ICSC

Section V

SESSION OUTLINES: GENERAL SESSIONS

Wednesday, October 24, 2018
2:00 – 3:15 PM

General Session 1

Bordering on the Edge: Multijurisdictional Practice Issues for Inside and Outside Counsel

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I. This fast-paced program, which combines scholarship with humor wrapped into one of the most unusual multimedia presentations you've ever seen, focuses on matters that cross state lines, lawyers who do deals in more than one state, and the ethical implications of all this under the Rules of Professional Conduct.

II. Transactional lawyers exist to do deals. We negotiate with parties concerning the creation of entities. We represent corporations and partnerships, landlords and tenants, lenders and borrowers, developers and contractors, and a myriad of other clients and businesses. We handle matters that may require consent or involvement of local, state, and national governmental entities. We document deals at the front end, work through issues as deals are ongoing, and confer on work-outs at the back-end if and when things go wrong.

III. We usually do all of this from the confines of our offices, using land-lines, email, the Internet, smart-phones, and all the accoutrements of modern practice. Yet, though we sit in our offices, our deals often extend around the country and sometimes around the globe.

IV. We tend to think that we are fully conversant with the Rules of Professional Conduct that apply within our own state and that nothing we do violates these Rules, but can we really rely on our understanding of our local state's Rules when our deals are interstate or international?

V. Topics to be covered include:

- Doing multistate deals;
- Retention of local counsel;
- Clients hiring lawyers and lawyers getting clients during conventions held in states where the lawyers are not licensed to practice;
- Doing legal work while "on the road," while you're on vacation out of state, or at a convention;
- Multistate ethics issues involving the use of Facebook, LinkedIn, Twitter, blogs, "blawgs" (law blogs), and other social media sites;
- Ethical issues involved in telling "war stories" at meetings;
- What Rule 5.5 expressly permits, what it seems to permit, and what it doesn't permit.

Wednesday, October 24, 2018
3:30 – 4:45 PM

General Session 2

What's Trending?
Recent Case Law Affecting Shopping Centers

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I. LANDLORD AND TENANT

II. VENDOR AND PURCHASER

III. MISCELLANEOUS

Thursday, October 25, 2018
9:00 – 10:15 AM

General Session 3

Traps for the Unwary with Property and Liability Insurance

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I. A Few Basics.

A. Types of Policies.

B. ISO.

C. Terms You Need/Terms You Must Banish.

II. Liability Insurance.

A. The Liability Coverage Provided to the Named Insured.

B. Liability Limits.

C. What is an Additional Insured, and Who needs to be One?

(i) Named Insured or Additional Insured?
(ii) The Additional Insured Endorsement.
(iii) Primary and Noncontributory – Other Insurance Condition.

D. Possible Problems with Excess/Umbrella Liability Coverage.

E. The Importance of a Contractual Indemnity Provision.

F. Issues for Tenants.

III. Property Insurance.

A. The Two Base Forms Necessary for Property Coverage.

(i) First: The Form That Stipulates the Property That Is Covered (the "Covered Property").
(ii) Second: The Form That Describes (and Limits) the Events Causing Loss That Will Be Covered.

B. The Insured Amount.

C. The Coinsurance Penalty for Underinsurance, and How to Avoid It.

D. The Tenant's Coverage for Loss of its Leasehold Interest.

E. Loss of Rents and Loss of Business Income.

(i) How to Obtain Coverage for Loss of Business Income and Loss of Rental Value.
(ii) What is Lost Business Income and Rental Value?
(iii) Coverage for Extra Expenses.

F. Coverages to Add (and Limitations to Avoid).

- (i) Add Terrorism Coverage.
- (ii) Add Flood Coverage.
- (iii) Add Building Ordinance Coverage.
- (iv) Avoid the Protective Safeguard Endorsement.
- (v) Watch Out For Vacancy.
- (vi) Add Mechanical Breakdown.

G. Waiver of Claims/Waiver of Suborgation – Each Party Should be Responsible for its Own Property.

- (i) What is a Right of Subrogation and Why Should It Be Waived?
- (ii) How Can an Insurer's Rights of Subrogation Be Waived?
- (iii) Is an Endorsement to the Policy Necessary?
- (iv) What is the Effect of Laws Limiting a Party's Right to Waive Claims?

H. The Risks of Relying on the Tenant to Insure the Landlord's Property.

I. The Lender's Rights and Protections.

J. Making Parties' Restoration Obligations Match Their Insurance.

IV. The Elephant in the Room: How Can a Party Obtain Proof of the Other Party's Insurance?

V. Conclusion.

Thursday, October 25, 2018
10:30 – 11:45 AM

General Session 4

Prophets and Profits: Shopping Center Development for the Multichannel, Mixed-Use Future

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I. Reciprocal Easement Agreements

- (A) Older Reciprocal Easement Agreements
- (B) Newer Reciprocal Easement Agreements

II. Existing Leases

- (A) Right of First Refusal.
- (B) Use Restrictions.
- (C) Site Plan Protection.
- (D) Co-Tenancy.
- (E) Relocation Rights.
- (F) Covenant of Quiet Enjoyment.
- (G) Relevant Cases.

III. Operational Issues

- (A) SNDA/Estoppels.
- (B) Parking.
- (C) Continued Operations During Construction.
- (D) Staging Areas/Construction Trailers.
- (E) Special Events.
- (F) Incentives.

IV. Parking

V. Access

VI. Recent United States Supreme Court Decision

Thursday, October 25, 2018
12:00 – 1:15 PM

General Session 5

Financing Your Shopping Center in Today's Real Estate Capital Markets; from Term Sheet to Closing: Negotiating a Loan You Will Not Regret

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I. STATE OF THE REAL ESTATE FINANCE MARKET IN 2018

A. *CMBS Loans –What is happening in the market?*

B. *Insurance Company Loans and other Balance Sheet Loans*

C. *Mezzanine Lending Market*

D. *Retail Loans*

II. FINANCIAL DEFINITIONS – ISSUES TO FOCUS ON WHEN ANALYZING DEBT YIELD AND DEBT SERVICE COVERAGE RATIO DEFINITIONS (AND THE COMPONENTS THEREOF) WITH RESPECT TO YOUR SHOPPING CENTER

A. *Importance of Financial Definitions in Loan Documents*

B. *Include Financial Definitions in Term Sheet*

C. *Issues for a Borrower to Consider When Negotiating in the Term Sheet and/or Loan Documents the Component Definitions of Debt Yield and Debt Service Coverage Ratio*

III. FUTURE DEVELOPMENT: ISSUES TO CONSIDER IN CONNECTION WITH PLANNED EXPANSIONS AND/OR CONSTRUCTION AT YOUR CENTER

A. *Scope of Future Plans*

B. *Obtaining Lender Approval for Proposed Construction/Redevelopment*

C. *Minimize Servicer Involvement*

D. *SPE Issues*

E. *REMIC*

F. *Security/Reserves*

G. *Expansion Release*

H. *Interference with Existing Shopping Center Operation and/or Existing Tenants' Business*

I. *Post-Completion Deliveries*

IV. RECOURSE CARVE-OUT GUARANTORS

A. *Caps on Guarantees – How Common*

B. *Net Worth and Liquidity Requirements*

C. *Provisions a Borrower Should Seek to Negotiate*

D. *Individual Guarantees*

E. *Replacement Guarantors upon Guarantor Default or Death of Individual Guarantor*.

F. *When is a Guarantor Released*?

G. *Discussion of Requirement of New Guarantor in Connection with Permitted Equity Transfers or JV Change of Control Event*

V. TRANSFERS AND PLEDGES AND THE DUE-ON-SALE/ENCUMBRANCE RESTRICTION IN THE LOAN DOCUMENTS

A. *Discussion of Sponsorship*

B. *Permitted Equity Transfers*

C. *Moody's 2018 View on Sponsorship and Transfers*

D. *Pledges*

E. *Violations Trigger Event of Default and Recourse In Loan Documents*

F. *Loan Assumptions*

VI. LEASING

A. *Impact of Increasing Retail Bankruptcies on Shopping Center Financing*

B. *Lender Consent with Respect to Leasing Activity– How to Minimize*

C. *Other Leasing Covenants*

D. *SNDA'S*

E. *Estoppels*

VII. CASH MANAGEMENT

A. *Springing, Soft or In-Place Hard*

B. *Who is the DACA Bank?*

C. *Budgets and Lender Approval*

D. *Are Operating Expenses in the Cash Management Waterfall?*

E. *If a Cash Sweep is in Place – Will Lender Permit Borrower Access to Excess Cashflow Subaccount?*

VIII. FINANCIAL REPORTING REQUIREMENTS

A. *Gap Versus Tax Reporting*

B. *Frequency of Delivery of Financial Reports: Financial Statements, Balance Sheets, Operating Statements, Rent Rolls, Etc.*

C. *Guarantor Reporting – What is Required?*

D. *Audited Statements*

E. *Regulation AB and Securitized Loans*

F. *Penalties for Non-Compliance*

IX. INSURANCE

A. *Recent Updates*

B. *Anchored Retail – Will the Lender accept the Anchor's Insurance*

C. *Self-Insurance*

D. *Legal Non-Conforming Properties - Issues to Consider*

X. "KNOW YOUR BORROWER"

A. *Increased Regulations on Banks Create Bigger Burdens on Shopping Center Owners*

B. *Preparation of Detailed Organizational Chart for Borrower*

C. *Searches – Bankruptcy, Litigation, Judgement, AML*

D. *OFAC/PATRIOT ACT – How Deep In The Equity Should The Lender Go?*

XI. INERNAL HOUSEKEEPING AND DILIGENCE FOR THE SHOPPING CENTER OWNER IN CONNECTION WITH LOAN CLOSING

A. *Advance Preparation and Internal Due Diligence Prior to Term Sheet*

B. *Order Third Party Reports*

C. *Entity Housekeeping*

D. *Review of Property Level and Borrower Representation and Warranties for Compliance*

E. *ERISA Analysis*

F. *Existing Loan and Payoff*

G. *Account Maintenance and Treasury Matters*

H. *Securitization Cooperation*

Friday, October 26, 2018
9:00 – 10:15 AM

General Session 6

David v. Goliath: Negotiating the Small Tenant Lease (Without Resorting to Slingshots)

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I. Introduction

II. Protection of Business

A. Use
B. Non-disturbance
C. Financing
D. Franchises
E. Expansion

III. Tenant Operations

A. Maintenance
B. Disruption of Services and Casualty
C. Parking
D. Signage

IV. Unanticipated Costs

A. Build-out
B. Compliance with Law
C. Utilities
D. Operating Costs
E. Surrender of the Premises

V. Exit Strategies

A. Transfer of Lease
B. Termination of Lease
C. Guaranties
D. Relocation and Transition
E. Disputes

VI. Conclusion

Friday, October 26, 2018
10:30 – 11:45 AM

General Session 7

Food Halls and Entertainment Uses – The New "Anchors" Floating to the Top

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I. Introduction

II. Food Halls

- A. Structuring the Deal
- B. Design, Layout and Construction
- C. Permitting Considerations (i.e. Alcohol permitting)
- D. Use and Exclusive Use Clauses in a Food Hall Environment
- E. Management of Food Hall Tenants and Patrons
- F. Structuring of Tenant Reimbursements
- G. Replacing Under-Performing or Poorly Operated Food Stalls
- H. Miscellaneous

III. Entertainment

- A. Security
- B. Noise
- C. Operating Hours
- D. Occupancy and Crowd Control/Monitoring
- E. Alcohol Concerns
- F. Percentage Rent Considerations
- G. Special Events/Sponsorships/Branding/Advertising
- H. Assignment/Subletting

IV Conclusion

Friday, October 26, 2018
12:00 – 1:30 PM

General Session 8

Make a [Shopping] List and Check It Twice
Identifying and Handling Conflicts of Interest in the Retail Real Estate Practice

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I. Lawyer Discipline and Civil Risks.

II. Identifying Conflicts.

III. Conflict Checking Procedures.

IV. Prospective Clients.

V. Assessing Identified Conflicts.

1. Current Client
2. Former Clients
3. Specific Rules

VI. Resolving Current Client Conflicts.

VII. Joint Representations

VIII. Organizational Clients.

IX. Resolving Former Client Conflicts.

X. Mid-course Conflicts.

XI. Prior Work Conflicts.

XII. Hypotheticals

1. **Situation One.** Owner/landlord asks you to represent it in the leasing of its shopping center. The manager advises that he has worked out the basic details with each of the five tenants. He thinks he can convince the tenants to also use you to represent them. Can you represent the owner/landlord and the prospective tenants on the leases?

2. **Situation Two.** You represent Company A in a transaction with Company B, *e.g.*, the lease in space within a shopping center. B is a client of your firm in unrelated matters, but is represented by other counsel in this transaction. You

are reluctant to seek B's consent to the representation of A, perhaps fearing B will not give it. You reason that the parties are not adverse in litigation, and that they are not even hostile. Besides, B wants the deal, and will not walk away because you are representing A.

3. **Situation Three.** Potential tenant A hires you to represent it in lease negotiations with shopping center owner/landlord for Unit A in the center. The next day, potential tenant B contacts your partner to represent it in lease negotiations for the same Unit A in the center. Can you take on the second representation? Do you now have a confidential information conflict regarding A because you now know B is also seeking to lease the same space?

4. **Situation Four.** You receive a call from Renee Jones, the general counsel of MultiProperties, Inc. (MPI), for whom you have done other commercial real estate work, the last matter having concluded 18 months ago. You know that Renee's background is as a transactional lawyer, but that she has had little or no experience in shopping centers or zoning regulations. Renee advises you that she has worked out a deal with two individuals to create an LLC and, with money contributed to the LLC from each member and financing from a bank, acquire a strip mall (and surrounding five acres of land) that currently has several tenants. Renee casually mentions that the complex is built on a former Army munitions installation. The leases are currently well under market rates and the LLC does not intend to renew them. She notes that several of the leases do have options to renew but she is confident they will "knuckle under" when they expire approximately three months after the anticipated acquisition; she expects you to make that happen. The LLC plans to renovate one retail unit to suit the business of one of the LLC investors, who plans to lease the space for one of his private businesses.

   a. Client Identification
   b. Conflicts
   c. Engagement Letters
   d. Drafting Issues
   e. Post Closing Issues

Friday, October 26, 2018
12:00 – 1:30 PM

General Session 8

Make a [Shopping] List and Check It Twice
Identifying and Handling Conflicts of Interest in the Retail Real Estate Practice

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I. Lawyer Discipline and Civil Risks.

II. Identifying Conflicts.

III. Conflict Checking Procedures.

IV. Prospective Clients.

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    a. Client Identification
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    c. Engagement Letters
    d. Drafting Issues
    e. Post Closing Issues

Section VI

SESSION OUTLINES: SEMINARS

Wednesday, October 24, 2018
2:00 – 3:15 PM

Seminar 1

Three's Company (or a Crowd?) – Issues in Franchise Leasing

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I. Introduction: The respective interests, conflicts and legal positions of Franchisors, Franchisees and Landlords.

II. Franchisor Concerns During Franchisee & Landlord Negotiations

- A. Franchisor Rights: Rider or Lease Provisions
- B. Collateral Assignment of Lease
- C. Franchisor Right of Entry
- D. Franchisor Notice and Cure Rights
- E. Third Party Beneficiary Rights/Franchisor Liability

III. Franchisee Interests in Conflict with Landlord and Franchisor

- A. Permitted Use
- B. Operations
- C. Construction, Repair, Maintenance, and Remodel Requirements
- D. Radius Restrictions

IV. Conflicts Between Franchisor / Franchisee and the Landlord

- A. Assignments to Franchisor, Other Franchisees without Landlord Consent
- B. SNDA Requirements
- C. Condition of Premises Upon Vacating/Termination
- D. Survival of Options
- E. Exclusive Use and Remedies for Violation
- F. Landlord Default and Self-Help

V. Landlord Concerns Relative to Franchisees as Tenants

- A. Indemnities
- B. Guaranties

Wednesday, October 24, 2018
3:30 – 4:45 PM

Seminar 2

Leasing Bootcamp: Show Me the Money!

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I. Introduction - This seminar is intended for leasing professionals and attorneys who are fairly new to the industry, and for those with more experience who would like to hear a current take on the clauses they negotiate every day. We will cover the topics from both the landlord and tenant perspective, share war-stories, and suggest negotiation strategies. We will also discuss how certain clauses may be specific to certain tenant type uses (such as comparing how certain clauses will be negotiated differently by a restaurant tenant and a retail store).

II. The Premises

A. Definition

B. Measurements

C. Location

III. Lease Contingencies

A. Pre-Delivery

B. Post-Delivery

IV. Use

A. Use of Premises

B. Continuous Operations/Recapture

C. Exclusives

D. Kickout

E. Tradenames

F. Restrictions

V. Co-Tenancy

A. Opening Co-Tenancy

B. Operating Co-Tenancy

VI. Remodeling/Alterations

A. Remodeling

B. Alterations

VII. Repairs and Maintenance

A. Premises Repairs

B. Shopping Center – CAM

VIII. Assignment/Subletting/Transfers

A. Transfers Requiring Landlord Consent

B. Assignments Not Requiring Landlord Consent

C. Non-Disturbance Agreements

D. Release Provisions

IX. Surrender

A. General Condition

B. Personal Property

C. Alterations

D. Special Issues (vaults; grocery stores; pools)

E. Casualty/Condemnation

A. Casualty

B. Condemnation

F. Miscellaneous

A. SNDA

B. Limitation on Liabilities

C. Lease Audits

D. Confidentiality

E. Tenant Credit (Security Deposits, Letters of Credit)

F. Landlord Credit re: Tenant Allowance

Wednesday, October 24, 2018
3:30 – 4:45 PM

Seminar 3

The ABCs of REAs: An Introduction to Shopping Center Reciprocal Easement Agreements

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I. Essential Purpose of an REA

II. Scope of an REA; Approving Parties

III. Overall Concerns of Parties to REAs

IV. Substantive REA Issues

A. Easements

1. Access (ingress/egress)
2. Parking
3. Utilities
4. Signage
5. Accent Lighting
6. Construction
7. Minor encroachments
8. Easements to Use the Enclosed Mall
9. Duration of easements

B. Site Controls

C. Construction Requirements and Restrictions; Building Maintenance Architectural Theme Building Plan and Site Plan Approvals

1. General Construction Issues
2. Construction Requirements and Timing
3. Construction Staging Area; Safety and Cleanliness Requirements
4. Ongoing Building Maintenance and Common Area Maintenance Requirements

D. Exclusive and Prohibited Uses

F. Casualty and Condemnation

G. Lighting Requirements

V. Term of an REA; REA Priority; Default Remedies

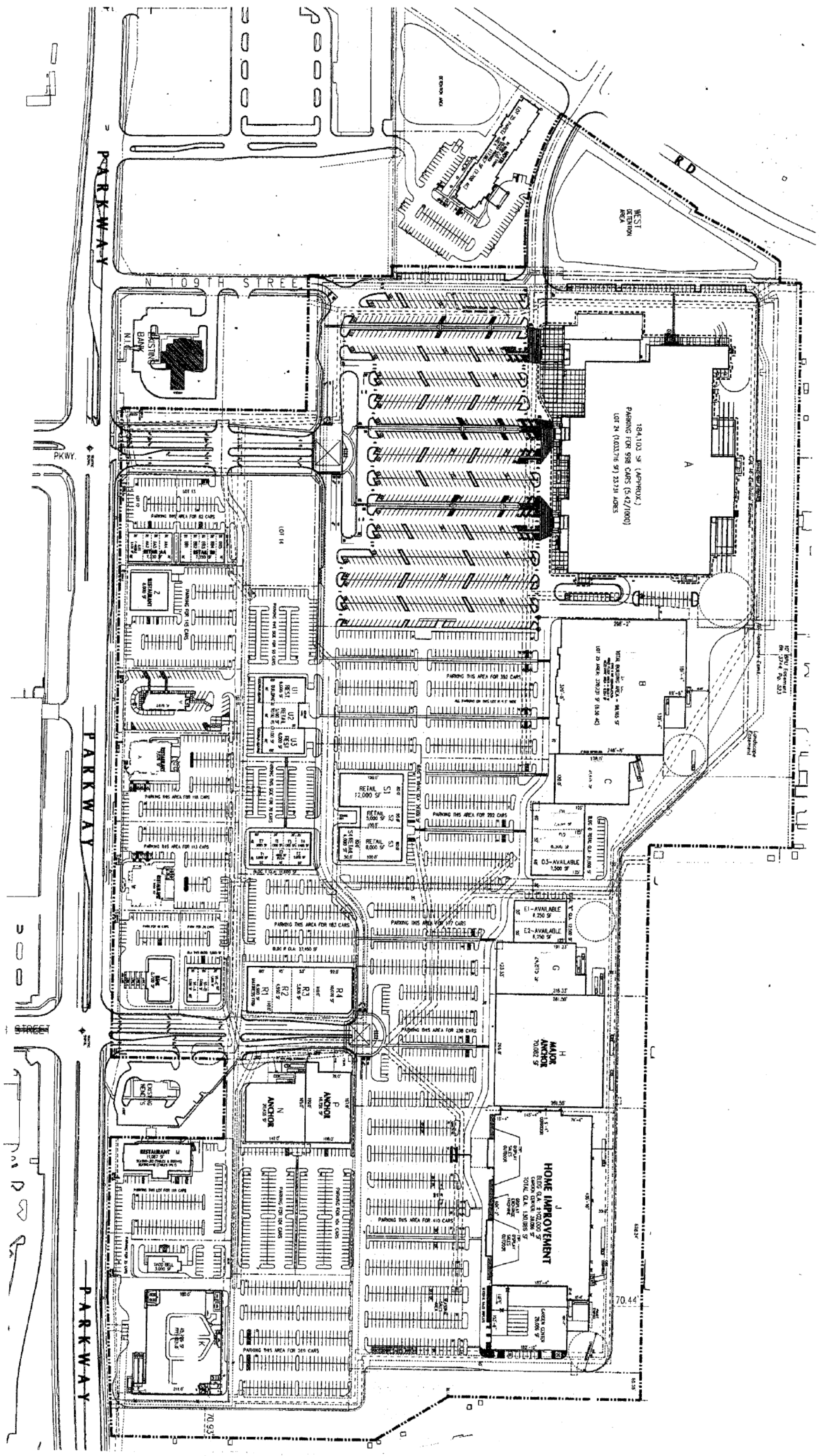
A. Term

B. Priority of an REA

C. Limitations on REA Default Remedies

VI. Case Study (see site plan)

EXHIBIT A - CASE STUDY SITE PLAN



Thursday, October 25, 2018
9:00 – 10:15 AM

Seminar 4

Common Problems and Pitfalls with Letters of Intent:
Mean What You Say and Say What You Mean

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I. Introduction: Discuss the principal goals of letters of intent ("LOIs").

