the ability to pursue a development deal).

What developing trends lend themselves to license agreement arrangements?

Traditionally, "Pop up" stores have been used for seasonal Halloween or Christmas outlets and designer sample sales. However, today, social media has made it easier and less expensive than ever to advertise the availability of pop up space. Web sites such as thestorefront.com connect property owners who have short term retail space to rent with artists, brands and boutiques in need of temporary quarters, something in the nature of Airbnb. Lately, national brands and known entities have been using "pop up" spaces: Kate Spade opened one to launch a new line, Kanye West had a pop up space at 355 Bowery in New York City to sell tickets, hats and bags in connection with a concert tour, and tech giants Google and Microsoft opened temporary locations to capitalize on the holiday rush. These pop up stores provide a landlord income while it seeks a more permanent tenant, waits for longer term rents to rise, or, perhaps, works through a zoning change. Pop up tenants can add positive visibility or buzz to a location, increasing its desirability.

When entering into a license agreement for a pop up store, a property owner should be careful not to hinder its pursuit of a more profitable long term tenant or, in a mall setting, violate existing tenants' exclusive uses or other rights. Likewise, the owner should keep in mind that a pop up occupant may not be as vested in the location as a tenant with a lease and may be less concerned with running a quality operation or being a good neighbor. In all events, liability insurance should be in place because accidents can happen even if the pop up use is only for a few days.

License agreements provide an attractive flexible short term use option for a specific limited purpose whereby a retailer can experiment with a location or create a splash in a heavily trafficked area that it could not afford otherwise. Because there is typically not a large fit out investment, users are agreeable to the licensor's right to terminate at will upon notice. In fact, in certain circumstances, there might not even be a grant of a specific space to the user. For example, in a retail context, the pop up space can be integrated into another non-exclusive use such as where an art gallery agrees to place a certain number of pictures on its walls or a cigar vendor has the right to have a concession stand at a hotel.

Another growing use of license agreements is in shared space situations. With the popularity of temporary work arrangements, a user may not even be devised a specific work space and could have non exclusive rights to use a conference room, reception area, and available secretarial services (for an extra fee). The user need not make a long term commitment to the space nor invest in outfitting an office since it typically comes furnished. The owner gets optimal use of its space and the ability to charge for a la carte services. Depending on the facts and circumstances, these arrangements may be appropriately characterized (and documented) as licenses. Where the occupant does not have exclusive use of a particular office space for a set period and the agreement is terminable upon thirty days' notice, it seems unlikely the transaction would run awry of any court-imposed license/lease distinction.

Food halls are increasingly popular today, in particular, those where a celebrity chef "curates" a food court. For example, it has been reported that Anthony Bourdain is opening Bourdain Market at Pier 58 on the Hudson River by the Meatpacking District. See Faith Hope Consolo, The Faithful Shopper: All Hail the Food Halls, The Huffington Post (January 15, 2016). The build-out may include a Singapore-style open area hawker market with moveable stalls selling a variety of inexpensive foods surrounded by a communal eating space. In a food hall, the curator sells different vendors the right to use a designated portion of the space. The curator typically retains the right to change the vendor mix (upon reasonable notice) and the food vendor gets profits and positive exposure without investing in fixturing and promoting a traditional restaurant. Again, since occupancy can be terminated at will after notice and the use is not exclusive, a license agreement seems to be the right legal vehicle.

Hypothetical: The Acme Shopping Center, located off a throughway exit ramp in Wylie, Colorado consists of two anchor pads and a strip mall with five retail stores. Developer Ed Coyote owns one of the pads ("Pad A") as well as the retail stores. The other pad ("Pad B") is owned by Rob Runner, an independent operator. Pad A and the retail stores are all mortgaged to Anvil Bank ("Anvil"). Pad B is mortgaged to Rocket Bank ("Rocket").

The Pad A tenant, a first class clothing and accessories department store, has defaulted on its lease and filed for bankruptcy. The premises are dark (in violation of many CC&R's) and Coyote is negotiating with Anvil Bank to change Pad A's use and reopen. Coyote's retail stores are all operating (albeit in a diminished capacity).

Runner's Pad B is leased to BullsEye, a successful multi-purpose department store which has exercised its right to pay only percentage rent while Pad A remains dark.

What are the legal issues confronting Coyote, Runner, Anvil, Rocket and the retail tenants?