A. The overarching goal of LOIs is to insure that the parties have a meeting of the minds on threshold business issues before they spend time, effort and money on preparing binding legal agreements and performing due diligence.

1. Lease LOIs.

2. Purchase and Sale LOIs.

3. JV LOIs.

B. Theme: Identify where you don't want to go with LOIs so that you make sure you don't get there.

II. Avoid spending too much time and money on a lengthy, complicated non-binding LOI.

A. Keep LOIs short and simple, typically focusing only on threshold or very important business points.

B. The test for addressing an issue in an LOI should typically be whether resolution of that issue is a threshold condition to a party's willingness to begin working on the definitive binding agreement.

III. Avoid having a binding LOI that fails to address many extremely important concepts.

A. Clearly specify that the LOI is non-binding except for any specific binding provisions like confidentiality and exclusivity.

B. Never have an LOI that is generally binding unless a sophisticated person absolutely insists on it and you document the problems with a binding LOI.

1. Consider whether a binding LOI includes the essential contract terms required for it to be legally enforceable.

C. Avoid putatively binding obligations to "negotiate in good faith" as such provisions invite litigation and are generally unenforceable.

1. Discuss LOI litigation case law.

IV. Avoid provisions or concepts that go beyond basic business terms without proper consideration or scrutiny by legal counsel.

A. Avoid "legalese", complex risk allocation provisions (unless they relate to a very specific material business issue and lawyers are involved in drafting the provisions), or technical terms or concepts.

V. Avoid having non-lawyers draft complicated provisions that fail to express the parties' actual intent, so that there's no actual meeting of the minds on those points.

A. Consider using a simple LOI template with blanks for key terms and involve lawyers if material editing to the template LOI will occur.

1. Discuss sample lease LOI.

2. Discuss sample purchase and sale LOI.

3. Discuss sample JV LOI.

B. Avoid having brokers or other non-lawyers "play lawyer" in drafting complicated LOI provisions—it never ends well.

1. Discuss examples of these kinds of LOI provisions.

VI. Avoid having an LOI that includes layers of redlined or interlineated changes and comments that are sometimes fragmentary, incomprehensible or contradictory.

A. Avoid an LOI that is visually a mess and cannot be correctly understood without oral explanations of the written LOI provisions.

B. Involve lawyers in the preparation of any LOI that involves (i) synthesizing comments and concepts received from multiple people and (ii) converting that into comprehensible written work product.

VII. Conclusion.

Thursday, October 25, 2018
9:00 – 10:15 AM

Seminar 5

Retail Chapter 11s – Quick Moving Cases and First Day Hazards

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I. Introduction

II. Parties and Case Profiles

A. The Players

1. Debtor
2. Secured Lender
3. U.S. Trustee
4. Vendors and Landlords
5. Unsecured Creditor Committee
6. Equity Holders
7. Inventory Liquidators and Real Estate Advisors

B. Lease Decisions and Fast Track Cases

1. Treatment Options with Unexpired Leases
   a. Assumption
   b. Assumption and Assignment
   c. Rejection
2. The 210 Day Deadline to Assume or Reject and DIP Financing
3. Case Outcomes
   a. Reorganizations and RSAs
   b. Section 363 Going Concern Sales
      i. The Motion to Approve Bidding and Sale Procedures
      ii. Due Process
      iii. The Auction
      iv. Lease Designation Rights
      v. Recent Cases
   c. Liquidations

III. First Day Motions

A. Store Closing Sales

1. Adequate Protection – 363(e)

2. Sale Guidelines
3. Side Letter Agreements
4. Stub Rent

B. DIP Financing and Cash Collateral Motions
1. Quick Case Milestones
2. Liens Against Leases and Lender Occupancy Rights
3. Stub Rent and Waiver of Right to Surcharge Lender – 506(c)

C. Pre Negotiated/Packaged Plans of Reorganization, Disclosure Statement Hearing

D. Lease Rejections

E. Lease Rejection Procedures

IV. Lease Amendments in Retail Cases

A. Context and Purpose
1. Assumption or Assumption and Assignment

B. Terms
1. Court Approval
2. Retroactive Relief
3. Conditions to Effectiveness
a. Order Approving Assumption (but not Assignment)
b. Timely Compliance with Lease and Amendment
c. Cure of Defaults and Agreement on Amount
d. Attorneys' Fees
e. Release of Landlord
f. Multiple Leases – Condition Amendment on Assumption of Other Leases

<u>Exhibits</u>:

A. Sample Committee Questionnaire and Notice of Formation Hearing

B. Sample Store Closing Sale Guidelines

C. Sample Lease Rejection Procedures

Thursday, October 25, 2018
9:00 – 10:15 AM

Seminar 6

I Missed What??? The Ongoing Saga of ADA Challenges and Claims

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I. A review of Title III of the Americans with Disabilities Act ("ADA")
   A. Definition of "public accommodation"
   B. Examples of public accommodations
   C. Recent opinions regarding exemptions

II. How does a covered entity comply with the ADA – recent caselaw
   A. Removal of barriers
   B. What is readily achievable
   C. Hand controls for vehicles
   D. Historic buildings

III. ADA Title III litigation – recent caselaw
   A. Plaintiffs' burden of proof
   B. Affirmative defenses
   C. Standing, Mootness, Primary Jurisdiction, Testers
   D. Damages/Attorneys' Fees
   E. Class certification
   F. A discussion of successful (and unsuccessful) Motions to Dismiss/Summary Judgment

IV. Websites as a place of public accommodation
   A. A review of recent caselaw
   B. WCAG 2.1 AA success criteria
   C. Recent developments in ADA Title III litigation

V. Update on state and federal legislation
   A. Current legislative efforts to curb perceived ADA abuse
   B. State action to stop serial plaintiffs

Thursday, October 25, 2018
10:30 – 11:45 AM

Seminar 7

The Fun and Games (Not!) of Shopping Center Use Restrictions: Sorting Out Exclusive, Prohibited, Obnoxious, and Downright Unattractive Use Restrictions

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I. TOPIC:

Shop owners historically relied on zoning restrictions to maintain an acceptable retail and low-impact commercial market "bubble" around their stores. However, the introduction of planned shopping centers controlled by one or more owner-landlords or a recorded restrictions document (or both) allowed further "use mix and control" refinement by way of documented use restrictions to control the permitted uses and prohibited or restricted undesirable uses in a center. This seminar will address issues and challenges in managing the myriad of shopping center use restrictions (exclusives, prohibited, restricted, and the like), including the problem some traditional restrictions pose as shopping center uses evolve, managing retailers' use restrictions that "overlap" another tenant's exclusive or prohibited uses (or both), drafting use restrictions that are both clear and legally enforceable, and other conundrums in managing the vast array of use restrictions in shopping center leases.

II. INTRODUCTION:

A. Restrictions on the use of land come in a variety of shapes and sizes:

1. Governmental – most common restriction on usage of land is zoning

   (a) Operates at a broad level, creating restrictions on the types of structures and uses that are permitted within a given area, such as residential zoning restrictions that prevent operating a gas station out of a residential garage.

   (b) U.S. Supreme Court opinion *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) upheld zoning as a legitimate governmental power under the police powers of government, and confirmed that public government entities have the reasonable right to regulate property uses in the form of zoning ("Euclidean" zoning)

   (c) Planned Unit Development – rendering zoning moot…?

2. Private limitations on permitted uses:

   (a) Recorded declarations

   (b) Reciprocal easements

   (c) Deed restrictions

   (d) Leases

B. Restrictions in a recorded instrument can have long-term effects

C. There are three primary methods used to place use restrictions on commercial leases:

1. Prohibited use clauses

2. Restricted use clauses or covenants

3. Exclusive use provisions

III. PROHIBITED USES:

A. "Obnoxious" and other undesirable uses

B. Generally take the form of a laundry list (see Appendix A in full materials)

1. Typically include uses that require intensive, long-term parking with little potential for "cross shopping", such as health clubs and other sport venues (e.g., skating rinks, bowling alleys), and movie theaters.

2. Include uses that are also often restricted by zoning, e.g., adult (obscene) type uses, sale of alcohol, and gas stations and auto repair shops

IV. RESTRICTED USES:

A. Restricted from being operated within a defined zone or x-number of feet away from the premises, such as the following examples:

1. Parking intense uses (movie theaters, health clubs)

2. Non-retail uses (e.g., medical)

3. Internet fulfillment centers

4. Professional / office uses

B. Accomplish the broad work of a prohibited use clause by narrowing the scope to particular areas

1. Segregate the non-retail uses away from the retail uses

2. Can prevent over-crowded parking lots and promote cross-shopping

V. EXCLUSIVE USE RESTRICTIONS:

A. Retailers with unique uses wanting to eliminate competition

B. Force landlords to not lease other shopping center space to a competitor

C. Drafting concerns and best practices:

1. Balance a tenant's concern that its "evolving" protected primary uses be included in the exclusive use versus a landlord's concern that an "evolving" use not infringe on another tenant's use clause.

2. Landlord issues:

   (a) Keep the use restrictions clear and narrowly drafted

   (b) Tie the Tenant's exclusive use to the Tenant's permitted use (and vice versa)

   (c) "Use it or lose it" provision

(d) Maintain a running comprehensive list of all shopping center use restrictions (prohibited, restricted uses, exclusive use provisions)

3. Tenant issues:

(a) Due diligence – review ALL existing use restrictions (recorded and unrecorded) copied ("snips") from original source documents, not a typed list or summary.

(b) Landlord "rep & warranty" as to comprehensive list of all use restrictions

(c) Landlord "rep & warranty" that existing use restrictions will not restrict or limit operation of the tenant's intended use

(d) Duty to inquire as to existing exclusives even if not presented by the landlord

(e) Any exclusive restriction should be no broader than legitimate business justifications reasonably require

VI. ISSUES CONCERNING USE RESTRICTIONS:

A. Legal Concerns

1. Anti-trust

2. Reasonableness in terms of scope and distance

3. Remedies

(a) Money damages, either calculated and proven, or liquidated damages, such as reduced rent and / or right to terminate the lease

(b) Injunction / TRO

4. Uses evolve and interpretations evolve.

(a) As of what date should the restrictive use be interpreted? As of the date of the document, or as of a later date when the prohibited use is challenged?

B. Cases:

1. *Marriott Corp. v. Combined Properties Ltd. Partnership*, 239 Va. 506 (1990)

2. *Waynesboro Village, L.L.C. v. BMC Props.*, 255 Va. 75, 496 S.E.2d 64 (1998)

3. *Providence Square Assocs., LLC v. G.D.F., Inc.*, 211 F.3d 846 (4th Cir. 2000)

4. *Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trail Plaza*, LLC, 811 So. 2d 719 (Fla. 3d DCA 2002)

5. *Waynesboro VIll. LLC v. Chick-Fil-A, Inc.*, 2014 Va. LEXIS 91 at *1 (May 27, 2014)

6. *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 881 F.3d 835, 840 (11th Cir. 2018)

Thursday, October 25, 2018
10:30 – 11:45 AM

Seminar 8

Top Ten Common Misconceptions in Ordering Title Insurance

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I. Introductions

II. Top 10 misconceptions about title insurance

A. Why spend money on title insurance? It makes more sense to self-insure

1. Statistical information supporting the number of claims and amounts every year.

2. Common defects

a) Filing or clerical errors
b) Evidence of a debt repaid (or not) that has not been released of record
c) Missing (or dead) heirs
d) Survey or boundary issues
e) Title search reveals past problems, so that they can be corrected before you take title.

B. Don't worry about mechanics' liens. They're small

C. We are sure the transaction is authorized.

1. Title company acts as a back-stop to ensure that the transaction is authorized by all parties.

2. Unless you are delivering an opinion letter in connection with closing, how often do you check your own client's organizational documents and authority?

3. Title insurance is critical both in the diligence phase and the closing process.

4. There may be forged or falsified documents that impact property ownership. Additionally, someone may have falsely impersonated a previous owner of the property.

D. Why negotiate title rates? They are all the same.

1. In many (but not all) states you can negotiate the rates.

2. List states that have filed rates.
3. You can negotiate and get reissue rates.

E. Agents are great, they give me what I want.

1. Agents sometimes over-promise.

2. Everything must be approved by the underwriter.

3. Standards of agents are sometimes lower than the title company.

4. Get an insured closing letter.

5. Title company must retain reserves by law.

F. That zoning endorsement covers any lingering concerns.

1. Zoning endorsements are a waste of money because they only reiterate what is on the survey.
2. What other endorsements are a waste of money?

G. I can just redraft/negotiate the ALTA form of endorsement.

H. Our title policy will cover that, just like a causality policy.

1. Title insurance protects you against the existing state of facts.
2. Title insurance insures that title to a property is just as the seller promised.
3. The title insurance covers legal fees over the title fight and.

I. The title company has the claim now, I’m out.

1. Parties involved in the transaction will be asked to provide documents, emails and draft materials.
2. Lawyers could receive a subpoena for documents related to past transactions.
3. Real estate lawyers are brought into help evaluate the claim.

J. We got a great claim, the title company has no choice but to pay now.

1. What does a policy cover?
2. Beware of the carve-outs.

Thursday, October 25, 2018
10:30 – 11:45 AM

Seminar 9

Rolling, Rolling, Keep Those Doggies Rolling: The Issues with Limited Guaranties including Rolling Guaranties

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I. Introductions

II. What is a Guaranty and why do Landlords prefer to have them?

III. How is a Guaranty formed and what is the scope?

  A. Absolute Unconditional Guaranty

  B. Limited Guaranties
    1. Payment Guaranty
    2. Fixed-Term Guaranty
    3. Capped-Amount (Fixed or Formula-Based Amount) Guaranty
    4. Good Guy Guaranty
    5. Rolling Guaranty

IV. Rolling Guaranty Hot Button Issues/Drafting Considerations
  A. Hybrid Rolling and Step-Down Cap Guaranties
  B. Ambiguity in Guaranteed Rent
  C. Enforcement Costs
  D. What Kind of Guaranty is it really?

V. Rolling Guaranty Hot Button Issues/Cases
  A. Role of Judge vs. Jury
  B. Focus on Words of Contract
  C. Consideration of Other Evidence Depends on Law of State

VI. Hypotheticals & Discussion of Relevant Cases

Thursday, October 25, 2018
12:00 – 1:15 PM

Seminar 10

Making Lease Remedies Great Again: Lessons Learned from Litigating Lease Clauses

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I. Introductions

II. Self-Help, Opening, Operating, Co-Tenancy, and Exclusives in Commercial Leases

A. Self-Help Remedies

1. Self-Help Remedies For Landlords
2. Self-Help Remedies for Tenants
3. Summation

B. Non-Monetary Breaches – Opening and Operating Covenants, Co-Tenancy, and Exclusives

1. Opening and Operating Covenants
2. Co-Tenancy Clauses
3. Exclusives
4. Summation

III. When the Tenant Files Bankruptcy

A. Tenant Relief Under Title 11 of the United States Code

1. The Automatic Stay
2. Lifting the Automatic Stay
3. Stay Relief by Consent
4. Payment of "Stub Rent"
5. Proofs of Claim

B. Landlord Recourse Under 11 U.S.C. §365; Assumption and Rejection

1. Rejection of the Lease
2. Assumption of the Lease
3. Assumption and Assignment of the Lease
4. Termination of the Lease

C. Leases of Nonresidential Versus Residential Real Property

D. Summation

Thursday, October 25, 2018
12:00 – 1:15 PM

Seminar 11

You are buying WHAT?—Avoiding Pitfalls in Purchases and Sales

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I. Introductions

II. General Context and Framework for Negotiation; Institutional vs. Non-Institutional Seller

   A. Brokers

   B. Due Diligence Materials

   C. Form of Contract; Negotiation

III. Major Contract Issues to Be Negotiated

   A. Due Diligence Issues
      1. General
      2. Delivery of Due Diligence Materials
      3. Time Periods
      4. Tenant Interviews

   B. Title and Survey Matters
      1. Timing
      2. Cure Obligations

   C. Seller's Representations and Warranties
      1. Scope of Representations and Warranties
      2. Survival of Representations and Warranties
      3. Security for Seller's Post-Closing Obligations and Liabilities

   D. Tenant Estoppels

   E. Operation of the Property Through the Closing Date

   F. Default by Seller

   G. Good Faith Deposit; Liquidated Damages

IV. Conclusion/Questions

Friday, October 26, 2018
9:00 – 10:15 AM

Seminar 12

The Doctor is In: Leasing to Medical Related Uses

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I. **Lease Issues**

A. Effect of and interplay with assignment and subletting provisions

B. Getting around use restrictions in leases

C. Negotiating revised exclusives, co-tenancy requirements, and operating covenants

D. Negotiating the use clause

E. Negotiating the CAM provisions

F. Restructuring real property taxes and assessments

G. Restructuring the rental parameters

H. Impacts on parking requirements and required ratios

I. Effect on definition of and parameters of the “shopping center”

J. Signage rights and signage controls

K. Impact on common area use rights, easements and utilities

L. Subordination, non-disturbance, and attornment issues

M. Site plan controls

II. **REA Issues**

A. Revising use restrictions and prohibitions

B. Effect on parking ratio requirements

C. Restructuring CAM provisions

D. Dealing with exclusives, co-tenancy requirements, and operating covenants

E. Impacts on cross-easements for parking ingress and egress

F. Impacts on utility easements

G. Effects on site plan

H. Restructuring signage, signage controls, and signage rights

III. **Lender Issues**

A. Restructuring covenants regarding changes to use

B. Restructuring covenants with respect to land use changes

C. Covenants regarding net operating income, loan to value ratios, and debt service coverage

D. Controls over lease amendments, terminations and other requirements

IV. **Land Use Issues**

A. Is medical use a permitted use?

B. If not, what permits and approvals are required?

C. What environmental review will be required?

D. Design and other controls.

E. Vesting vehicles in place

F. Revisions to conditions of approval

G. Requirements for subdividing or re-subdividing the shopping center

H. Payment of updated in lieu fees and implementation of other mitigation measures

V. **Other Considerations**

A. Neighbors and Community groups

B. Outparcel owners and adjacent landowners

VI. **Leasing to Health Care Providers in Shopping Centers**

A. Medical Office Building (MOB) vs. “Doc in a box”

B. Benefits to the Health Care Provider:

1. Lower cost to build-out and operate

2. High retail traffic volume brings in customers/gives exposure

3. Proximity to patient population

C. Benefits to Owner

1. New tenant source

2. Traffic volume benefits other retail tenancies

3. Stable, longer-term tenant

D. Uses

1. Primary care

2. Urgent care.

3. Mini-med clinics.

4. Preventative care.

5. Diagnostic lab.

6. Dialysis.

7. Imaging (MRI, CT, Mammography)

E. Use Restrictions

1. Does the zoning permit the use?

2. Do retail leases within the shopping center prohibit the use?

3. Does the REA prohibit the use

F. Upgrade modifications

1. Are structural support upgrades necessary

2. Are mechanical system upgrades required for the use

3. Are clear ceiling heights large enough

4. Is shielding/lead lining required?

5. Are the electrical systems sufficient to handle the electrical load?

6. Will the use require a generator?

G. Other issues

1. Will the parking areas support required parking ratios

2. Medical waste handling.

3. Privacy/HIPAA compliance.

4. 24/7 access/security.

5. Above-standard services/janitorial.

6. Surrender condition.

H. The drug store/grocery story

Friday, October 26, 2018
9:00 – 10:15 AM

Seminar 13

Mixed Up About Mixed-Use?
Sorting Out Unique Leasing and Development Issues in Mixed-Use Project

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I. DEVELOPMENT ISSUES

A. Zoning Concerns

B. Easement Issues
1. Access/Vertical Transportation
2. Parking
3. Utilities
4. Trash Facilities
5. Loading Docks and Delivery Times
6. Crane Swing
7. Construction Staging
8. Encroachment and Support Easements

C Insurance and Casualty Issues

D. Maintenance and Repair Issues

E. Common Area Maintenance Charges

F. Parking
1. Parking Facilities Ownership
2. Paid Parking/Valet Parking
3. Exclusive vs, Non-Exclusive Parking Areas
4. Nested Parking Facilities
5. Parking Management Company

G. Architectural Controls

H. Condominiums

I. Lenders

J. Environmental

K. Governance
1. Vertical Parcels with Dominant Retail/Commercial
2. Vertical Parcels with Dominant Residential

II. **LEASING ISSUES**
1. Retail as an Adjunct to Residential

2. Places not Spaces
3. Rents and Charges
4. Opening and Ongoing Co-tenancy
5. No-Build and Common Area Restrictions
6. Parking
7. Exclusives
8. Synergies

Friday, October 26, 2018
9:00 – 10:15 AM

Seminar 14

Passport Revoked: How to Ensure Your Brands Do Not Fail Internationally

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I. Gateway to the World: Establishing a Strong Brand
- ***A. What is a Trademark***
- ***B. Obtaining, Protecting, and Maintaining Strong Trademark Rights***
  - 1. Trademark Distinctiveness
    - a. Generic Terms
    - b. Descriptive Marks
    - c. Suggestive Marks
    - d. Arbitrary Marks
    - e. Coined or Fanciful Marks
  - 2. Assessing Trademarks for Availability and Registrability
    - a. Trademark Clearance
    - b. Trademark Filing

II. Undiscovered Territory: International Trademark Law and Filing Systems
- ***A. Acquisition of Trademark Rights***
  - 1. First-to-Use – Rights Granted to the First User
  - 2. First-to-File – Rights Granted to the First to File
- ***B. Filing Mechanisms***
  - 1. The EUTM System
    - a. Advantages
    - b. Disadvantages
  - 2. The Madrid System
    - a. How it Works
    - b. Advantages
    - c. Disadvantages

III. Travel I
- ***A. Trademark Enforcement***
- ***B. Brands Under Attack – Defending Your Rights to Use and Register Your Mark***
  - 1. "Use it or Lose it" – the threat of non-use cancellations
    - a. Non-Use Cancellation in the EU
    - b. Proving Use
  - 2. Monitoring Your Mark

IV. Baggage Claim: Additional Brand Protection Considerations
- ***A. Investment Vehicles***
- ***B. Tax***
- ***C. Immigration***
- ***D. Labor and Employment***
- ***E. Environment Regulation***
- ***F. Review of Investments***
- ***G. Competition***
- ***H. Cultural and Social Differences***
- ***I. Software Compatibility***
- **J.** ***Political Stability***
- **K. Safe Landing**

Friday, October 26, 2018
10:30 – 11:45 AM

Seminar 15

What's Popping with Pop-Up Stores?
Assessing the Unique Challenges and Benefits of the Short-Term Pop-Up Trend

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I. Introductions

II. The Origin of a Pop-Up Deal

A. First, what *is* a pop-up?
   1. Is Santa Claus the "first pop-up"?
   2. Short-term tenancy
   3. A unique or untested concept that draws traffic
   4. Potential entry points for permanent tenant opportunities
   5. More efficient way to backfill vacant space
   6. An opportunity for a retailer to test a new market or product

B. Second, who's driving the deal?
   1. Landlord side
      a. Leasing-driven deals
      b. Marketing-driven deals
      c. Brand partnership-driven deals
   2. Tenant side
      a. Online or new concepts testing brick and mortar waters
      b. Seasonal (and sometimes seasoned) retailers
      c. Brands using space as a marketing platform

III. The Anatomy of a Pop-Up Lease (or License)

A. What form does the deal take?
   1. "License"
   2. "Lease"
   3. Event Agreement
   4. Other forms
      a. Marketing sponsorships to identify business opportunities

B. What does the premises look like?
   1. Backfill space
      a. White box or tenant buildout?
   2. Dedicated pop-up space
      a. Inline space or modular space?

C. How is the rent structured?
   1. Traditional monthly rent
   2. Percentage rent deals
   3. Operating cost only deal

D. How long is the term?

1. Can range from 1 day to 1 year
2. How length of term can impact key provisions
3. Fixed term or month to month?

E. What does a tenant's use provision look like?
   1. Exclusive protection?

F. How do you address common area charges and utilities?
   1. Separate charges
   2. Costs eaten by Landlord

G. Who handles maintenance and repair?
   1. Short-term tenants given white boxed space – often Landlord
      a. But be wary of REIT constraints against tenant services
   2. Longer-term tenants treated more like inline tenants

H. What happens in the event of casualty?

I. What happens in the case of a tenant default?
   1. License vs. Lease consideration allows for different remedies
   2. Given short-term tenancy, Landlord will want to be able to terminate quickly

IV. Other Legal Considerations

A. Can pop-up tenants help satisfy a co-tenancy clause?
   1. Many leases require tenants under long-term leases
   2. But pop-ups can drive traffic to a center in a way that benefits other tenants

B. What happens if a pop-up tenant violates another tenant's exclusive use?
   1. Enforcing against the pop-up tenant
   2. What's the cure period for the tenant claiming violation?
      a. Pop-up tenancy may be over before remedy accrues

C. Does your pop-up lease violate another tenant's prohibited use clause or other Landlord covenants?
   1. Seasonal uses (often prohibited) versus other pop-up uses

D. Does your pop-up lease require lender approval?
   1. Consider drafting loan agreements to carve out short term pop ups when applicable

E. Converting a pop-up tenancy to a permanent tenancy
   1. New lease, or amend existing?

V. Case Studies

VI. Conclusion

Friday, October 26, 2018
10:30 – 11:45 AM

Seminar 16

Don't Get Lost in the Financial Shuffle – Remembering to Nail Down Often Forgotten Provisions in Financing Agreements

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1. STRUCTURAL DYNAMICS AND PRIORITY
   - 1.1 Lease Prior to Mortgage
   - 1.2 Mortgage Prior to Lease
   - 1.3 Mortgagee's World View
   - 1.4 Tenant's World View
   - 1.5 Subordination Chart Senior Mortgage
2. OWNER'S BALANCING ACT BETWEEN THE TENANT AND THE MORTGAGEE
   - 2.1 Pro forma Tenant Profile for Mortgagee Pre-Approval:
   - 2.2 Tenant designated in to satisfy Mortgagor's performance requirements under mortgage
   - 2.3 Mortgagee Safe harbor Conditions to Tenant Lease Assignment
   - 2.4 Tenant Self Insurance, Retention, or High Deductibles
   - 2.5 Tenant Set-Off Against Rent from Landlord Breach
   - 2.6 Mortgagee Carve Outs from Tenant Right of First Refusal Tenant Option Holder
   - 2.7 Condominium Votes and Pass-Throughs
   - 2.8 Tenant Exclusives
   - 2.9 Mortgagee Protection for Tenant Improvements, removables, and immovables
   - 2.10 Tenant Improvement Mechanics' Liens
   - 2.11 Tenant Compliance, Reporting and Confidentiality delivered to Mortgagee
3. CONTRACT VEHICLES FOR PRIVITY
   - 3.1 Subordination, Non-Disturbance and Attornment Agreement
   - 3.2 Estoppel
4. ADDITIONAL CONTRACT PROVISIONS
   - 4.1 Additional Mortgagee Contract Provisions
   - 4.2 Additional Tenant Contract Provisions
   - 4.3 Lien Circuity
   - 4.4 Subtle Strategies

Addendum: Quick Guide to Issues that Should be Addressed and Coordinated When Negotiating Loan Documents and Leases

Friday, October 26, 2018
10:30 – 11:45 AM

Seminar 17

How to Avoid Out-Kicking Your Coverage:
Construction Insurance and Risk Management Strategies for Retail Developments

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I. Insurance Policies and Coverages

A. Key Considerations
1. Risk Allocation Techniques
2. The Role of Risk Managers

B. Builders Risk Insurance
1. What is An “All Risk” Policy?
2. What Coverage does Builder’s Risk Provide?
3. Options for Buyers and Beneficiaries

C. Commercial General Liability
1. Differences Between CGL and Builder’s Risk
2. “Standard” CGL Coverages and Exclusions
3. Additional Insured Requirements

D. Umbrella Excess Coverage
1. Right-Sizing Coverages
2. Exhaustion, Contribution and Other Limitations

E. Professional Liability
1. Architects, Engineers & Design/Builders
2. Claims Made vs. Occurrence-Based Coverage
3. Project-Specific Endorsements

F. Wrap-Up Policies
1. Differences Between OCIP and CCIP
2. Economic and Administrative Considerations

G. New Insurance Products and Coverages
1. New 2017 AIA Construction Contracts Checklists
2. Environmental Coverages
3. Contractor’s Pollution Liability Coverage
4. Subcontractor Default Insurance
5. Cyber Liability Coverage

II. Payment and Performance Bonds

A. Key Considerations
1. Project-Related Issues
2. Contractor-Related Issues

B. Performance Bonds

1. What is the Obligation to Perform?
2. Completion Options and Requirements
3. Surety Notice Requirements
4. Waiver of Notice Clauses & Indemnity
5. Subcontractor Bonds vs. General Contractor Bonds

C. Payment Bonds
1. What is the Obligation to Bond off Liens?
2. Dual Obligee Riders
3. “Claimants” Defined
4. Notice Requirements
5. Discharge Complications and Issues

III. Construction Defect Claims and Insurance Considerations
A. Rights and Responsibilities
1. Insured Notice Obligations
2. Insurer Decisions: Accept, Reserve or Disclaim
B. Coverage Determinations and Exclusions
1. Does Defective Work Constitute Property Damage
2. Additional Insureds: Complications and Considerations
C. Recoverable Damages
1. Economic Loss vs. Property Damage
2. Consequential Damages and Liquidated Damages

Friday, October 26, 2018
12:00 – 1:15 PM

Seminar 18

Minimizing Headaches when Dealing with Excess Space

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I. Legal Distinction between an Assignment and a Sublease.

II. Release Provisions.

III. Landlord Consent.

A. Generally

B. Tenant considerations

C. Tenant Remedies

IV. Recapture Rights

A. Timing of Landlord's Exercise

B. Permitted Transfers

C. Leasehold Improvements

D. Loss of Profit/Continued Control

V. Subleases

VI. Sample Provisions

A. Sample Big Box Assignment/Subletting Provision

B. Sample in-line Landlord Form Assignment and Subletting

C. Sample Landlord Oriented Amendment Memorializing Assignment

D. Sample Landlord Oriented Consent to Sublease

VII. 50 State Survey

Saturday, October 27, 2018
9:15 – 10:30 AM

Seminar 19

The Furious Five of Leasing: Concepts Every Retail Attorney Must Master

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I. DELIVERY AND CONDITIONS TO RENT COMMENCEMENT.

A. Delivery Conditions.

B. Landlord's Work.

C. Timing Concerns

D. Landlord's Delay in Delivery

E. Rent Commencement Conditions

F. Disputes.

II. ADDITIONAL RENT

A. Common Area Maintenance Charges.

B. Real Estate Taxes and Assessments

C. Insurance Costs and Expenses

D. Definition of the Tenant's Proportionate Share

E. Payment and Tenant Audit Rights

III. USES (Permitted, Exclusive and Prohibited)

A. Permitted Uses

B. Exclusive Uses

C. Prohibited Uses

IV. OPERATING COVENANTS and CO-TENANCY

A. Operating Covenants

B. Co-Tenancy

V. **<u>ASSIGNMENT and SUBLET</u>**

A. Basic Prohibitions on Transfers by the Tenant

B. Customary Exemptions Requested By Tenants

C. The Landlord's Consent

D. Landlord's Recapture Rights

E. Sharing Of Profits.

F. Recognition and Attornment

G. Other Considerations.

Section VII

SESSION OUTLINES: WORKSHOPS

Wednesday, October 24, 2018
2:00 – 3:15 PM

Workshop 1

Three's Company!
How Landlords, Tenants and Mortgagees Interact during the Negotiations of Estoppels and SNDAs

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I. Introductions

II. Subordination, Non-Disturbance and Attornment Agreements

  A. General overview of issues:

    1. Priorities and risk

    2. The concepts of subordination, non-disturbance and attornment

    3. What are the negotiating positions of the parties?

III. Estoppel Certificates

  A. General overview of issues:

    1. Role and function of estoppel certificates

    2. Reliance on estoppel certificates – highlights from recent case law

IV. SNDA Group Exercise and Discussion

  A. Workshop participants to be divided into "lender" and "tenant" groups

    1. Participants will be given time to review pertinent clauses from a form of SNDA

    2. Group discussion regarding, based on relative position, what amendments ought to be made

V. Estoppel Certificates Group Exercise and Discussion

  A. Workshop participants to be divided into "landlord" and "tenant" groups

  1. Participants will be given time to review a form of estoppel certificate (tenant group to review a form of estoppel certificate presented by a landlord on behalf of a lender, and landlord group to review a tenant's marked up estoppel certificate

  2. Group discussion regarding, based on relative position, what amendments ought to be made

Wednesday, October 24, 2018
2:00 – 3:15 PM

Workshop 2

Don't Assume Anything: Navigating the Loan Assumption Process and its Pitfalls

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I. Introductions

II. Negotiating Loan Assumption Documents for a Financing Secured by a Shopping Center

A. Allocation of Liability Between New Borrower/Guarantor and Original Borrower/Guarantor
   1. Non-Liability of New Borrower for Original Borrower Defaults
   2. Release of Original Borrower from Post-Assumption Liabilities
   3. Limitation of New Borrower's Assumed Obligations to Post-Assumption Period
   4. Estoppel from Lender

B. Potential Provisions of Original Loan Documents to be Modified
   1. Transfer Provisions
   2. SPE Covenants
   3. Non-Recourse Carveouts
   4. Leasing Restrictions
   5. Use of Insurance Proceeds for Restoration
   6. Cure Periods for Defaults
   7. REIT Status Maintenance Provisions

III. Diligence Required in connection with Loan Assumption

A. Title
   1. A new lender policy or an endorsement to the existing lender policy will be required
   2. A Memorandum of Assumption will be recorded and must be referenced in the title policy or endorsement

B. Survey
   1. Obtaining survey for purchase
   2. The new survey must be certified to current lender which may be a REMIC Trust for securitized transactions

C. Organizational Documents
   1. Typical of those required at origination, both for new borrower and new guarantor(s)/indemnitor(s)
   2. New borrower will have to comply with SPE and independent manager/director requirements, if any, in loan documents
   3. Good standing certificates and resolutions authorizing the execution and delivery of the assumption agreement will be required for outgoing sponsor for assumption agreement

D. Contracts and other Property-Level Diligence
   1. Lender may request copies of then-in-place service contracts and a rent roll to update its files

2. New property management agreement must be delivered and collaterally assigned - this agreement must meet the requirements set forth in the loan documents, including with respect to fees and the identity of the property manager
3. Property, liability and other required insurance to be in place as of closing of the assumption
4. Zoning reports, environmental assessments and property condition and seismic reports - lender may require they be provided and certified to lender - if not, lender will be relying upon what was provided at closing plus covenants in loan documents

E. Opinion Letters
1. Due authority and enforceability opinion letters will be required as if it were new origination
2. Local opinion may be required if, for example, the mortgage/DOT is being amended in connection with the assumption
3. If the loan is securitized, the following may be required:
a. New Delaware State Law and Authority to File opinions
b. New Non-Consolidation Opinion - must be prepared early on in process because it is part of the package the servicer sends to the rating agencies
c. REMIC opinion - generally will be prepared by Lender's counsel

IV. Costs and Timing

A. Costs will Vary for Securitized and Non-Securitized Loans - Starting Point is the Loan Agreement
1. Assumption fee - may be percentage of outstanding loan balance or fixed fee
2. Processing fee
3. Loan modification fee if loan documents are being modified in any way in connection with the assumption
4. Underwriting fee
5. Securitized-Only:
a. Rating Agency fees
b. Rating Agency counsel fees
c. Servicer fees (master and special)
d. Servicer counsel fees
6. Local counsel fees

B. Timing
1. Time to complete application
2. Time to complete underwriting
3. Securitized loans - several extra steps:
a. Submit to Special Servicer, if applicable
b. Special Servicer to confer with controlling class
c. Submit to Rating Agencies for no downgrade letters
d. Work on parallel tracks
e. Closing - Once Special Servicer approval obtained and Rating Agencies issue No Downgrade Letters, quick to closing

V. Cash Management and Tenants

A. A new lockbox agreement will be needed even if the lockbox bank does not change - this is a lead time item and should be addressed early in the process
B. A new cash management agreement or an amendment to the existing cash management agreement will be required, depending upon the age of the loan and the provisions contained in the existing agreement
C. Keep KYC diligence in mind and address early
D. Lenders will require copies of tenant direction letters as if it were a new loan closing

VI. Requirements a Special Servicer Could Impose

A. Reserves
1. Among other things, underwriters will review status of leases and re-evaluate tenant roll

2. Modifications to TILC reserves may be required
   a. Caps may be removed
   b. Monthly deposit amounts may be adjusted
   c. Additional funds may be required, payable in a lump sum, at closing
3. Deferred Maintenance
   a. Reserves may be required
   b. New Borrower may be given several months to address
4. Reserves for reverse 1031 exchanges
5. Others

B. Additional fees for loan modifications
C. Additional guarantors
D. Revised loan document language

VII. Date Downs - Defaults - Representations

A. Outgoing borrower must date down the representations in the assumption agreement
B. Incoming borrower must date down the representation in the assumption agreement, generally to its knowledge based on information it received from the outgoing borrower
C. If representations cannot be dated down, it is prudent to alert the lender early in process, particularly if a default has been uncovered

VIII. Other Loan Assumption Issues

A. Negotiation of Loan Assumption Provisions in Purchase and Sale Agreement
1. Allocation of Loan Liability between Seller and Purchaser
2. Allocation of Risk if Loan Assumption Condition is Not Satisfied
   a. Purchaser Modifications to Loan Documents Not Accepted by Lender
   b. Lender Approval Not Obtained for Purchaser and New Guarantor
3. Allocation of Responsibility for Loan Assumption Costs and Expenses
4. Other Options if Loan Assumption Condition is Not Satisfied
   a. Seller Indemnification of Purchaser for Liability to Lender
   b. Seller Defeasance/Prepayment of the Loan

B. Negotiation of Loan Assumption Provisions of Loan Documents at Origination
1. Loan Assumption Fee and Other Costs
2. Timing, Notice and Ability to Rescind
3. Rating Agency Confirmation/No Downgrade Letter
4. Standard for Approval of New Borrower, Guarantor and Property Manager
5. Due Diligence Requirements for New Borrower
6. Other Conditions to Lender Consent to Transfer

C. Understanding the Players Involved; Roles, Motivations and Limitations
1. Master Servicer
2. Special Servicer
3. Rating Agencies

Wednesday, October 24, 2018
3:30 – 4:45 PM

Workshop 3

Is There Too Much Space Between Us? Challenges and Opportunities in Tenant Downsizing

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I. Introduction

A. Existing tenants may determine that they are operating in too much space relative to a current prototype or may seek to reduce occupancy costs by downsizing their space. In such circumstances, Landlords and Tenants must consider and work through a number of issues and problems. This discussion will cover downsizing opportunity and challenges for tenants and landlords in traditional department stores, junior anchors and in-line stores.