What different issues arise if Coyote wants to change Pad A's use to multifamily? To medical?

How can title insurance help Coyote close his loan modification with Anvil?

III. 2021 Changes to ALTA/NSPS Survey Standards

A. **Overview of changes:** Earlier this year on February 23 revisions to the ATLA/NSPS Minimum Standard Detail Requirement For ALTA/NSPS Land Title Surveys went into to effect. The ALTA/NSPS survey standards have developed over the years and set out what a survey must show in order for title insurance companies to provide an insured owners survey coverage. More specifically, covered risk 2(c) of an ALTA title policy covers an insured owner against loss or damage sustained or incurred by reason of "any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the land. However, this coverage is limited/eliminated by the insertion of the following standard exceptions:

(1) Rights or claims of parties in possession not shown by the public records.

(2) Easements, or claims of easements, not shown by the public records.

(3) Encroachments, overlaps, boundary line disputes, or other matters which would be disclosed by an accurate survey and inspection of the premises.

In order to remove this standard exceptions and provide the coverage set out in Covered risk 2(c), ALTA and NSPS (former ACIM) developed a specific set of standards for surveyors to follow when completing a survey for the purpose of a title company reviewing and relying on said survey to delete the standard exceptions above and replace with specific exception disclosed by the survey. The current revisions generally have been adopted to tighten up the standard guidelines and specifically state who is responsible for providing the information needed to complete the survey, (i.e. insured, surveyor or title insurance company) there are some changes of not. Below are some changes of note that address issues that arise from time to time:

1. Revision as to who shall secure approval for surveyor to enter land: "Shall secure approval" replaces "may need to" secure approval for surveyor to enter upon land. This comes up from time to time as the surveyor's client is typically a buyer and doesn't yet have a possessory interest in the property yet. However, in most transactions the seller is only required to purchase the buyer standard owner's coverage containing the general exceptions and if the buyer want the survey exceptions removed the buyer must hire the surveyor. Typically, a term in a purchase and sale agreement will require a seller to cooperate and provide the buyer and its vendors access to the property. Under this

revision the buyer shall secure approval as to previously when the buyer/client "may need" to provide access.

2. "Field Work must be performed on the ground: ALTA surveys require a certain amount of field work. This revision makes clear that the field work must in fact be done on the ground.

3. Recorded easements discovered by surveyor but not listed on title report: If a surveyor becomes aware of a recorded easement not reflected on the title report or commitment that the survey is utilizing, the surveyor most disclose to title insurance company as well as depict on the survey unless title company provides evidence of the easements releases.

In addition, revisions have been made to Optional Table "A" Matters contained in Table A will not be included in the ALTA survey unless specifically negotiated for between the land owner/buyer/insured and the surveyor. Those items negotiated for are typically what's required by the title company. Generally. For a title company to delete the standard exceptions owner's policy it will typically want items 1, 6(a), 8, 9, 10 and 11 of Table A included on the survey as set out below:

1. Monuments placed (or a reference monument or witness to the corner) at all major corners of the boundary of the surveyed property, unless already marked or referenced by existing monuments or witnesses in close proximity to the corner.

6. (a) If the current zoning classification , setback requirements, the height and floor space are restrictions and parking requirements specific to the surveyed property area set forth in the zoning report or letter provided to the surveyor by the client or the client's designated representative, list the above items on the plat or map and identify the date and sources of the report or letter.

Redline showing changes: [(a) If the current zoning classification, setback requirements, the height and floor space area restrictions, and parking requirements specific to the surveyed property are set forth in a zoning report or letter provided to the surveyor by the client or the client's designated representative, list the above items on the plat or map ~~current zoning classification, setback requirements, the height and floor space area restrictions, and parking requirements~~. and lidentify the date and source of the report or letter.]

8. Substantial features observed in the process of conductingthe fielding work (in addition to the improvements and features required pursuant to Section 5 above) (e.g. parking lots, billboards, signs, swimming pools, landscaped areas, substantial areas of refuse.)

9. Number of and type of parking spaces.

10. AS designated by the client, a determination of the relationship and location of certain division or party walls with respect to adjoing properties.

11. Evidence of underground utilizes existing on or serving the surveyed property as

determined by (in addition to the observed evidence of utilities required pursuant to Section 5.E iv) as determined by:

a. Plans and /or report provided by client (with reference as to the sources of information;

b. Markings coordinated by the surveyor pursuant to a private utility locate request.