II. Hypothetical

A. You're in-house counsel for a big box retailer, Spears. Spears is struggling. Sales are down. Numerous stores are drastically underperforming and many stores are no longer profitable in their current formats. The CEO walks into your office and wants to know what Spears' options are and whether or not Spears can close or downsize the underperforming stores. You dive into the assignment. Where do you look? What are your considerations? What provisions of the various leases and occupancy agreements are you going to focus on during your review?

B. As general counsel for a commercial real estate developer, you receive a notice from your largest big box store, Spears. Spears is the largest anchor tenant at your most prominent center. The notice indicates that Spears needs to downsize to reduce its occupancy costs and it is going to sublease its space to:

i. multiple tenants (including a full service restaurant operator, a fast casual restaurant, a heart-rate monitored, high-intensity class based gym, and a medical marijuana dispensary); or
ii. one large fitness facility and movie theater/entertainment complex with a bowling alley.
iii.

What are the possible concerns/repercussions for your client?

C. What if, instead of leasing its space, Spears owns its space and occupies it pursuant to an REA (or other similar agreement) with the developer? What impact does that have on the analysis?

D. In lieu of subleasing, Spears and landlord have agreed to a rent reduction and the addition of a percentage rent element to the lease. As landlord's attorney and tenant's attorney what are the issues that need to be addressed in the amendment?

III. Second Hypothetical

A. You receive a "fully" negotiated LOI from your client, a developer. You recently did a lease for this client with "The Selfie Store." Eighteen months in to its ten year term, the Selfie Store has realized that it didn't need 15,000 square feet of space to print, retouch, and frame selfies to sell to their customers. Selfie Store's footprint is way too large and they are going to try to reduce occupancy costs by significantly downsizing. The "fully" negotiated LOI, which happens to be signed by your client and the Selfie Store, only says: "The Selfie Store will surrender 10,000 square feet of space to Landlord and will continue to operate in the remainder of the space. Submission of this LOI shall not constitute an offer or option to lease the premises. All terms and conditions outlined in this proposal above are non-binding and shall not become effective or binding unless and until such time as a lease has been fully negotiated and executed by all parties." You call opposing counsel to hash out the details of this space reduction agreement. What are the issues and concerns for each party to this agreement?

IV. Open discussion and questions

Wednesday, October 24, 2018
3:30 – 4:45 PM

Workshop 4

Which Hat am I Wearing Today? Bouncing between Landlord and Tenant positions, and In-House and Private Practice – Strategies to Seamlessly Exchange Hats

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INTRODUCTION

I. Understanding and Keeping Focus on the Client's End Game

A. Retailer

1) Options to Extend
2) Merchandising flexibility
3) Exclusive Uses
4) Reduction and/or fixing of operating costs
5) Landlord Work letters
6) Site Plan control
7) Exit strategies

B. Developer

1) Lease up
2) Credit Tenants
3) Split up the center
4) Non-traditional revenue
5) Ability to market center
6) Public amenities
7) Avoidance and Management of Exclusive Uses

II. Flexibility.

A. Retailer

1) Assignment, subletting and concessionaires
2) Catalog sales and internet sales
3) Tenant Gross Sales Terminations
4) Signage
5) Shopping Carts
6) Conduct special events
7) Rights to Extend Term
8) Patios

B. Developer

1) Non-Traditional Uses
2) Demise of Regional Enclosed Malls
3) Alternate ways to generate income and traffic
4) Selling experience
5) Site Plan Flexibility

C. Buyer

1) Contract Stage
2) After Closing

D. Seller

1) Contract Stage
2) After Closing

III. Control.

A. Retailer

1) Prohibited Uses
2) Exclusives and Remedies
3) Co-Tenancy requirements
4) Site Plan controls
5) Visibility/access rights
6) Operating Hours
7) Right of first option or refusal
8) Right to purchase
9) Brand Name protections

B. Developer

1) Merchandise mix
2) Landlord Gross Sales Termination
3) Exclusives
4) Co-tenancy requirements
5) Rights of approval
6) Restrictions on exercising options
7) Requires intentional leasing
8) Radius requirements
9) Relocation rights
10) Recapture rights
11) Limitation on number of subleased spaces
12) Site Plan Modification

C. Buyer

1) Contract Stage
2) After Closing

D. **Seller**

1) Contract Stage
2) After Closing

IV. Multiple Decision Makers.

A. Retailer

1) Primary business person
2) Concessionaires and licensees
3) Leasehold mortgagees
4) Possible lender
5) In outlets
6) Gaining Approving Party status

B. Developer

1) Lender
2) Joint Venture Parties
3) Quasi-governmental entities
4) REA parties
5) Tenants with restrictions, exclusives, prohibited uses
6) Multiple owners of center
7) Bond holders

V. Techniques to Get into the Groove; to Stay the Course

A. Retailer

1) Pep Rallies
2) Calendared Status Meetings
3) Project Lists
4) Option notice meetings
5) Listen
6) Abstracts
7) Hold-Over Tenant Update

B. Developer/Landlord

1) Monday morning Metrics Meeting:
2) Know, and Focus on, the Priorities of the Company:
3) REC/CAC:
4) Abstracts:

VI. Role of Counsel.

A. Variety of Opposing Counsel

1) Retailer
2) Developer

B. Roles of In-house vs. Outside Counsel

1) In-house
2) Outside

Wednesday, October 24, 2018
3:30 – 4:45 PM

Workshop 5

Measuring Omnichannel/Internet/E-commerce Gross Sales to Customers You Can't See—Do they count? Should they count? The Sales, that is.

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I. Introduction

II. Current retail industry definition of Omnichannel / E-commerce

III. Currently, who are Customers You Can't See?

IV. The evolution of retail and what may be next

V. Why should Tenants care?

VI. Why should Owners care?

VII. Essential conversations on Inclusions and Exclusions in Gross Sales negotiations:

A, Inclusions: How much of the transaction or customer journey involves the physical store?

B. Exclusions: Employee sales & meals

(i) Payment card issuers and payment processors

(ii) Delivery services, fulfillment services & 3rd party costs

(iii) Returns

VIII. Conclusion

Wednesday, October 24, 2018
3:30 – 4:45 PM

Workshop 6

Stranger Things: Keep Your Clients Out of the Upside Down When Negotiating Joint Venture Agreements

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Overview
- A. Purpose and Relationship
- B. Economics
- C. Management
- D. Exits – When and How – Buy-Sell, Forced Sales
- E. Bankruptcy Issues

II. Purpose
- A. What is the goal? Is there a solid business plan? Do the parties have the same exit timeframe?
- B. Do the parties want the venture to have “exclusivity” to protect from competing ventures nearby – or have a requirement that a party spend a particular amount of time on the venture?

III. Economics
- A. Capital contribution obligations,
- B. Distribution priorities, preferred return, promote calculation and fees payable to affiliated members (asset management, property management, leasing, financing, disposition, and acquisition fees)

III. Management
- A. Approval rights and Major Decisions
- B. Disputes and Disagreements
- C. Different Types of Dispute Resolutions and Remedies.
- D. Remedies for Failure to Fund a Capital Call
- E. Other Defaults and Remedies for Breaches

IV. Exits and Transfer Rights
- A. Restrictions on transfers
- B. Permitted Transfers
- C. ROFRs/ROFOs/Forced Sale

V. The impact of bankruptcy on the Member’s rights and obligations
- A. Does the bankruptcy of a partner/member cause the dissolution of the JV/LLC?
- B. Are the management and voting provisions enforceable?
- C. Are the “removal for cause” provisions enforceable – i.e., can the non-debtor members remove the debtor/member?
- D. Are the exit (buy/sell – forced sale – rofo) provisions enforceable?
- E. Are the capital obligations enforceable – if they default, can you cram down or make a loan?

Thursday, October 25, 2018
9:00 – 10:15 AM

Workshop 7

It's Your Center, but it's also My Business: The Evolving Concept of Exclusives and Restricted Uses

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I. EXCLUSIVE RIGHTS GENERALLY:

A. **Exclusive Right to Sell**: Exclusives give a particular tenant an exclusive right to sell a particular type of merchandise or service or the exclusive right to operate a particular concept.

B. **Direct Competition**: The exclusive is intended to protect the exclusive holder from direct competition. The exclusive holder is attempting to ensure that its projected sales (upon which its economic deal is based) will be realized and not diminished by the entry of a competitor to the center.

C. **Leverage**: The scope of an exclusive often comes down to the relative leverage of the parties.

D. **Precise Drafting Required**: Exclusives require precise drafting to allow all parties (including incoming tenants) to proceed with certainty.

II. PREVALENCE OF EXCLUSIVES:

A. **Enclosed Malls**: Landlords are generally very reluctant to grant exclusives in enclosed malls. Typically in an enclosed mall, a tenant will only obtain an exclusive if (a) it is a food use in a food court or (b) it is a special, unusual or unique use or (c) the center can only support one merchant in the particular category.

B. **Strip Centers**: In power centers and strip malls, powerful big box tenants generally have the ability to get exclusives. Generally, smaller tenants will not get exclusives, unless they have the type of use that the landlord is willing to protect because the center can only support one merchant in the particular category.

III. LANDLORD'S CONCERNS GENERALLY:

A. **Exclusives Restrict Future Leasing**: Exclusives may affect the landlord's ability to enter into leases in the future. In larger malls with many tenants, landlords have to be especially careful about granting exclusives. Retailers are expanding their product lines and are increasingly careful about preserving their ability to change their concept and may be reluctant to come into a center where exclusives will limit their use or their ability to evolve or to exit the property through an assignment.

B. **Restrict to True Competitors**: The landlord will want to ensure that the exclusive is as narrow as possible to avoid giving the exclusive holder the power to keep other tenants out of the center, unless those tenants are true competitors of the exclusive holder.

C. **Binding Major Tenants**: With respect to big box tenants or other large tenants that are able to negotiate open use clauses, it is often difficult to get them to agree to be subject to exclusives, unless those exclusives will not restrict their current or potential lines of business.

D. **Compliance by Future Tenants**: The landlord wants to be sure that exclusives are disclosed to future tenants, so that those tenants comply with the exclusives.

E. **Existing Tenants Subject to Future Exclusives**: The landlord may want certain existing tenants to be subject to future exclusives, if the landlord knows that a future tenant may insist upon such protection in order to come into the center.

F. **Clear Drafting**: The landlord wants any exclusives to be drafted clearly so that it can proceed with future leases with certainty.

IV. **<u>TENANT'S CONCERNS GENERALLY</u>**:

A. **Broad Exclusive**: The tenant wants the broadest possible exclusive in order to protect its sales and have the ability to keep its competitors out.

B. **Absolute Prohibition**: If possible, the tenant will want an absolute prohibition against the sale of certain items, which will give the tenant a lot of control.

V. **<u>INCOMING TENANT'S CONCERNS GENERALLY</u>**:

A. **Broad Use**: An incoming tenant will want the broadest possible use and will want to allow for evolution of their concept.

B. **Waiver If Exclusive Ambiguous**: An incoming tenant may want a waiver if an exclusive is ambiguous and may apply to either their core or incidental business.

C. **Future Exclusives**: An incoming tenant will not want to be subject to future exclusives.

VI. **<u>INCOMING TENANT'S APPROACH TO EXISTING EXCLUSIVES</u>**:

A. **Verbatim Copies of Exclusives**

B. **Address at Start of Deal**

C. **Request Entire Provision**

D. **Exhibit**

E. **Indemnity**

F. **Landlord Summary of Exclusives**

VII. **<u>DRAFTING</u>**: The exclusive must be clear enough to allow enforcement and to provide certainty for future leases. If the exclusive is ambiguous, future tenants may insist upon a waiver.

A. **Enforceability**

B. **Exclusives Narrowly Construed**

C. **Limit to True Competitors**

VIII. **<u>PROHIBITED USES</u>**: An exclusive is different from a prohibited use. Prohibited uses prevent noxious uses, uses that would detract from the quality of the center and parking intensive uses. Prohibited uses can cause the same type of problems for the landlords that exclusives do, if a landlord permits too many different types of uses to be prohibited in the center.

IX. **<u>TYPES OF EXCLUSIVES</u>**:

A. **Landlord Responsible for Its Voluntary Acts**

B. **Landlord Responsible for Acts of Others**

C. **Incoming Tenant on Notice**

X. **<u>EXCLUSIVES APPLICABLE TO ITEMS NOT SOLD BY RETAILER</u>**: Sometimes a retailer will insist on an exclusive with respect to items it does not sell. These types of exclusives should be resisted. They do not protect the tenant's core business and simply grant the tenant unwarranted control over the leasing of the center.

XI. **<u>EXCLUSIVE LIMITED TO PRIMARY USE</u>**:

A. **Competing Use is Primary Use**

B. **Defining Primary Use**

C. <u>Percentage of Sales</u>

D. <u>Display Area</u>

XII. **<u>EXISTING TENANT EXCEPTION</u>**: The landlords will generally require that existing tenants be carved out of an exclusive.

A. **Assignees and Sublessees**

B. **Relocation or Expansion**

C. **Renewal or Replacement Lease**:

XIII. **<u>VIOLATIONS OUT OF LANDLORD'S CONTROL</u>**: The landlord will only want to be responsible for leases that it enters into that permit a violation of an exclusive. The tenant should ensure that the exclusive applies to leases, licenses or any other agreements entered into by the landlord that permit a party to take occupancy of a space in the center.

A. **Rogue Tenants**

B. **Cure Period**

C. **Reasonable Efforts to Enforce**

D. **Limited Obligation to Litigate**

E. **Court Allowed Competitors**

XIV. <u>TENANT NOT USING PREMISES FOR PROTECTED USE:</u> If an exclusive holder stops using the premises for the protected use, the landlord will want to eliminate the exclusive. The exclusive holder will not want to lose the exclusive unless it stops using the premises for the protected use for some extended period and will want to carve out any periods when the exclusive holder is not operating as a result of casualty, condemnation, alterations or other events that permit it to be closed under the lease.

XV. **<u>GOING DARK</u>**: A landlord will often insist that if an exclusive holder is dark for certain period of time it will lose the exclusive. As set forth above, an exclusive holder will want to exclude periods when it is permitted to be closed under the lease.

XVI. **<u>EXCLUSIVE-LESS CENTERS</u>**: The landlord may attempt to keep all exclusives out of its center. Some tenants will agree to this type of regime but will insist that if any tenant is granted an exclusive that their exclusive will spring into existence and bind any tenants coming in after the exclusive begins to apply. In this scenario, it only takes one tenant insisting on an exclusive to eliminate the exclusive-less center.

Thursday, October 25, 2018
9:00 – 10:15 AM

Workshop 8

Anchored in Place – Is There Such a Thing Anymore?
Co-Tenancy and Operating Issues

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I. Introduction

II. Opening Co-Tenancy Requirements and Covenants
- A. Opening Requirements
  - 1. Types of Requirements
    - (a) Named Key Stores
    - (b) Key Stores Pool
    - (c) Percentage of GLA

III. On-Going Co-Tenancy Requirements and Operating Covenants
- A. On-going Requirements
  - 1. Types of Requirements
    - (a) Named Key Stores
    - (b) Key Stores Pool
    - (c) Percentage of GLA
  - 2. Key Tenant Operational Requirements
  - 3. Replacements of Key Tenants
  - 4. Square Footage Tests
  - 5. Excused Closures
- B. Remedies for Failure of On-going Co-tenancy Requirements
  - 1. Tenant May Go Dark
  - 2. Rental Reduction
  - 3. Termination
  - 4. Condition vs. Covenant
- C. Continuous Operations Requirement
  - 1. Generally
  - 2. Implied Covenants
  - 3. What does it Mean to be Open
  - 4. Landlord's Remedies for Tenant Violation of Operating Covenant
  - 5. Landlord's Right to Recapture of Tenant Fails to Operate

IV. Recent Case Law Discussion
- A. Kleban Holding Co. LLC vs. Ann Taylor Retail, Inc.
- B. Grand Prospect Partners, LP vs. Ross Dress for Less, Inc., et al

V. Sample Provisions
- A. Opening Covenants
- B. On-going Covenants
- C. Replacement Tenant Language
- D. Continuous Operating Covenants
- E. Recapture Provisions
- F. Landlord Remedies for Tenant's Failure to Open or Operate

Thursday, October 25, 2018
9:00 – 10:15 AM

Workshop 9

Digital Disruption: Assessing the Impact of Technology on Shopping Centers and Retail Leases

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I. Introductions

II. Discussion of Developments In Technology

  A. Computer

  B. E-Commerce

  C. Smartphone

III. “Digital Retail” Changing Physical Retail

  A. “Omni-Channel” Marketing

  B. “Hyperlocal" Tracking

    1. Tenants/Retailers

    2. Landlords

IV. What to do with Consumer Information?

  A. Monetize it!

  B. Privacy Issues

    1. What information is collected?

    2. Where is data stored?

    3. What is being shared?

  C. Protections from Data Breach/Hacks

V. Digital Retail Impacting Leasing Strategies

  A. Tenant Mix

  B. Retail sales in omni-channel world

  C. Rent Calculation

    1. Base Rent

2. Percentage Rent

3. Gross Sales

D. Fulfillment Centers

E. “Showrooming”

VI. Case Study I: Amazon

A. Amazon Go! Store of the Future?

1. No cashiers/checkout – electronic payment

2. Cameras/scanning

B. Privacy Issues?

C. Amazon Lockers

D. Whole Foods Acquisition

VII. Case Study II: Ridesharing

A. Impacts on Parking Density Requirements

B. Retail Centers become Fulfillment Centers

VIII. Conclusions

Thursday, October 25, 2018
9:00 – 10:15 AM

Workshop 10

Do I Think That? Unconscious Bias – How to Spot it and Become an Inclusive Leader

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I. Introduction And What's In It For Me And My Company Or Firm

II What Is Unconscious Bias And How Can You Tell?

III. What Does The Research Say

A. Rosenthal Bloomers: How you treat others affects what they think of themselves and their ultimate success

B. Resumes: You can be ruled out just on the basis of your name despite being highly skilled.

C. Auditions: What blind auditions from orchestras tell us.

D. Scoring Law firm Memos.

E. Salary and Height.

F. Foreign Accent and Credibility.

IV. What Would You Say? Real Life Real Estate Scenarios
See attached Scenarios:

Tactics:
• Assume Good Intent/Explain Impact
"It sounds like you're trying to give me a compliment, but it feels a little more like an insult."

• Ask A Question
"I'm surprised to hear you say that. What past experiences have you had working with other women?"

• Interrupt and redirect
"Let's get back to business and talk about the important issues."

• Reveal the contradiction
"Abby is one of our highest ranked associates and Forbes just named her to 30 Under 30: The Top Young Lawyers."

• Humor
"I know that statement didn't come from this room."

V. Personal Action Plan: What Should/ Can We Do

VI. Resources
Appendix I

Scenarios

1. I am 42 years old, but at times I still get mistaken for a 20-something at times. This year I presented the findings of a research project to all the other senior staff in our office. My manager, who is only 8 years older than me, introduced me to the group by sharing how hard I worked and prepared, then ended his introduction with, "Considering how young our presenter is, his information will likely lack what the rest of us know based on our experiences, but it will be a good starting point." After a remark like that, how do I gain respect from the group; and how do I make sure my manager does not hold me back from promotions and opportunities based on his misperceptions of my experiences?

2. You are in a discussion with several colleagues over selection of the new City Manager. Your firm regularly works for the City and deals with the City Manager. One candidate is in his thirties from a progressive city with similar needs as your City, and he has had notable successes in his job. The other candidate is in his sixties with lots of experience at another city similar to yours, and because he used to work in your City government, he has direct knowledge of your City's needs and excellent relationships with the City's staff. One of the young associates in your group says, I wish people in their sixties would just step aside and let the next generation take charge. You are the supervising partner to this associate and are yourself in your 60's. What do you say or do?

3. You are an associate at a closing dinner with clients and other attorneys in your group, including those in management. When the waitress asks if anyone wants dessert, you enthusiastically say that you have your eye on the chocolate lava cake. Your colleague sitting next to you says loudly: "I guess you are blowing your diet tonight!", and the rest of the table laughs. After that joke, no one else orders dessert. Generally, this is a very active fit bunch, and you are the only person who is noticeably very overweight. How do you reply?

4. The head of the in-house real estate law area at your company and your direct supervisor is planning a summer picnic at her house. The last time this occurred, the menu was comprised of burgers, brats, chicken and egg salad, without vegetable or other options. You are a known vegan and another real estate lawyer in the group is vegetarian. How do you respond to the invitation?

5. You are staffing a project and recommend that a partner use an African American associate on the project. The partner says he doesn't think she will be a good fit for the client. What do you say or do?

6. I'm one of the few Asians on my team and everyone confuses me with another Asian (John) who works in a completely different department. The other person is at least ten years younger than me and has performance issues. We look nothing alike and have little in common. I mistakenly get phone calls and emails for him, and people even call me his name. I didn't think much of it when I first started working here, but after several years it has shifted from merely frustrating to insulting. In fact, I suspect recently a director did not include me on a team for a cutting-edge project because he confused me with John. This director constantly calls me John when he sees me around the office. How do I respond when I have nothing in common with John other than our race? And how do I deal with losing out on career advancement opportunities because of John's reputation?

7. A real estate partner and a Native American associate are pitching to be hired by a developer of a gaming project that will compete with nearby Native American casinos. During the pitch, the developer says things like "we need a firm to pow-wow with without going off the reservation, and one that will get in the canoe with us and out-paddle the competition." When the firm lands the project, the Native American associate is not included on the client's representation team. Was it a bad idea for the partner to select this particular associate for the pitch? Did the partner do the associate a favor by not putting him on the new client's team?

8. Jamil is the real estate department's only African-American lawyer. The department's supervising attorney greets Jamil's peers around the office with a handshake and "hello" or similar greetings. However, he always approaches Jamil with a fist bump and "hey brother, whatssup?" or similar colloquial greetings. Jamil wonders if his supervisor thinks of him

differently than his peers in other ways – including having confidence in Jamil's skills. Should Jamil be concerned, and if so what should or could he do about it?

9. Two managers discuss the invitation list for an upcoming business development dinner called: "Steaks, Whiskey and Cigars!" One of the managers suggested inviting Tommy, an openly gay employee who had done the most work on projects similar to the work that would come from this dinner. The other manager, Dan, responded, "This is more of a 'manly' event. I'm not sure it's Tommy's kind of outing." Dan invited me instead, and I accepted the invitation. In hindsight, I wish I would have said something.

10. You are gay and have worked at the company for over 10 years. Consistently, the real estate attorneys and business partners ask the other men to participate in various fantasy sports leagues. They have never once asked you, assuming that you don't like sports.

11. The firm is sponsoring a women's client development event where women in the firm and women clients spend the afternoon at a spa. Susan, a lesbian, is not invited. When you ask about this, the organizer responds: "I can't imagine she would be interested in the venue or the services."

12. A female partner and a male associate are in a law firm conference room with a male client and a male real estate broker. The conference room has a glass wall facing the reception area. As a young female associate walks by, one of the clients stares at her, chuckles and says that he would like to take her home for a good time. What does the partner say? What might the other men say?

13. A new female associate joins the real estate practice group. A male partner tries to put together an informal welcoming lunch. Others aren't able to make it. Because it feels awkward to have lunch with just the female associate and because he doesn't want anyone to question the propriety of moving forward, the male partner rescinds the lunch offer. What does the associate say?

14. One of the attorneys at the firm sends out an e-mail using the firm's server inviting people to an informal, non-firm sponsored happy hour at a local pub. Prior history is that these type of events can go long into the night. You are a male supervising attorney at the firm with female direct reports who plan to attend. Should you go? If you attend and witness inappropriate behavior, what should you do?

15. The firm has a celebration and has champagne toasts for the team that just won a big case. When the flutes are passed, you are the only one who does not take one, because for religious reasons you do not drink alcohol. The managing partner announces, we are all waiting on Jane to get her class so we can toast Adam on his big win." Embarrassed, you grab a glass and hold it aloft. But when you do not take a sip the person next to you remarks, "You know it is bad luck not to toast." What do you say or do?

16. You are new to the ICSC and you are asked to organize a NextGen meeting in your City on a date set by ICSC. It happens to fall on a Friday night at Sundown. You strictly observe of the Sabbath. Obviously the organizers put a lot of time and energy into scheduling this event, and you do not want to come across as critical of ICSC during your first interaction with the organization. How do you proceed?

17. You are interviewing assistants for the group. After interviewing one candidate, one of your partners asks, "Did you notice how she dressed? She's definitely a Mormon," and he states emphatically that he is not in favor or hiring her.

18. You are helping a client with a potential dispute where you have hired an expert company in the construction field. The multi-state team assembled by the client includes a native Chinese speaker whose English is extremely difficult to understand. The team meets via conference calls and frequently the attendees on the calls ask the speaker to repeat himself. It is impeding progress and other team members complain to you off line. What do you say or do?

19. Your real estate department works in teams and is culturally diverse. The head of the department is assembling a team for a complex shopping center acquisition in a typical suburban setting. At a meeting, the department head announces the team for this acquisition, and highlights the assets each brings to the team. Upon announcing the name of Maria Rosario, the department head mentions that as a Hispanic lady and with her heavy accent, she would be there to add diversity to the team. Do you say anything?

20. You and a couple of coworkers, who are your equals, are out to lunch and the conversation turns to the most recent hire (who is not present). He is Venezuelan and recently fled his home country due to the political upheaval there. He

speaks perfect English, but has a heavy accent. One of your colleagues comments that his heavy accent is offensive. What do you do?

21. You have several colleagues that speak Spanish as their first language, and in the break room they frequently sit together eating lunch. You don't speak Spanish and feel like you would be breaking in if you asked to sit with them, so instead you sit at another table or just avoid having lunch when they are there. You worry how the team works together or your status in the team is being affected. Should you say anything?

22. You are in the initial meeting with a potential new client who is a general contractor in the high end construction industry. The engagement is related to a claim made by the landowner against the contractor for shoddy construction. During the meeting the potential client repeatedly makes references to "Hispanics" having no work ethic and how you "can't find any 'of those people' in this community to do good construction work". Do you say anything? Do you take the engagement?

23. A client has an inner city urban project under development that will include a low income residential component, along with service retail that this neighborhood desperately needs. She is looking to hire a competent project manager to oversee the job. Your specialty is construction law and you have handled numerous very high profile projects on behalf of clients in your community. The client calls to ask if you have good or bad information on her potential new hire, an African-American. She tells you she thought one of the good qualities of this hire would be that "this guy will know how to speak the language."

24. Juan and Blaine are peer young lawyers in the real estate department who both graduated law school near the top of their classes. However, Juan's background is very different from Blaine's. Blaine grew up in the city as a third generation lawyer, attended prestigious schools, was in a fraternity, and he has many connections already in the City and with others in the office. Juan was the first in his family to attend post-secondary school, and worked his way through school with little extra time available to join additional clubs and events. Blaine likes Juan and can tell Juan is as smart and capable as Blaine. After both have completed their first two years in this department, Blaine has noticed Juan does not receive the same advancement opportunities as Blaine. Blaine wonders if it is actually because of some of the nuanced differences between them. Juan uses less sophisticated words, and wears clothes with a little less polish or style than Blaine's, and Juan does not have a shared prior contact or hobby with the client or partner. But, Juan is smart, surely he notices these things on his own, surely he "gets it"? Is it Blaine's place to say something, especially if it might diminish some of Blaine's future advancement opportunities?

25. A national retail company's general counsel is a third-generation graduate of an ivy league school. This GC is a key supporter of her alma mater, and she naturally more frequently stops by the offices of, and plans outings with, other lawyers in the law department with ivy league connections. The GC insists that while she may spend more time with some law department lawyers than others, that does not affect her decisions to promote and advance attorneys within the company's legal department. You work in the legal department but feel that you have missed out on several opportunities. Should you discuss this with her or is that too risky?

Thursday, October 25, 2018
10:30 – 11:45 AM

Workshop 11

Pleasures of the Palate: From the Food Court to White Table Cloths

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I. Introduction

II. Construction

  A. Construction Exhibit

    1. Landlord Work

    2. Tenant Work

  B. Utilities

  C. Grease Trap

  D. Exhaust/Venting

III. Operation of Business

  A. Operating Covenant

  B. Hours of Operation

  C. Online Delivery Services

  D. Sampling

  E. Trash Removal

  F. Co-Tenancy Provisions

    1. Opening Co-Tenancies

    2. Operating Co-Tenancies

IV. Parking

  A. Parking

  B. Valet Parking

  C. Employee Parking

V. Patios/Common Area Seating

  A. Patio Rent

  B. Maintenance

VI. Permitted and Exclusive Uses

  A. Primary Use/Menus

  B. Exclusive/Competing Use

    1. Competing Use

    2. Remedies

VII. Liquor Licenses

VIII. Conclusion

Thursday, October 25, 2018
10:30 – 11:45 AM

Workshop 12

Ethics and Professionalism: You Make the Call

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I. Competence

   A. Know the parties
   B. Know the case/transaction
   C. Know the law
   D. Know the pitfalls

II. Unrepresented Parties

III. Communication with Opposing Counsel

IV. Obligations in Transactions with Opposing Counsel

V. Unequal Treatment and Bias

Thursday, October 25, 2018
10:30 – 11:45 AM

Workshop 13

Mixed-up and Mixed in: Creating and Co-Existing in an Integrated Project

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I. Introductions

II. Development

- A. Acquisition/Redevelopment
- B. Permits
- C. Financing
  - (i) Institutional Financing
  - (ii) PILOT- Payments in Lieu of Taxes
  - (iii) TIF- Tax Increment Financing
  - (iv) State and Federal Funding

III. Ownership Structures: Developing it Alone or Partnering Up

- A. Joint Ventures
- B. Condominiums
- C. Reciprocal Easement Agreements
- D. Leasehold Interests
- E. Corporations, Limited liability companies, Partnerships

IV. Leasing

- A. Definition of Shopping Center; Cost Sharing
- B. Use Restrictions and Exclusives
- C. Co-Tenancy; Phasing
- D. Common Area Expenses
- E. No Build, No Kiosk and No Change Areas
- F. Access

V. Operational Concerns

- A. Construction
- B. Noise
- C. Venting
- D. Trash
- E. Loading

VI. Conclusion

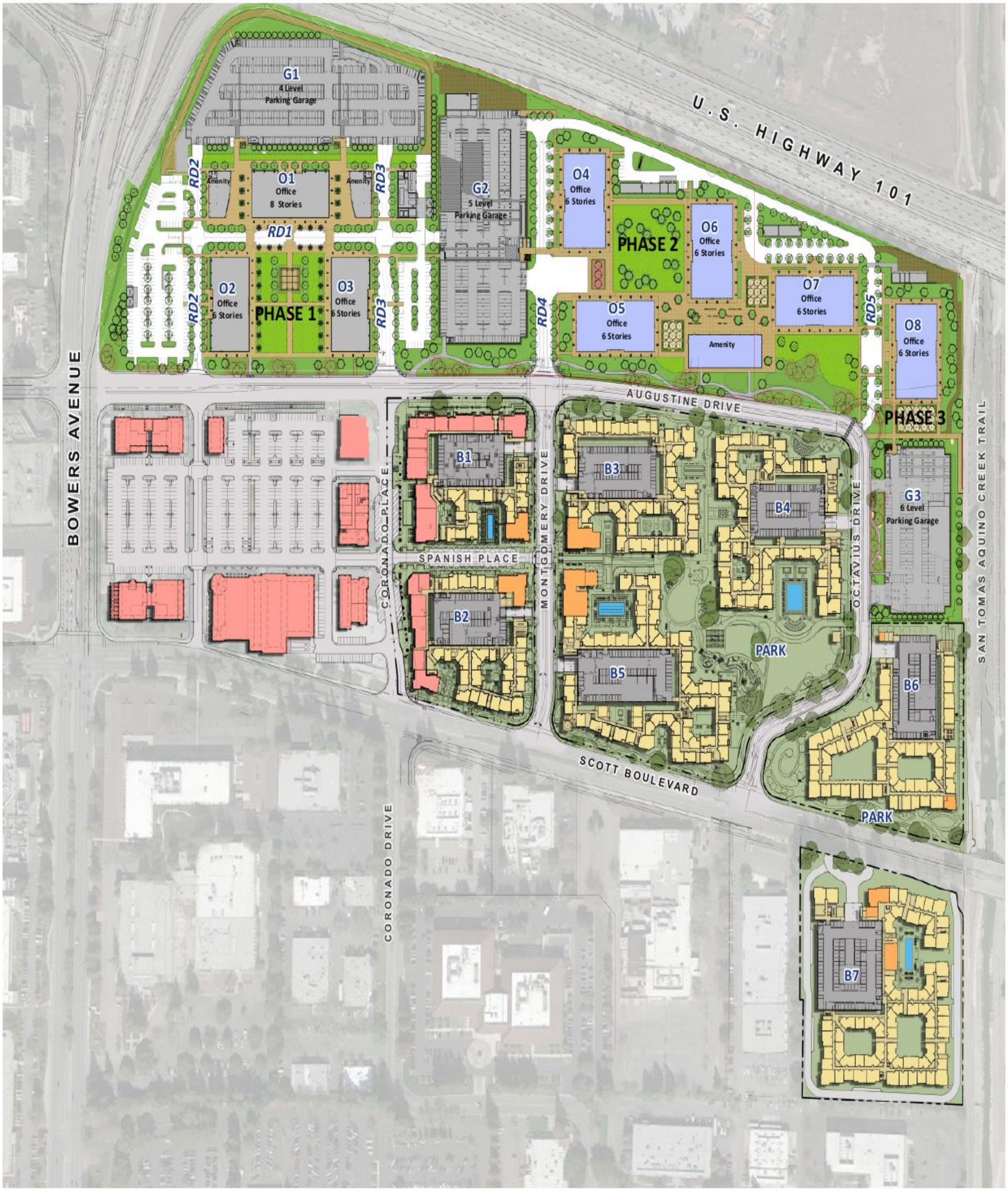
HYPOTHETICAL:

Urban Legend Development ("ULD") owns a large parcel of land. The parcel contains an operating supermarket anchored retail shopping center, but the adjacent land is not yet developed. ULD intends to develop the adjacent land as a mixed use project. The proposed project will contain ground floor retail, restaurant and service uses; a movie theatre; an entertainment facility with bowling; and boutique fitness clubs. In addition, the project will include community amenities such as an amphitheater and a park, as well as a hotel, residential and office components. Initial considerations with respect to permitting, financing and ownership structure will need to be addressed.

The project has been approved!!! ULD is ready to break ground on "Mixed In Super Center" and commence its leasing efforts. The project will ultimately contain 18 new buildings and will be constructed in phases, so there will be numerous challenges to deal with during the marketing and leasing process.

Then, after the grand opening of Mixed In Super Center, ULD's work will not be done. In addition to the ongoing considerations with respect to future development, there will be a number of operational items to be handled. Hopefully, these have been properly addressed in the lease, but unfortunately, due to the nature of this shopping center, ULD will continuously face new concerns that need to be solved.

This workshop will talk about these stages and highlight certain issues that are unique to mixed use projects when compared to indoor shopping malls and open-air retail centers.



U.S. HIGHWAY 101
G1
4 Level
Parking Garage
O1
Office
8 Stories
Amenity
Amenity
RD1
RD2
RD3
RD4
RD5
O2
Office
6 Stories
O3
Office
6 Stories
PHASE 1
G2
5 Level
Parking Garage
O4
Office
6 Stories
O5
Office
6 Stories
O6
Office
6 Stories
O7
Office
6 Stories
O8
Office
6 Stories
PHASE 2
PHASE 3
Amenity
G3
6 Level
Parking Garage
BOWERS AVENUE
AUGUSTINE DRIVE
CORONADO PLACE
SPANISH PLACE
MONTGOMERY DRIVE
OCTAVIUS DRIVE
SAN TOMAS AQUINO CREEK TRAIL
SCOTT BOULEVARD
CORONADO DRIVE
B1
B2
B3
B4
B5
B6
B7
PARK
PARK

Thursday, October 25, 2018
10:30 – 11:45 AM

Workshop 14

Relocation of Existing Tenants in Connection with a Repurposing and Redevelopment of a Shopping Center

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I. Introduction

II. Part 1: The Landlord's Perspective

- A. The Implications of Bhasin v. Hrynew
- B. Early Termination for Demolition and Redevelopment
- C. Unilateral Non-Contractual Early Termination by Landlords

III. Part 2: The Tenant's Perspective

- A. Considerations Shared by Both Retail and Office Tenants
  - 1. Consent
  - 2. Size
  - 3. Advance Notice
  - 4. Leasehold Improvements and Trade Fixtures
  - 5. Tenant Compensation
  - 6. Tenant Right to Unilaterally Terminate the Lease
  - 7. Constraints on the Timing of the Relocation
  - 8. Adjusted Rent for the Relocated Premises
- B. Retail Tenants' Additional Considerations
  - 1. Parameters of the Relocated Premises
    - a. Configuration
    - b. Visibility
    - c. Frontage
    - d. No-Build Zones
    - e. Access and Proximity Issues
  - 2. Parking Ratios
- C.. Office Tenants' Additional Considerations
  - 1. Parameters of the Relocated Premises
    - a. Configuration
    - b. Vista and Other Attributes of the Existing Premises
    - c. Access
- D. Parking

IV. Conclusion

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Workshop 15

No Contract, No Coverage: Common Mistakes that Lead to Uninsured Claims

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I. Introduction

A. Agreements that Allocate Risks and Typically Require Insurance as a Source of Funds

1. The Property Management Contract

2. Non Owned Auto Insurance Coverage

3. Waiver of Subrogation

B. Risk Analysis Required to Underpin Appropriate Insurance Requirements

C. Identifying Scope of Work and Parties Responsible for its Performance

D. Key Questions to Ask

E. Common Assumptions

II. Contractual Risk Allocation

A. Indemnification and Hold Harmless Provisions

1. What is Insurance?

2. Key Elements of an Effective Indemnification Provision

B. Additional Insured Status; the Certificate of Insurance is Not Enough

1. 2013 Updated Endorsements

2. When is Additional Insured Status Required

C. The Relationship between Coverage, Additional Insured Status, and the Contractual Indemnity

1. Coverage Flows Direct via Additional Insured Endorsement

D. Waiver of Subrogation

1. Mutual Waiver?

2. All Claims, Self-Operative or Specific Insurance Clauses

3. Limits on Waiver of Subrogation in Leases

4. Right to Waive Subrogation

5. In Cases of Potential Disproportionate Loss

6. Accord Certificate of Liability Insurance Sample Language

E. Exculpation

III. The Menu of Insurance Options

A. Preliminary Terms

1. Coverage Limit

2. Accessing Broader Coverage if afforded in the policy

3. Deductible vs. Self-Insured Retention

4. Per location aggregate limit

5. Whose insurance is primary?

B. A Menu of Policy Options

1. Commercial General Liability

2. Umbrella Insurance

3. Non Owned Auto Insurance

4. Commercial Automobile Liability – Owned, Hired and Non-Owned

5. Property Insurance

6. Builder’s Risk Insurance

7. Business Income Insurance

8. Liquor Liability Insurance Coverage

9. Worker’s Compensation Insurance

10. Employer’s Liability Insurance

11. Pollution

12. Specialty Insurance in General

IV. A menu of Insurance Requirements

A. Lease Agreements

1. Commercial Lease Agreement for Lower Risk Tenant

2. Commercial Lease Agreement for Mid Risk Occupancy

3. Commercial Lease Agreement for Higher Risk Occupancy

4. Commercial Lease Agreement with Liquor Exposure

5. Commercial Lease Agreement with Liquor Exposure (Big Box)

6. Commercial Lease Agreement with Pollution Exposure

7. Ground Lease Agreement

B. Contract/Vendor Agreements

1. Standard Contractors/Vendors (Low Risk Exposure)

2. Standard Contractors/Vendors (Mid Risk Exposure)

3. Standard Contractors/Vendors (High Risk Exposure)

4. Contractors with Pollution Exposure

5. Contractors with Professional Liability/Errors & Omissions Exposure

6. Special Note re: Property Management Contracts

V. The Houdini Dilemma and the Certificate of Insurance

A. The Anatomy of the Certificate

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Workshop 16

Cannabis Leasing: Business Opportunity and Legal Conundrum

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I. Introductions

II. Setting The Stage – The Ever Changing Legal Landscape of Medical and Recreational Cannabis Businesses
- i. Scope of Cannabis Industry
- ii. Cannabis Industry's Impact on the Real Estate Market