Of the typical Table Items requested by the Title Company, item 11 addresses issues as to who is responsible for what. Underground and undisclosed/unrecorded utility lines is a concern for title companies and the ability of surveyors to obtain them has always been challenge. The new revisions places the burden upon the client/insured to obtain any utility maps for the local governments or utilities and provide them to the surveyor.

B. **Redline Changes and comments to Table A** (Attached as exhibit "A" is the complete redline of all changes to the ALTA/NSPS Survey Standards:

2021 Changes to ALTA/NSPS Survey Standards

The following will highlight the significant 2021 Table A changes and provide a brief overview of the nineteen items that may be negotiated. Most of the Table A Items did not require modification and are only listed below.
Item 1. Monuments *placed at all major corners of the boundary of the* ***surveyed*** *property unless already marked. Many local jurisdictions on the West coast dictate that once monuments are set the survey is required to be filed of record with the municipality by the surveyor.*
Item 2. Address(es) *of the surveyed property.*
Item 3. Flood Zone Classification *graphically plotted.*
Item 4. Gross Land Area *listed.*
Item 5. Vertical Relief *(topographic data).*
Item 6.(a) List the current zoning *classification, setback requirements, the height and floor space area restrictions and parking requirements set forth in a zoning report or letter provided by the client or* ***the client's designated representative****.*
Note, this item still places the responsibility on others, not the surveyor, to engage municipalities 8 directly or engage a zoning information resource like CDS to provide the applicable zoning report. Utilizing a zoning research company reduces the risk of unforeseen expenses, delays and inadequate zoning information.
Item 6.(b.) Graphically depict the building setback requirements as provided by the client if the requirements do not require an interpretation by the surveyor. *Clarity provided in 2011 remained to address the responsibility of the surveyor and relieved the surveyor of the expectation to provide an opinion or statement to the intent of the data provided by the client.*
Item 7.(a.) Exterior dimensions *of all buildings at ground level.*
Item 7.(b.) Square footage *of exterior footprint of all buildings at ground level.*
Item 7.(c.) Measured height *of all buildings.*
Item 8. Substantial features observed *(in addition to the improvements and features required pursuant to Minimum Standards Section 5.) examples of the items to be shown include parking lots, billboards, signs, swimming pools, landscape areas and substantial areas of refuse.*
Item 9. Number and type of clearly identifiable parking spaces *on surface parking areas, lots and in parking structures. Striping of clearly identifiable parking spaces on surface parking areas and lots. Surveyors are not required to provide a site plan or depict the striping within parking structures.*
Item 10. Determination of division or party walls. *The 2021 change removes Table A 10.(b) that required the surveyor to determine whether certain walls are plumb if selected by the client. This item now focuses on only the determination and location of certain division or party wall with respect* ***to adjoining properties****.*

Item 11. Evidence of underground utilities existing on or serving the surveyed property (in addition to the observed evidence of utilities required pursuant to Section 5.E.iv.) as determined by:
(a) __ plans and/or reports provided by client (with reference as to the source of information)
(b) __ markings coordinated by the surveyor pursuant to a private utility request
*2021 further clarifies that above ground observed evidence of utilities existing on, above or beneath the surveyed property is required pursuant to 2021 Minimum Standards Section 5. The 2021 Table A item is **in addition** to the minimum requirement. The Table A item 11. note further details concerns and addresses the surveyor's responsibility for identifying underground utilities through 811 utility location request or information provided by the client. The note specifically states the fact that an 811 call from a surveyor may be ignored or result in an incomplete response that the surveyor will be required to note on the plat or map.*
***Item 12. Government Agency survey-related requirements** (e.g. HUD).*
For 2021 this item specifically states the relevant survey requirements are to be provided by the client or client's designated representative.