III. A Brief Overview of Federal Legality and Illegality Issues—Controlled Substances Act
- i. Supremacy Clause
- ii. Cole Memorandum/Sessions Memorandum
- iii. Rohrabacher Blumenauer Amendment to Appropriations Bill
- iv. Internal Revenue Code (§ 280(E))
- v. Department of Treasury/Banking – FINCEN/SARs
- vi. Trademarks and Patents
- vii. Bankruptcy

IV. State-Specific Regulatory Systems
- i. California
- ii. Colorado
- iii. Massachusetts
- iv. Ohio

V. Other Considerations
- i. Insurance
- ii. Ethics
- iii. Security

VI. Leasing Consideration for Cannabis-Related Businesses
- i. Permitted Uses
- ii. On-Site Cash
- iii. Payment of Rents
- iv. Utilities
- v. Inspection of Premises
- vi. Indemnification
- vii. Signage and Marketing
- viii. Odors
- ix. Tenant Improvements and Build-Out
- x. Events of Default
- xi. End of the Lease Term
- xii. Duty to Report.
- xiii. Definitions of Laws

VI. Questions & Answers

Thursday, October 25, 2018
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Workshop 17

Catch a Plane, Ride the Rail, Hop a Subway or Roll the Dice:
Unusual Provisions in Retail and Food Leases in Non-Traditional Locations

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Introductions

I. Airport Concession Leasing

A. Applicable Parties
1. Prime Landlord
2. Landlord
3. Subtenants

B. Structure of Contract
1. Fee Manager
2. Developer
3. Public Private Partnership (P3)

C. Prime Lease/Sublease Interaction
1. Forms
2. SNDAs

D. Lease Between Prime Landlord and Airlines/Airport Authorities

II. Airport Provisions

A. Street Pricing Requirements

B. Airport Employee Discount Requirements

C. Minimum Wage/Living Wage/Prevailing Wage Requirements

D. Campaign Contributions

E. Disclosures – RFPs and Sublease Levels

F. Airport Concession Disadvantaged Business Enterprises (ACDBEs)

1. Joint Venture Guidance

G. Worker Retention and Employee Training

H. FAA/TSA Compliance, including Security (Employee Badging)

I. Volatility of Airlines and Mergers and Impact on Concessions

1. How does a Tenant Protect Itself?
2. Kick Outs

J. Enplanement Protection

1. Sales per Enplanement (how much average passenger spends)
2. MAG Tied to Enplanements
3. Landlord's Right to Terminate
4. Percentage Rent tied to Enplanements
5. Example of Rent Reduction Based on Enplanements

K. Tenant's Store Hours

L. Labor Harmony

M. Special Sublease Considerations

1. Rental Upon Delivery
2. Airport Modifications/Relocation
3. Pouring Rights

III. College Campus F&B Leasing

A. Specialty Retail (Bookstores)
B. Food & Beverage
C. Issues to be Aware of During Lease Negotiations

IV. Train Station Leasing

A. Old Infrastructure/Re-Development Opportunities
B. Denver Union Station Redevelopment
C. Union Station Master Plan (Amtrak – Washington, DC)

V. Technology

A. Digital Initiatives
B. Privacy

1. Example of Privacy Provision

VI. Military

A. Example of Build-out and Construction-Related Provisions
B. Examples of Provisions Relating to Operations

I. Casino Retail Leasing

A. Gaming Authority's Licensure Requirements
B. Hours of Operation vs. Liquor License Requirements (Restaurants)
C. Signage
D. Casino Modifications / Visibility / Access

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Workshop 18

Outwit, Outplay, Outlast: How to be a Survivor When Creating Outparcels in Existing Shopping Centers

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I. Introduction

II. Challenge No. 1: Purchase of proposed outparcel for the development of a hotel.

A. Hotel Developer Perspective: Issues to be addressed:
1. Zoning/Entitlements
2. Subdivision
3. Access
4. Parking
5. Utilities
6. Impact Fees/Tax Implications

B. Landlord's Perspective: Issues to be addressed:
1 Zoning/Entitlements
2. REA's/Declaration/CC&Rs/OEA's
3. Uses
4. Parking
5. Signage
6. Common Area Maintenance
7. Easement Rights
8. Existing Financing/Release of Outparcel
9 Rights of Existing Tenants
10. Construction

C. Major Tenant's Perspective: Issues to be addressed:
1. Uses
2. Parking
3. Visibility
4. Signage Rights
5. REA's/Declaration/CC&R's/OEA's
6. Common Areas
7. Construction

III. Challenge No. 2: Negotiating the ECR with a proposed Major Tenant.

A. Landlord's concerns: Issues to be addressed:
1. Restrictive Covenants/Noxious Uses/Competing Uses
2. Building Area Restrictions
3. Height Restrictions
4. Utility Easements
5. Parking Requirements for Outparcels
6. CAM Allocation
7. Design Approval Rights on Outparcel buildings

B. Major Tenant Lease Issues:

1. Sunset of the ECR
2. Outparcel condition until developed
3. Outparcel lighting requirements
4. Outparcel signage restrictions

IV. Challenge No. 3: Dealing with Major Tenant vacancies.

A. Redevelopment of Outparcels: Issues to be addressed:
1. City Concerns
2. Major Tenant concerns
3. Existing Lender concerns

B. Addressing Major Tenant lease provisions: Issues to be addressed:
1. Outparcel definitions

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Workshop 19

Who's "in" – Who's "out": How to Use Outside Counsel Effectively

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1. How to Select an Outside Counsel
   a. Referrals
   b. Online Resources
   c. Formal Process

2. Conflicts
   a. Specialized Firms
   b. Waivers
   c. Chinese Walls

3. Formalities
   a. Retainer Agreements
   b. Staffing
   c. Fee Arrangements
   d. Invoices
   e. In-house Resources

4. Paperwork Considerations
   a. Proprietary Systems
   b. Systems
   c. Confidentiality
   d. Reviews and Abstracting

5. Training
   a. Communication
   b. Training
   c. Materials

6. How to make sure you have the right Outside Counsel
   a. Finding an Outside Counsel who acts like an In-house Counsel
   b. Deadlines, priorities and goals
   c. Communication
   d. Status update
   e. Evaluations

7. Overall Success.
   a. Efficiency and collaboration
   b. Long term trust and cooperation

Friday, October 26, 2018
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Workshop 20

Value-Added Title Insurance: Secrets from the Underwriter's Crypt

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I. Introductions

II. Negotiating Title Insurance Coverages for Shopping Centers

A. Leasehold Title Insurance and Electrical Power Endorsements

B. Mezzanine Loan Coverage(s)

C. Multi-Site, Multi-State Acquisitions

D. Hypotheticals to be Discussed:

1. Errol Trolling owned a chain of shopping centers. Alas, each of his three wives gave birth to a son (each named Errol, Jr.), then promptly divorced him. After his third strike-out, at age 61, despondent, mired in child support and alimony, Errol took up sport-fishing. He was killed by a lightning bolt off the coast of Florida as he tried to beat the storm to shore. He had caught no fish.

In a macabre tribute to their late father, Errol A, Errol B and Errol C ("the Errols"), now co-owners of the shopping centers, have decided to lease out rooftop space at each center to Love Beam, a solar energy producer. Love Beam plans to sell 30% of the energy it produces to the Errols and 70% to the power grid.

To evidence its interest in the property, LoveBeam will acquire a leasehold interest in an airspace parcel located within the shopping center (as shown on a subdivision map) for a term of 20 years. To finance the purchase and the installation of the equipment arrays, Love Beam will borrow $10,00,000 from an investor who requires security for its loan by way of an insured Deed of Trust and Assignment of Leases and Rents, Security Agreement and Fixture Filing.

What title insurance products might be applicable?

2. Bob Weaver is the 100% owner of Shadow Group LLC, the sole member of Shadow Properties LLC, the owner of the land and buildings comprising The Shady Shopping Center in Bloomington, Illinois. Bob has a gambling problem. In addition to failing to pay his last two year's federal income taxes, and embezzling by submitting falsified receipts, Bob took out a high interest rate, unrecorded second mortgage on the Center (unbeknownst to his first lender) from a group of private investors in Las Vegas. That mortgage is about to come due, potentially giving new meaning to the term "breakage". But as luck would have it (luck being Bob's business plan), Mark, one of Bob's country club friends, just became the trustee of his ailing aunt's generation-skipping trust and is seeking a real estate investment "to diversify the risk". As trustee of the Minnie Stroke Living Trust, Mark has agreed to buy a 30% interest in Shadow Group LLC.

The Trust’s attorney, an honest professional with an ordinary name, has advised Mark to leverage the Trust’s investment with Mezzanine financing for which the lender will, of course, require insurance.

What insurance products might be applicable? How might the insurance underwriting process expose Bob’s skullduggery and/or protect the Trust from harm?

3. Your client is purchasing a chain of grocery stores with sites located in multiple states. Some are owned in fee, some are leaseholds.

What title issues should concern you?

How can you reduce title insurance costs in structuring your client’s coverage?

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Workshop 21

Entity Purchase Agreements:
What to have in Hand when You're Not Buying the Land

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I. Introductions

II. General Overview, Purchasing Entity Interests as Opposed to Purchasing Real Property

A. What Exactly Is Being Purchased

B. How Is This Accomplished

C. Why Do This

III. Who Are You Buying From

A. Owner of 100% of the Entity

B. Operating Member

C. Owner of a Non-Controlling Interest or Investor Member

IV. How Much Are You Buying

A. 100% of the Entity

B. A Controlling Interest

C. A Non-Controlling Interest

V. Differences in Due Diligence

A. Corporate Records

B. Entity Searches

C. Organizational Documents

D. Financial Information

E. Entity Level Taxes

VI. Differences in Documentation

A. Entity Transfers

B. Indemnities

C. Reporting Requirements

D. Board/Officer Changes

VII. Differences in Representations, Warranties and Covenants

A. Entity

B. Property

VIII. Differences in Closing Requirements

A. Entity Transfer Documents

B. Deed and Assignments

IX. Title Insurance

A. Buying a New Owner's or Investor's Policy

B. Non-Imputation Endorsement

C. Affidavits and Indemnities

X. Questions

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Workshop 22

Thinking Outside of the Traditional Box, What to do when Your Anchor Tenant Goes Dark

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I. Summary of the Current State of Retail
   A. Bankruptcies
   B. Consolidation
   C. Proliferation of online retail sales
   D. Amazon and "Amazon-like" retailers

II. Current Retail Trends
   A. Retail shopping center redevelopment
   B. Restaurants and entertainment anchors
   C. Showroom concept stores
   D. Non-traditional retail uses
   E. Emphasis on experiences
   F. Department store to fulfillment center conversions

III. Navigating the Landscape When an Anchor Tenant Closes
   A. Subleasing
   B. Downsizing/Subdividing
   C. Common Issues/Impedients
      i. Use restrictions
      ii. Limitations on Service Retail Users
      iii. Co-tenancy
      iv. Protected areas
      v. Shopping Center remodel restrictions

IV. Future of Retail
   A. Continual transformation of the industry
   B. Merging of online sales and brick and mortar operations
   C. Speed and convenience will rule
   D. Personal touch and appeal will be critical
   E. Social aspects of shopping (the experience) will matter more and more

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Workshop 23

Commas in the Courtroom: Drafting Trial-Ready Leases by Thinking Backward

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I. Introductions

II. The Rules of Procedure You Should Know: Thinking Backward from Trial

A. How Documents are used in Trial

1. Exhibits, Demonstrative Exhibits, and Notebooks

B. How Depositions are used in Trial

1. What's a Deposition?
2. Percipient Witnesses, Expert Witnesses, and Percipient Expert Witnesses
3. Corporate Designees and Persons Most Knowledgeable and Qualified—FRCP 30(b)(6)

C. How Documents and Depositions are used Before Trial

1. Summary Judgment
   a. Memoranda of Agreements, Drafts
   b. Marketing brochures
   c. Sham Declarations
2. Temporary Restraining Order or Preliminary Injunction
3. The Complaint

III. The Rules of Substance You Should Know: Contracts, Commas, and Canons of Construction

A. A commercial lease is a contract and is subject to the standard rules of interpretation.

B. The rules you should know:

1. Plain Meaning: The intent of the parties is to be determined from the "plain meaning" of the language used. Therefore, understand the meaning of the words you use. And don't count on being able to introduce evidence of intent or your own understanding outside of the "four corners" of the lease. A court will look beyond the lease only if a term is found to be ambiguous (see below at 5).

2. Whole Contract, with Each Provision Having Meaning: The lease is to be construed as a whole and all provisions are to be given effect and read together. Therefore, take care that each provision agrees with the other.

3. Reading Documents Together: Where a lease is made up of two or more documents, the documents are to be construed together rather than separately.

4. Course of Dealing / Parties' Interpretation: The parties' own "practical construction" of the lease may guide a court's interpretation of it. Therefore, how you implement a provision in practice may dictate its meaning in court.

5. Resolving Ambiguity, Part 1: When a lease term is ambiguous, its meaning is to be ascertained by the lease's terms and circumstances surrounding its creation, such as the

relationship of the parties, actions of the parties, and established business usages. Therefore, drafts of leases may decide the final lease's meaning.

6. Resolving Ambiguity, Part 2: Ambiguity in the lease may be construed against the drafter. Therefore, avoid ambiguity whenever possible. Better yet, represent and warrant that both parties carefully negotiated the lease and were represented by counsel.
7. Specific and General Terms: Specific terms are favored over general terms. Therefore, watch for the interrelationship between general and specific provisions relating to the same issue.

IV. The Deposition

A. Rent Escalation and the "Premises" (Hypothetical 1 - clause below)

B. The "Shopping Center" (Hypothetical 2 - clause below)

Hypothetical 1 – Rent Escalation and the "Premises"

A. ARTICLE 1: THE PREMISES

Approximately, but no more than, 25,000 square feet of land (the "Premises") with an address of Your Town, Massachusetts, designated as "Premises" on Exhibit A, and legally described on Exhibit B, which Premises are a part of the property designated as "Landlord's Property" (the "Property") on Exhibit A. The Premises includes all improvements, structures, and buildings now or hereafter located thereon, and in common with others entitled thereto, all rights, privileges and easements appurtenant thereto including, without limitation, access over streets, ways, drives and the like serving the Premises.

B. EXHIBIT A: THE PREMISES

The land under the 24,800 square foot building as shown plus twenty feet around the structure on each side.

C. SECTION 4.1: RENT ESCALATION

Base rent for the first ten (10) Lease Years shall be $24,000 per annum. Base rent for the remainder of the term shall be ten percent (10%) of the Fair Market Value of the **Premises** (FMV).

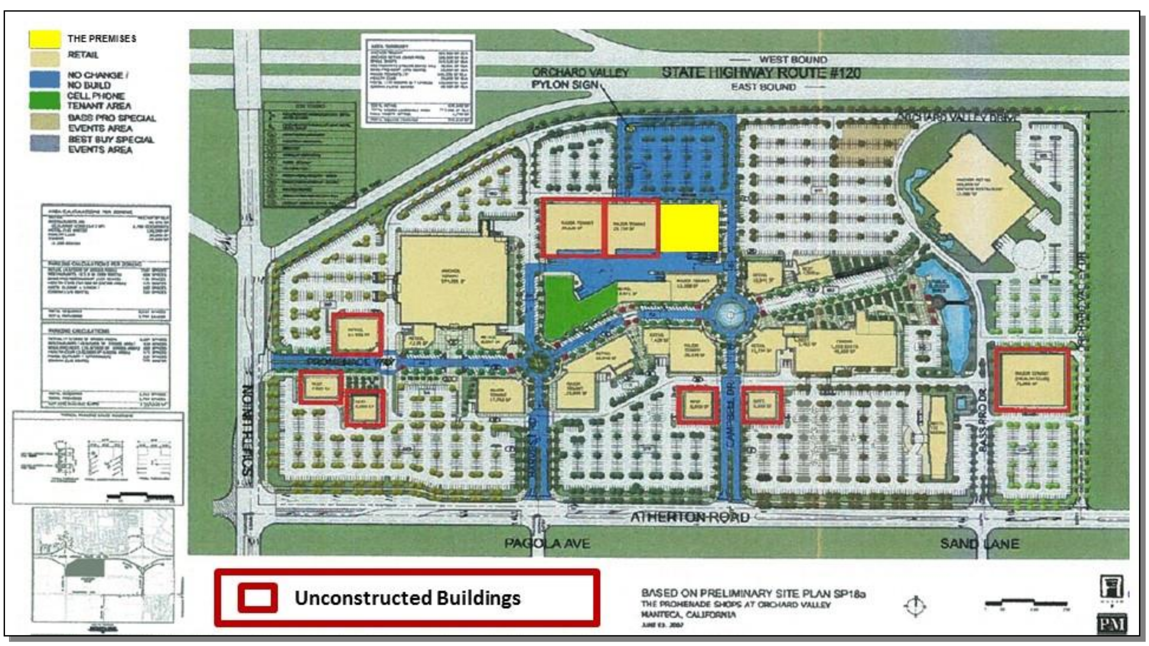
Hypothetical 2 – The "Shopping Center"

A. THE PREMISES.

Subject to the terms and conditions of this Lease, Landlord leases to Tenant and Tenant rents from Landlord the premises situated in the Your Town, State of California, and known and described as follows: The premises and improvements and appurtenances constructed and to be constructed thereto (the "Premises") located … in Your Town, California **(the "Shopping Center").** The legal description of the Shopping Center is attached hereto as Exhibit A and made a part hereof, and **the Shopping Center is outlined in red on the site plan attached hereto as Exhibit B** and made a part hereof; provided that in the event of any conflict between Exhibit A and Exhibit B, **Exhibit B shall control**. The Premises contain approximately thirty thousand thirty-eight (30,038) square feet … (the "Premises") located in the Shopping Center as shown on the Site Plan attached hereto as Exhibit B and made a part hereof, exclusive of square footage applicable, if any, to a loading dock appendage to Premises resulting from the design of the Shopping Center. **Nothing contained in this Lease will prohibit Landlord from constructing the Shopping Center at various times, and in various phases or sections**, subject to the provisions of Article 5 hereof. **The buildings located within phases or sections constructed after the date of execution of this Lease will be deemed to be included within the defined Shopping Center for all purposes of this Lease as of the date that the buildings are fully constructed**. Anything herein to the contrary notwithstanding, **the definition of "Shopping Center" for purposes of calculation of Tenant's proportionate share of Additional Rent, only as hereinafter defined, does not include any buildings (a) which are not yet fully constructed.**

G. Opening Co-Tenancy. Tenant shall not be required to open for business unless **sixty percent (60%)** (not including the subject Premises) **of the gross leasable area of the Shopping Center**, including at least two (2) of the following: (i) J.C. Penney; (ii) Bass Pro; (iii) a cinema is open and operating at the Shopping Center ("Opening Co-Tenancy Condition"). If this Co-Tenancy Condition is not met, Tenant may either (i) delay opening until the condition is met or (ii) open for business and pay fifty percent (50%) of the Rent and Additional Rent. If the Opening Co-Tenancy Condition is not satisfied or is waived by Tenant within twelve (12) months after the "Actual Possession Date", as that term is hereinafter defined, Tenant shall have the right to terminate the Lease upon written notice to Landlord.

Ex. B:



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Workshop 24

When Disaster Strikes – Who You Gonna Call?

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This interactive workshop will focus on the aftermath of catastrophic events and how to minimize their impact. Topics will include natural disasters, arson, mechanical failures, and terrorism. While examples given will be to some extent fictionalized, all will be based on real events.

A. Some General Considerations (Beyond Insurance)
- I. Dealing with the Press
- II. Site visit safety
- III Communication Tools
- IV. Lease Provisions: Force majeure
- V. Lease Provisions: Insurance

B. Issues Encumbered Once Disasters Strike
- I. Natural Disasters (Earthquakes, Hurricanes, Tornado, Tropical Storms, Wild Fires, and Floods)
  - a. Pre-disaster planning/preparation (Hurricanes/Tropical Storms) vs Triage decision making (Earthquakes, Tornadoes)
  - b. Communication tools (pages, cell phone, land line)
  - c. Loss of property; loss of life; loss of business; loss of employees
  - d. Dealing with government agencies (e.g. FEMA, State, Local) and representatives (e.g. governors, mayors)
  - e. Lease provisions interpreted and viewed in the light of a mass disaster
  - f. Know your insurance
  - g. Restoration and clean up
  - h. Community outreach

- II. Arson
  - a. Know your insurance coverage and your lease before you speak to anyone
  - b. Dealing with ATF, FBI and local law enforcement

- III. Mechanical Failures
  - a. Pipe burst, catastrophic structure failure etc.
  - b. Know your insurance and your lease (what is Landlord's responsibility vs. Tenant's responsibility)
  - c. Insurance

- IV. Terrorism (Things you probably never think about and we hope you never face.)
  - a. Relationships, grief, monuments
  - b. Vigils and the grieving process
  - c. Security, safety and the public trust
  - d. Do you need terrorism insurance?
  - e. Know your lease

- V. Emergency Preparedness Plans
  - a. When are emergency plans necessary and what should they contain?
  - b. Annual review of types and amount of insurance coverage
  - c. Lease risk review

- VI. Not so Hypothetical Hypotheticals

Friday, October 26, 2018
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Workshop 25

Keep It Running! How to Make Your REA Last for Another Redevelopment

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I. Introductions

II. Merits of Working with an Existing REA/The Realities of Today's World

- Framework provided by an existing REA

III. "Before" and "After" Site Plans (<u>See attached site plans</u>) – Hypothetical for Workshop – Exploring Alternatives to Restructuring a REA for a Redevelopment

A. Preliminary Action Steps

- What is the deal?
- Who are the parties to the REA?
- Do I have legible copies of <u>all</u> documents and <u>exhibits</u>?
- Title Update
- How to approach the anchors as REA parties?
- Who represents the REA parties?
- Confirm your compass bearing with lender/loan documentation
- Amend REA or elect two-party supplements/consents?

B. The Nitty Gritty

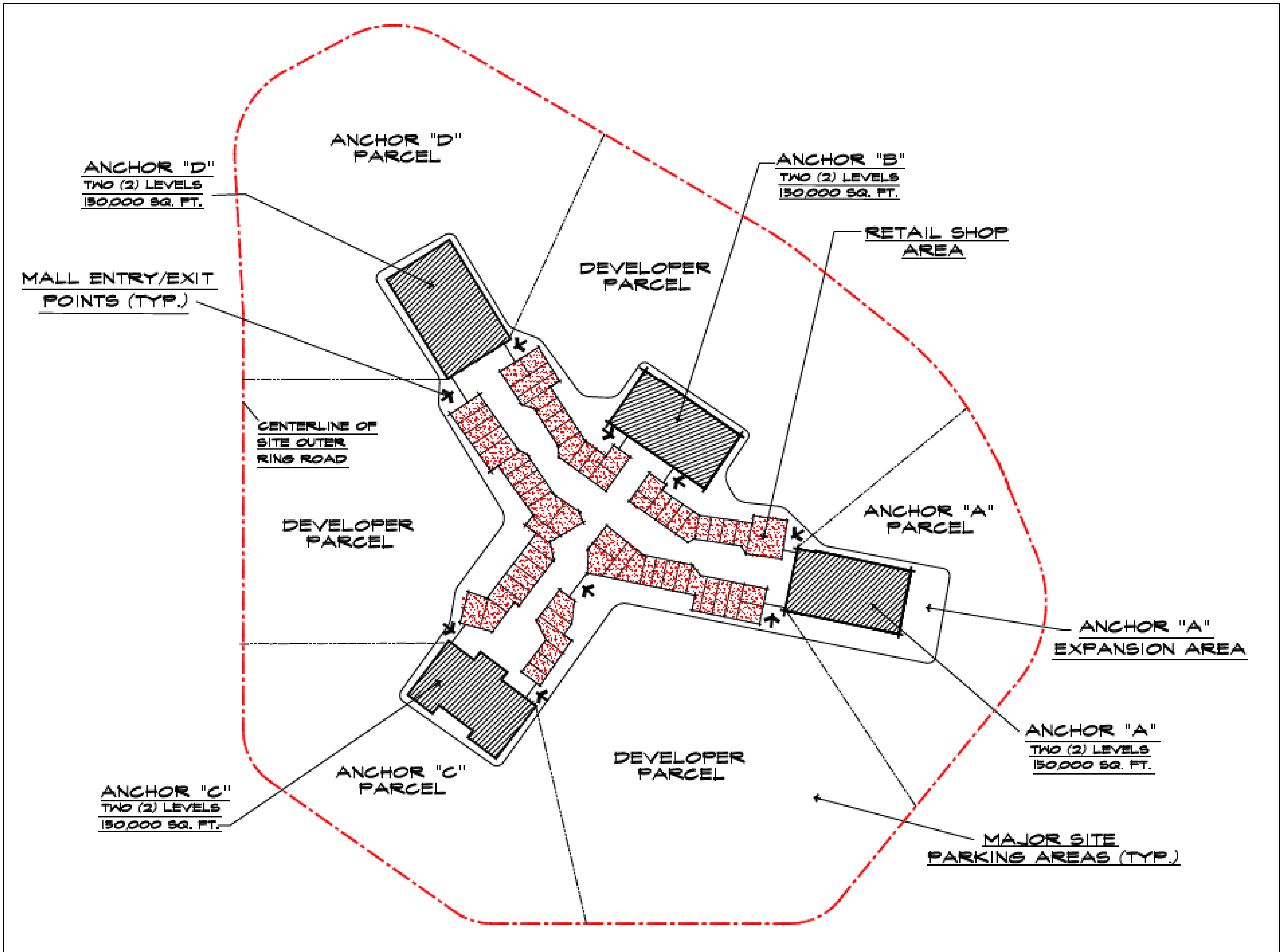
- Site Plan
- Outparcel Buildings
- Hotels
- Office Buildings
- Wrap and Hugs
- Grocery Store/Supermarkets
- Other uses

C. Other Concerns

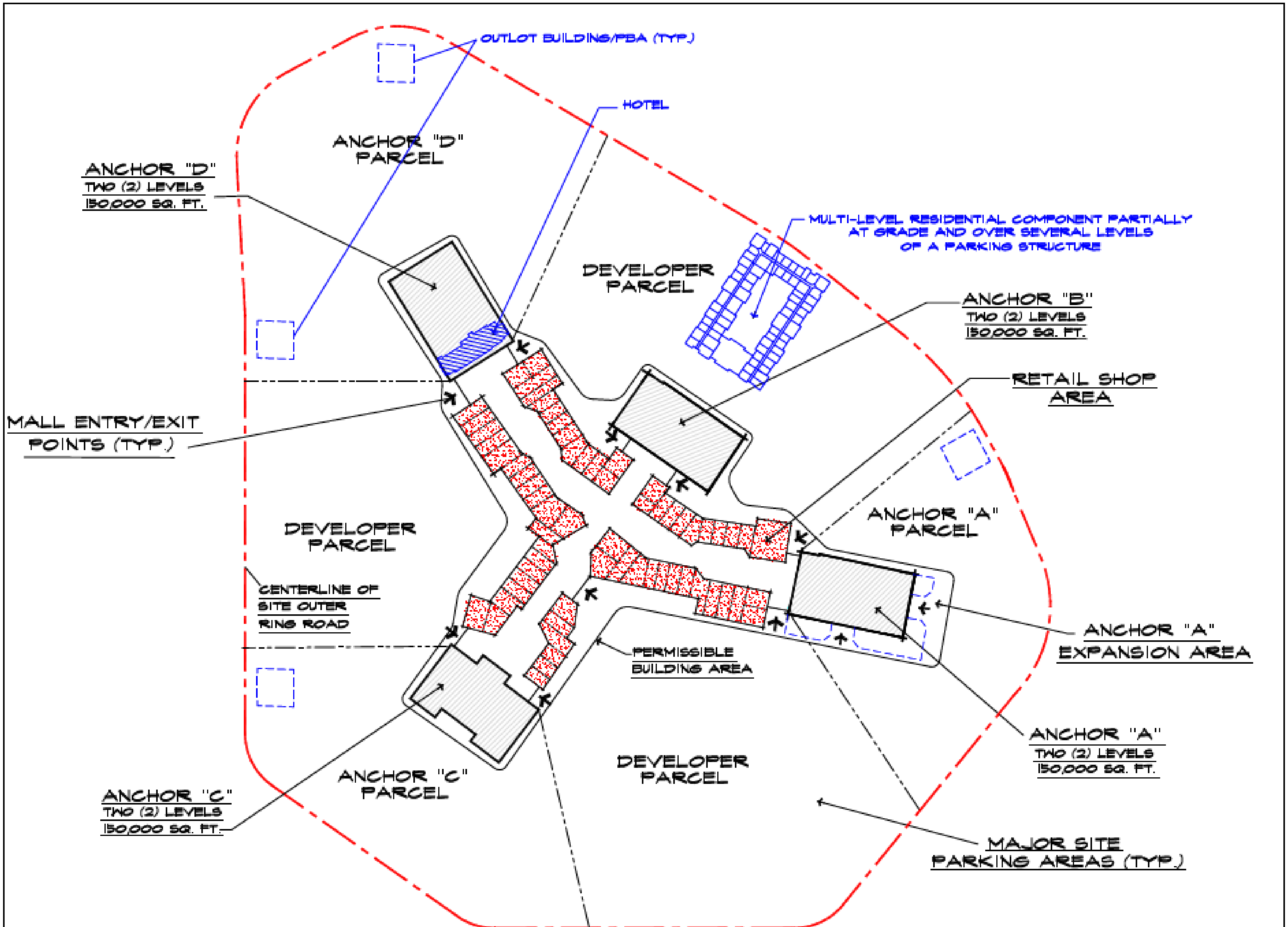
- Construction Schedules
- Parties to REA
- Adding newer/state of the art/operational clauses
- Addressing purchase options of developer entity
- Amending legal descriptions/land swaps
- Condominium regimes
- Air Space Parcels – any concerns/special considerations?

IV. Multiple REAs Governing a Project/Two-Party REAs

V. General Discussion – Questions – Wrap Up



EXISTING CONDITIONS



FUTURE CONDITIONS

Friday, October 26, 2018
10:30 – 11:45 AM

Workshop 26

Tax Reform's Impact on Retail Development

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I. Introduction and Overview

This workshop will focus on the Tax Cuts and Jobs Act's provisions that affect real estate investors and investment.

II. Section 1031 Like-Kind Exchanges

III. Carried Interest

IV. Technical Termination of a Partnership

V. Bonus Depreciation

VI. Section 179 Expensing

VII. Deduction of Business Interest

VIII. Section 118 of the Tax Code – Contributions to Capital
   A. History of Section 118
   B. Impact of Tax Reform
   C. Going Forward

IX. Qualified Opportunity Zones: A New Tax Incentive to Invest in Economically-Distressed Communities
   A. Special Rules for Capital Gains Invested in Opportunity Zones
   B. Qualified Opportunity Fund Defined

X. Unrelated Business Income Tax

XI. Section 199A: A Tax Deduction for Qualified Business Income
   A. Tax Deduction Calculation

XII. Net Operating Losses

XIII. Limit on Excess Business Losses for Noncorporate Taxpayers

Friday, October 26, 2018
12:00 – 1:15 PM

Workshop 27

Rethinking the Common Areas: The New Frontier for Amenities

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I. Introductions

II. General Discussion of Common Area Restrictions

- (a) Existing Lease Restrictions
- (b) REA Restrictions
- (c) Site Plan Controls
  - (i) Protected Parking Areas
  - (ii) Critical Access Drives
  - (iii) No-Build Areas
  - (iv) Minimum Parking Ratios

III. Common Area Uses – Tenant Initiatives

- (a) Sidewalk Sales and Displays
- (b) Food Trucks
- (c) BOPIS Parking
- (d) Delivery Vehicle Parking
- (e) Stork Parking
- (f) Valet Parking
- (g) Farmers Markets
- (h) Promotional Events

IV. Common Area Uses – Landlord Initiatives

- (a) Retail Containers/Temporary Shops
- (b) Ride Sharing Drop-Off and Pick-Up Zones
- (c) Experiential Retail
- (d) Greenspace for movies and community events
- (e) Valet Parking

V. Operating Expense Concerns

- (a) CAM Exclusions
- (b) Fixed CAM

VI. Conclusions and Legal Concerns

VII. Q&A

Friday, October 26, 2018
12:00 – 1:15 PM

Workshop 28

Sharing the Sandbox: Grocery Stores, Health Clubs, and What We Learned in Kindergarten

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A. Prohibited Use Covenants – History and Context.

1. Keeping out the "undesirables".
2. Times have changed. Uses that were once classified as "undesirable" may now be viewed as at least suitable.
3. Use of boilerplate prohibited use provisions has resulted in the provisions not keeping up with the changes.
4. Outdated boilerplate prohibited use provisions can create fatal ambiguity if challenged in court.

B. Traditional Retail and Causes of Change.

1. The Internet.
2. Bankruptcies creating vacancies.
3. Amazon.
4. Retailer downsizing.
5. Increase in non-traditional uses in shopping centers.

C. New Retail.

1. Service and "experiential" uses.
    a. Restaurants.
    b. Night clubs.
    c. Health clubs.
    d. Massage parlors.
    e. Bowling alleys.
    f. Educational facilities.

D. Prohibited Use Clauses.

1. Non-retail uses.
2. "Inappropriate" uses.
3. "Noxious" uses.
4. Parking intensive uses.

E. Addressing Change in Retail.

1. Traditional retail tenants now happily co-exist with office, residential and entertainment uses in mixed-use projects.
2. Landlords and retailers alike need to adjust their historical notions of compatible co-tenancy.
3. Many non-retail uses have become commonplace in shopping centers.

4. Uses that were once considered “inappropriate” have become socially acceptable and commonplace in modern shopping centers.

    a. Massage businesses (e.g., Massage Envy).

    b. Upscale tattoo parlors.

    c. Medical retail.

5. Even some “noxious” uses have made inroads.

    a. Tesla showrooms.

    b. Drop off/pick up only dry cleaners.

6. High density users are being integrated. Were parking fears overstated all along?

    a. Don’t the prime hours of use of high density users like health clubs and theaters suggest there never really was the competition for parking that was perceived to exist?

    b. Don’t both uses generate desired daily traffic? Destination uses.

7. Planning for high density users.

    a. Geographic separation if facility entrances face onto same parking field.

    b. Configure buildings so facility entrances face onto different parking fields – distance may not be a relevant factor.

    c. Locate employee parking to areas that don’t encroach on other retailers’ customer parking areas.

    d. Require tenants to require their customers to avoid parking in front of other retailers.

    e. Locating high density users where there is no obvious “best place” to park.

    f. Valet parking.

F. <u>More Change Is Coming – The Next Wave – Up and Coming Uses</u>.

1. The retail sale of marijuana and related products, including larger distribution facilities.

2. Retail and wholesale distribution centers for Amazon and other online retailers. (e.g., the “Amazon locker” allowing customer pickup of items purchased on-line).

3. “Doggie day care” and/or other pet care/boarding facilities.

4. Additional medical uses - medical office, surgi-center, dialysis and cancer treatment facilities.

G. <u>Updated Prohibited Use Clauses</u>.

1. Draft to foster both the goal of landlord to have a shopping center with heavy traffic, high sales volume and a bustling, energetic vibe, and the goal of tenant to have a profitable, thriving business.

2. Update prohibited use provisions as lease amendments present the opportunity.

3. Sample provision.

Friday, October 26, 2018
12:00 – 1:15 PM

Workshop 29

Management Agreements – Who Is Really Managing the Shopping Center?

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I. Introductions

II. Relationship Between Shopping Center Owner and Property Manager
   A. Services/Duties
      1. What should management fee cover?
      2. Excluded services
      3. What if services could be performed by on-site management staff?
      4. Additional services for additional fees
      5. Owner's requirements

   B. Management Fees
      1. What is included?
      2. What is not included?
      3. Minimum fees

   C. Reimbursable Expenses
      1. What should be included?
      2. What should not be included?

   D. Termination Rights
      1. Owner
      2. Manager
      3. With or without cause?
      4. Notice period
      5. Termination fees

   E. Indemnification
      1. How much liability should the manager take on?
      2. Should either party's indemnity by limited to claims covered by insurance?

   F. Insurance
      1. Owner requirements
      2. Manager requirements
      3. Contractor requirements
      4. Waiver of subrogation/claims – apply to all claims, including deductibles

   G. Limitations on Liability
      1. Owner's limitation, exculpation
      2. Manager's limitation
      3. Waiver of consequential damages
      4. Monetary caps

III. Conclusion

Friday, October 26, 2018
12:00 – 1:15 PM

Workshop 30

An Ounce of Prevention – How Proactively Structuring and Documenting Your Mixed-Use Project Can Solve Problems You Never Knew You Had

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I. Introduction

II. Project Structuring Considerations

III. Selecting the Optimal Project Structure

A. Single-Tier Condominiums

1. SINGLE-TIER MIXED-USE CONDOMINIUMS – ADVANTAGES
(a) Marketability
(b) Proportionate Representation and Fairness
(c) Statutory Framework Guarantees Rights
(d) Flexibility
(e) Non-Discrimination

2. SINGLE TIER MIXED-USE CONDOMINIUMS – DISADVANTAGES:
(a) Adherence to Burdensome Formalities
(b) State Consumer Protection Laws May Apply to Retail Units.
(c) Limitations on Developer Control
(d) Potential for Interference by Residential Board of Directors
(e) Establishment of Condominium Only at Substantial Completion
(f) Mixed-Use Condominium Documents Can Be Difficult to Amend
(g) Costs and Administration

B. Two-Tier Condominiums (Master/Sub Condos)

1. TWO-TIER MIXED-USE CONDOMINIUMS – ADVANTAGES
(a) Added Protections for Retail Component
(b) Protection from Undue Interference
(c) Greater Flexibility for Developer

2. TWO-TIER MIXED-USE CONDOMINIUMS – DISADVANTAGES
(a) Complexity
(b) Cost
(c) Difficulty to Amend
(d) Not Permitted in All Jurisdictions

3. Special Concern for Landlords and Tenants In Condominium Regimes.

C. Vertical Subdivisions; Air Rights Regimes

1. VERTICAL SUBDIVISIONS – ADVANTAGES:
(a) Flexibility
(b) Ease of Establishment and Amendment

(c) Establishment Prior to Construction
(d) Freedom From Condominium Law Requirements
(e) Freedom from Consumer Protection Laws
(f) Enhanced Protection for Retail Components.

2. VERTICAL SUBDIVISIONS – DISADVANTAGES
(a) Historically Less Common than Condominium Regimes
(b) No Statutory Basis for Vertical Subdivisions in Certain Jurisdictions.

D. Ground Lease Structures

IV. PROTECTING RETAIL USES IN A MIXED-USE PROJECT

A. Identification of Permitted Uses
B. Use of Shared Common Area
C. Right of Access
D. Hours of Operation
E. Noise and Disturbance
F. Participation in Project Governance
G. Self Help Rights for Retail Tenants
H. Responsibility for Maintenance and Repair
I. Budgeting; Allocation of Shared Costs
J. Capital Replacement Reserve Contributions
K. Renovation and Reconfiguration of Retail Space
L. Relocation and Replacement of Storefronts
M. Signage
N. Parking
O. Loading
P. Casualty; Repair and Replacement
Q. Insurance
R. Project Document Amendments
S. Regulation of Retail Leases

Saturday, October 27, 2018
9:15 – 10:30 AM

Workshop 31

The ‘Anything-But-Shopping’ Shopping Center:
Alternative/Supplemental Uses in the Age of the Internet

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I. History.

II. A Change in the Retail Landscape.

III. What was once old (and unwanted) is new (and desired) again.

A. Restaurants.

B. fitness studios and gyms.

C. Medical facilities.

IV. Retailers Evolve.

V. Leases Evolve.

A. Exclusives/Restricted Use provisions.

B. Percentage Rent.

C. co-tenancy provisions.

D. proportionate share determination.

VI. Where are we heading?

A. Less %-Rent deals… Or is it more %-Rent *only* deals?

i. Why less % Rent?

ii. Why % Rent only?