Item 13. Names of adjoining owners according to current tax records.
***Item 14. As specified by the client, distance to the nearest intersecting street**.*
***Item 15. Use of rectified orthophotography aerial imagery as the basis for showing the location of certain features (excluding boundaries) where ground measurements are not otherwise necessary to locate those features.** The surveyor **must** discuss the process with the client.*
***Item 16. Evidence of recent earth moving or construction work**. This item is essential for a lender to ensure that their mortgage will not be subordinate to a mechanic's lien.*
Item 17. Proposed changes in street right of way lines, if such information is made available to the surveyor by the controlling jurisdiction.
***Item 18. Wetlands** per 2011 requirements, has been **DELETED** as wetlands designation or the delineation of wetlands is not within the surveyor's purview.*
Item 18. Pursuant to Section 5. and 6., include any plottable offsite (i.e. appurtenant) easement or servitudes disclosed in documents provided to or obtained by the surveyor.
***Item 19. Professional liability insurance**. This item has not been modified and still contains specific language that states "…this item shall not be addressed on the face of the plat or map." Once the specific coverage of insurance is negotiated that amount is not to be displayed.*
***Additional Items** negotiated between client and the surveyor shall be identified as **20.(a), 20.(b)**, etc. and explained pursuant to Section 6.D.ii.(g). This establishes a platform to deliver unique client requirements, that are within the knowledge, training and capabilities of the surveyor. This option provides opportunities through the use of alternative surveying or drafting methods by which items may be graphically depicted and not measured.*
For example, Table A Item 20.(a), offered by CDS, provides a cost savings alternative to Table A Item 18. In many situations this alternative satisfies the requirements of lenders and title insurance companies concerning easements or servitudes benefiting the subject property and often reduces surveying fees and delivery times.
***CDS Table A Item 20.(a)** Graphically depict in relationship to the subject tract or property and any offsite easements or servitudes benefiting the surveyed property and disclosed in Record Documents provided to the surveyor as part of the Schedule "A". This provides an alternative to what could be an excessive amount of time spent in the field surveying the overall parcel when the subject property occupies an outparcel. For example, consider a restaurant within a shopping mall parking lot where each access road for the mall and parking lot areas provide access to the restaurant benefiting the subject property and creates an offsite easement. Table A, Item 18. would require the surveyor to locate all improvements that belong to the properties that the offsite easements cross. This potentially requires the entire shopping mall to be surveyed, in addition to the small subject property.*

- Considerations –
The ALTA/NSPS Minimum Standards and Table A optional items are deliberately selected for the purpose of satisfying the title insurance company's underwriting needs and gain extended title insurance coverage. It is paramount to adhere to current requirements and certification standards to ensure the value of the due diligence work can be realized for the current transaction and future transactions regardless of the title insurance company or lender. It is essential that all parties to the transaction, including the surveyor, clearly communicates early and sets proper expectations of responsibilities. Communication is crucial to avoiding delays due to missing research data such as zoning information or revisions in title documents and

commitments. Clear communication will ensure that the proper level of survey work is completed to satisfy the needs of all parties to the transaction. Working with a well-qualified and established surveying firms helps to avoid unnecessary delays, unforeseen additional charges, provides quality work and confirms the financial strength necessary to address claims that may fall outside of what is provided by the title insurance company.

C. Underground Utilities

Item 11. Evidence of underground utilities existing on or serving the surveyed property (in addition to the observed evidence of utilities required pursuant to Section 5.E.iv.) as determined by:
(a) __ plans and/or reports provided by client (with reference as to the source of information)
(b) __ markings coordinated by the surveyor pursuant to a private utility request
*2021 further clarifies that above ground observed evidence of utilities existing on, above or beneath the surveyed property is required pursuant to 2021 Minimum Standards Section 5. The 2021 Table A item is **in addition** to the minimum requirement. The Table A item 11. note further details concerns and addresses the surveyor's responsibility for identifying underground utilities through 811 utility location request or information provided by the client. The note specifically states the fact that an 811 call from a surveyor may be ignored or result in an incomplete response that the surveyor will be required to note on the plat or map.*

D. **Wetlands**:

***Item 18. Wetlands** per 2011 requirements, has been **DELETED** as wetlands designation or the delineation of wetlands is not within the surveyor's purview.*

E. **ATLA 25-06 (Same as Survey) (10/16/08) Endorsement**: On most transactions where ALTA extended coverage is requested, the ALTA 25-06 survey endorsement is requested as well. The survey endorsement insures against loss or damage if the land described in Schedule A is not the same depicted in the survey. Below is the text of said endorsement:

The Company insures against loss or damage sustained by the Insured by reason of the failure of the Land as described in Schedule A to be the same as that identified on the survey made by ____________________ dated _____________________, and designated Job No. _____.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.