B. Renewed focus on restaurant and entertainment concepts (Again!)

i. Where do these biases come from?

ii. The Elephant Bar in the room

C. Shorter-term/pop-up/temp-to-perm deals

D. More Showroom/Fulfillment retail… Bonobos/M.Gemi

E. Even less enclosed space

F. Hybrid centers

VII. The 'It's-Not-the-End' End to the Workshop.

Exhibit A
Examples of Restricted Use Provisions From a Department Store Agreement

Exhibit B
Provisions from Restaurant Operating Agreement

Exhibit C
Quality Conditions

Saturday, October 27, 2018
9:15 – 10:30 AM

Workshop 32

The Lease Can't Go On, Time to Exit Stage Left

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I. Introduction

II. Brief Overview – Reasons a Party Wants to Exit a Lease
  A. Bankruptcy (Toys R'Us, Sears)
  B. Corporate cutbacks
  C. Disappointing sales
  D. Changing market (Amazon anyone?)
  E. Mergers/Acquisitions
  F. Re-Development of Center
  G. Change of Co-Tenancy

III. Pre-Planning Exit Strategies
  A. Considerations in Negotiating Termination Rights
    1. Improvement Allowance
    2. Costs of Build-Out
    3. Timing to Re-Lease the Space
    4. Recapture Payment
  B. Tenant Strategies
    1. Termination by Express Right
    2. Gross Sales
    3. Violation of Exclusive Use
    4. Co-Tenancy Violation
    5. Ability to Assign/Sublet
    6. Landlord Default
    7. Casualty
  C. Landlord Strategies:
    1. Termination by Express Right
      a. Unilateral Right Without Cause
      b. Relocation of Premises
    2. Failure to Opene or Operate
    3. No Ability to Assign/Sublet
    4. Minimum Co-Tenancy
    5. Casualty
    6. Remedies
      a. Accelerated Rent
      b. Mitigation of Damages
      c. Right to Injunctive Relief and/or Specific Performance
      d. Unamortized Tenant Allowance

IV. No Pre-Planning – What is a Party to do?
  A. Strategic Default: Understand your liability/recovery
    1. Does Rent Continue?
    2. Accelerated Rent vs. Accrued Rent
    3. Control over the Premise

Saturday, October 27, 2018
9:15 – 10:30 AM

Workshop 33

Squaring the Circle of Mistrust: Negotiating Through Triple Net Issues

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In ancient times, Euclidian geometers contemplated an impossible challenge: constructing a square equal to a circle's area using only a compass and a straightedge. Today, leasing attorneys face a similarly impossible challenge: recasting the circle of mistrust over motives and practices into a few relatively square pages of certainty and parity using an equally limited set of lease tools. In this interactive Workshop, we will explore the key contested pass-through provisions, and propose analytical tools that will help you "square the circle" and build trust in lease negotiations.

I. Workshop Overview and Objectives
II. Defining the "Shopping Center" and the "Common Area"
III. Calculating Tenant's "Pro Rata" or Proportionate Share

   A. Measurement of Floor Area
   B. Elements of the Numerator
   C. Elements of the Denominator
   D. Using Different Denominators for CAM Costs, Taxes, and Insurance
   E. "Leased Area" versus "Leasable Area"

IV. Common Area Maintenance (CAM) Costs

   A. CAM Inclusions and Exclusions

      1. General Approaches
      2. Specific Concerns
         a. Capital Expenditures
         b. Management and Administrative Fees
         c. Insurance Costs

   B. Caps on CAM Costs

      1. Year over Base Year
      2. Year over Immediately Prior Year
      3. Year over High Watermark
      4. Recoupment/Banking
      5. Typical Exclusions from Caps on CAM Cost

V. Taxes

   A. Defining Taxes
   B. Tax Contests

VI. Insurance
VII. Reconciliations, Audits and Recoupment
VIII. Conclusions

Section VIII

SESSION OUTLINES: PEER TO PEER

Wednesday, October 24, 2018
3:30 – 4:45 PM

Peer to Peer 1

"Subject to Review by Risk Management": Earn Confidence in Your Ability to Review Insurance and Indemnity Provisions

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DESCRIPTION OF SESSION:

A fire breaks out in the gym on the mezzanine level of a mixed-used building, causing damage to property and inventory, including in several adjacent spaces. Due to the damage, the retail portion of the building is temporarily closed pending completion of fire department investigation and two floors of the office portion are temporarily closed due to the need for structural engineer investigation and determination. In a large multi-tenant retail center, a retail tenant employee is assaulted in the parking garage while performing duties in the course and scope of employment, which assault results in physical injuries, mental anguish and emotional distress.

In each instance, your risk management consultant is not available and you need to advise your client. In this Peer to Peer session, we will discuss what your insurance, indemnity and casualty provisions provide relevant to addressing incidents such as these and associated insurance coverage and denial of coverage outcomes.

FACT PATTERN 1:

A recently developed mixed-use building in the Seaport district of Boston is comprised of the following leased commercial space and owned residential units:

(1) Two street-level tenants:

   a. The Diner, a high-end full-service 24-hour restaurant with a separate oak-room bar area

   b. Banana, the hottest electronics and mobile device store, operated by a franchisee with no other locations

(2) The Box, an elite athletic training facility and gym, on the mezzanine level above The Diner

(3) Co-Working Company, a co-working environment, on four (4) contiguous floors above the mezzanine level

(4) An unoccupied floor of office space above Co-Working Company

(5) Fifteen (15) floors of condominium units above the office component of the building

As a result of a defect in the sauna in the gym, a fire broke out in The Box destroying the facility's locker rooms. In addition, smoke damaged the clothing merchandise sold by The Box, all of which had to be destroyed and replaced. Although water from the sprinklers and the fire department's fighting the fire resulted in pools of water throughout the gym's specialized impermeable floors, the balance of the gym's facility remained undamaged when the water was removed three (3) days later.

The kitchen and main dining room of The Diner were not affected by the fire, but water damaged the furniture (but not the fixtures) in the separate bar area, which need to be replaced. To give the fire department time to investigate the cause of the fire, the marshal ordered the retail portion of the building closed; accordingly, The Diner was required to close temporarily during the course of the investigation.

The Banana premises were not damaged by the fire, but smoke and water damaged the store's inventory, including hundreds of the hard to get, $2,500 Phone XL, which the store just received in a shipment the day prior to the fire. The phones were a total loss and would take at least ten (10) months to replace given the backlog at the factory. Otherwise, the Banana premises were not materially damaged. Banana was also temporarily forced to close due to the fire department investigation.

The fire destroyed the first floor of the Co-Working Company's space and may have caused structural damage to the floor of the Company's second floor, which housed the popular "community uses" shared space (complete with keg room, pool tables, soundproof sleep pods and the like) that the Co-Working Company's members utilized on a 24/7 basis. The "community uses" shared space was a big draw for the Co-Working Company's members and potential members. The potential structural damage to the "community uses" shared space resulted in the fire marshal declaring this area unsafe for occupancy pending review by a structural engineer. The results of the structural engineer's investigation would take approximately 60 to 90 days to complete. Landlord offered the Co-Working Company the use of the unoccupied office floor for its "community use" shared space functions during the investigation and restoration period.

To date, none of the parties have received any of the pending reports from inspectors, engineers or investigators.

THE FORM LEASE PROVISIONS: The relevant standard form lease provides the following:

A. DAMAGE AND DESTRUCTION.

1. Landlord shall repair damage to the Building and the premises promptly after Landlord receives sufficient insurance proceeds. Landlord's repair obligation is subject to delays beyond Landlord's reasonable control.

2. To the extent all or a material portion of the premises are damaged by a casualty and as a result thereof are not occupied by Tenant, rent will abate to the extent of proceeds of rental interruption insurance received by Landlord. If such casualty was caused by the negligence or willful misconduct of Tenant, its agents, contractors or employees, Tenant shall have no abatement right.

3. If any portion of the premises or a material portion of the Building is damaged, Landlord shall have no obligation to restore the premises and may terminate the lease in the event: (a) insurance proceeds available to Landlord are insufficient to cover the cost of restoration, (b) Landlord estimates that the restoration period will be greater than 180 days, (c) Tenant's abatement period will continue for more than one-quarter of the remaining lease term, (d) restoration costs will exceed twenty percent (20%) of the value of the Building, or (e) the casualty occurred in the last 24 months of the lease term.

4. In the event Landlord does not terminate the lease within sixty (60) days of the casualty occurrence, Tenant shall restore its premises with such modifications as may be required by law.

B. INDEMNITY AND INSURANCE. Tenant shall insure (i) the premises and all improvements, alterations and fixtures installed by or on behalf of Tenant, and (ii) Tenant's business operations in and from the premises. Specifically, Tenant is required to maintain the following insurance:

1. Special Causes of Loss (f/k/a "all risk") including flood coverage and business interruption for lost earnings due to a casualty. Policy shall be for full replacement value, name Landlord as a loss payee and contain a waiver of subrogation.

2. Comprehensive general liability insurance (CGL) naming Landlord as an additional insured.

Tenant agrees to use and occupy the premises at its own risk and Landlord shall have no responsibility or liability for any loss of or damage to fixtures or other personal property of Tenant. Tenant releases Landlord from all claims, losses and damages insured or required to be insured by Tenant. In addition, Tenant indemnifies Landlord from losses arising out of the acts or omissions of Tenant, its agents, contractors and employees.

SPECIFIC TENANT NEGOTIATED CHANGES TO THE FORM LEASE PROVISIONS: The tenants negotiated the following additional provisions to the form lease:

The Diner: If gross sales are less than $1,000,000 in any 12-month period, Tenant shall have the right to terminate the Lease within thirty (30) days after the expiration of such 12-month period. The Diner has concluded that as a result of its closure, its gross sales will be less than $1,000,000 within the 12 month period following the casualty.

The Box: Tenant has the right to terminate within fourteen (14) days of the casualty if more than 25% of the premises is damaged by casualty.

Banana: Banana's parent company (not a party to the lease) self-insures for all of its FF&E and inventory. The Banana franchisee does not have access to those self-insurance funds (and the parent is not a party / guarantor of the lease). Banana did not negotiate specific insurance / indemnity provisions in the form lease.

Co-Working Company: Tenant has the right to abate rent in the event that any portion of the premises is damaged and as a result thereof is not reasonably useable in the same manner as Tenant's other co-working facilities. In addition, Tenant shall have the right to terminate the Lease if (a) any so-called community use shared space is damaged, (b) if required repairs will take more than one hundred twenty (120) days, or (c) Landlord has the right to, but does not terminate, the Lease.

QUESTIONS FOR FACT PATTERN 1:

A. What the Landlord asks: Landlord has not yet exercised any termination rights or issued any notices to the tenants. Landlord wants to know what rights / responsibilities it has under its leases.

B. What the Tenants ask: Please advise each of your clients based on the following:

1. The Diner: The Diner believes that insurance will cover the personal property losses. Its concern is that during the time the bar area is closed, the restaurant portion of its space will not have the benefit of liquor service and therefore will temporarily lose customers and much needed revenue. Notwithstanding Tenant's right to kick-out due to decreased gross sales, Tenant's preference is to stay in the space but only if the restoration work will be completed in the next six (6) months in time for its busiest season (graduation and wedding times). The Diner wants your advice on the following: (a) what insurance will respond to its claims? (b) by when must Landlord advise Tenant of whether it will restore and what the restoration period will be?, (c) will Tenant be able to avail itself of its kick-out right if necessary? Tenant is concerned that Landlord's insurance carrier indicated it may deny coverage for rental income loss.

2. The Box: The loss of its locker room facilities and related amenities has Tenant's members cancelling their memberships in droves and is putting The Box out of business. Moreover, The Box knows that its members are signing one-year memberships at other gyms and due to those contracts, those members likely will not return to The Box in sufficient numbers to make up for the lost revenue during the restoration period. Landlord has taken the position that Tenant cannot terminate its lease because the locker rooms constitute less than 25% of its premises. What advice can you give Tenant with respect to its options?

3. Banana: Banana's lost inventory will cause this store's sales to severely underperform. Given the backlog at the factory, Banana does not believe it can adequately replace the lost revenue until it can build back its inventory in about 10 months. In the meantime, with such poor sales, Banana will not be able to pay rent. Landlord has informed Banana that it is not entitled to any rent abatement because its premises have not been affected or rendered untenantable. What advice can you give Tenant with respect to the rent abatement?

4. Co-Working Company: Tenant has notified Landlord that it intends to terminate the lease because the community use space was damaged and the balance of the space cannot be utilized in similar fashion to the Company's other co-working operations. In addition, Tenant asserts that more than 25% of its premises was damaged and estimates that restoration will take longer than 180 days (particularly given the closures due to the structural engineer review period). Tenant also believes that the cost to repair all damage will likely exceed "20% of the value of the Building." In discussions with the Company's manager, Landlord has indicated (a) rent should not fully abate because damage to one floor out of four is not material, (b) only one of the Company's floors was damaged and Landlord will provide the vacant floor for use as community use space, (c) Landlord will pay overtime to expedite the restoration work and as a result shorten the restoration period to 100 days, and (d) Tenant's estimate that damage exceeds "20% of the value of the Building" did not take into account the value of the residential units (which were not damaged at all). In light of Landlord's positions, what advice can you give Tenant with respect to its termination rights?

FACT PATTERN 2:

While performing duties in the course and scope of employment, Tenant's employee is assaulted in the parking garage of a large multi-tenant retail center with resulting allegations of physical injuries, mental anguish and emotional distress. The employee files suit including a monetary demand of $5,000,000 and names Landlord, Manager and the on-site third-party security firm as defendants alleging failure to maintain adequate lighting, surveillance and security.

Tenant is required to maintain liability insurance for their activities in, on and about the leased premises as well as Workers' Compensation ("WC") and Employer's Liability ("EL") covering all Tenant employees. The lease further provides that Tenant shall provide a broad-form indemnification in favor of the Landlord and Property Manager for any and all injuries to Tenant's employees unless caused by the sole and exclusive negligence of the Landlord or Manager. Tenant's Commercial General Liability ("CGL") policy contains an exclusion removing all coverage for assault claims. Manager, on behalf of itself and Landlord, tenders the claim to Tenant's CGL carrier as a third-party action over claim. Tenant's CGL carrier issues a reservation of rights letter and refuses to provide defense on behalf of Landlord and Manager citing exclusions contained within their policy.

WHAT THE LEASE PROVIDED:

Insurance Provision Excerpt:

Tenant shall, at its own cost and expense, procure and maintain during the Term the following insurance for the benefit of Landlord, Manager and Tenant with insurers lawfully authorized to conduct business in the state where the Premises are located:

(a) Workers' Compensation with statutory limits and Employer's Liability with limits of not less than $1,000,000 per employee accident or disease.
(b) Commercial General Liability insurance with limits of not less than $1,000,000 per occurrence and $2,000,000 general aggregate.
(c) Umbrella / Excess Liability insurance with limits of not less than $5,000,000 per occurrence and general aggregate over the required EL and CGL coverages.

The insurance required of Tenant shall be placed with companies at all times maintaining a current rating of not less than A- and financial category rating of at least Class VII in "A.M. Best's Insurance Guide" current edition. Tenant shall obtain for Landlord and Manager from its insurance companies/broker or cause the insurance companies/broker to furnish certificates of insurance attaching key endorsements including, but not limited to, additional insured, waiver of subrogation and notice of cancellation, evidencing all coverages required herein. Landlord and Manager reserve the right to require complete, certified copies of all required insurance policies including any endorsements. No such policy shall be cancelable or subject to reduction of coverage or other modification or cancellation except after thirty (30) days' prior written notice to Landlord and Manager from Tenant or its insurers (except in the event of non-payment of premium, in which case ten (10) days' written notice shall be given). Tenant's required policies shall contain severability of interests clauses stating that, except with respect to limits of insurance, coverage shall apply separately to each insured or additional insured. Tenant shall, at least seven (7) days prior to the expiration of such policies, furnish Landlord with renewal certificates of insurance or binders. Tenant agrees that if Tenant does not take out and maintain such insurance, Landlord may (but shall not be required to) procure such insurance on Tenant's behalf and at its cost to be paid by Tenant as Additional Rent. Tenant's Commercial General Liability insurance shall name Landlord, Manager and their respective officers, employees, agents, general partners, members, subsidiaries, affiliates and Lenders ("Landlord Parties") as additional insureds as respects liability arising from Tenant's occupancy or use of the Premises.
Tenant and its insurers hereby waive any and all rights of recovery against Landlord and Manager as respects any loss, damage, claims, suits or demands, howsoever caused, that are covered, or should have been covered, by valid and collectible insurance. If necessary, Tenant agrees to endorse the required policies to permit waivers of subrogation as required hereunder and hold harmless and indemnify Landlord and Manager for any loss or expense incurred as a result of a failure to obtain such waivers of subrogation from insurers.
Indemnification and Exculpation:
Tenant agrees to Indemnify the Landlord and Manager from and against any and all claims of any kind or nature, real or alleged, arising from (a) injury to or death of any person, including Tenant's employees, or damage to any property occurring within or about the Premises, the Building, the Property or the Project, arising directly or indirectly out of (i) the presence at or use or occupancy of the Premises or Project by a Tenant Party, (ii) an act or omission on the part of any Tenant Party, or (b) a breach or default by Tenant in the performance of any of its obligations hereunder. Tenant's obligations under this Section shall survive the expiration or earlier termination of this Lease. Landlord agrees to

indemnify the Tenant Parties from and against claims caused by injury to or death of any person or damage to or loss of any physical property occurring within or about the Premises, the Building, the Property or the Project, but only to the extent directly caused by Landlord's gross negligence or willful misconduct.

INSURANCE RESPONSE AND LIABILITY:

1. Landlord required what it believed to be adequate insurance and indemnification from the Tenant but failed to specify policy form numbers and edition dates and/or that certain coverages such as assault could not be excluded from coverage. Landlord's and Manager's attempt to tender the claim back to Tenant's liability carriers via an action over claim has been met with resistance by the Tenant's CGL carrier. Tenant's WC / EL will only pay statutory benefits and will not pay additional amounts sought by the plaintiff including mental anguish, emotional distress and punitive damages, which make up approximately 95% of the plaintiff's demand.

2. Interestingly, Tenant's Umbrella Liability coverage is not written on a "follow form" basis and does not include an exclusion for assault. However, the Umbrella Liability policy does not include a "drop-down" clause for claims excluded in the primary policies. Thus, the Umbrella Liability carrier is not obligated to provide defense or indemnification until if/when Tenant's $1,000,000 per occurrence CGL underlying limit requirement has been satisfied. Tenant's Umbrella Liability carrier proactively joins the action seeking to invalidate the action over claim based upon:

    a) The assault exclusion in the primary CGL policy even though the Umbrella policy does not follow form and/or contain a similar exclusion; and
    b) Allegations of negligence against the Landlord and Manager for failing to provide adequate lighting in the parking garage as well as allegations against the third-party security company for failing to maintain safe premises.

3. Although Landlord and Manager require broad-form indemnification from the Tenant for any injuries to Tenant's employees, a potential loophole has been created by not requiring specific CGL forms and editions and/or specifying that Tenant's coverage must not exclude, or better yet, must contain an <u>affirmative coverage grant</u> for occurrences involving assault.

QUESTIONS FOR FACT PATTERN 2:

1. As currently crafted, how might the opposing agendas of Landlord, Tenant and each of their insurers reflect upon the parties crafting the original lease provisions?

2. What additional exposure and expense does the Landlord potentially face as a result of Tenant's failure to maintain assault coverage in its CGL policy?

3. How might the Landlord's exposure to this claim have been mitigated and/or avoided had proper wording been included in the applicable lease?

4. Rework the lease insurance provisions referring to the sample wording provided in order to close the assault exclusion loophole.

5. What other contractual measures might be taken to avoid this claim being excluded under the Tenant's CGL policy?

Wednesday, October 24, 2018
3:30 – 4:45 PM

Peer to Peer 2

My "Pop-Up" is Cool but My Landlord is Hot: Maneuvering through the Assignment and Subletting Clause of Your Lease

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Description of Session

This peer-to-peer session will present two hypotheticals focused on the recent popularity of third-party concessions being integrated into larger format operations and how such operations reconcile with the assignment and subletting provisions of a lease. The first hypothetical explores a troubled tenant's desire to draw traffic into its store using multiple short-term licenses for "pop up" concessions and the challenges it faces under the "assignment and subletting" provision of its lease. The second hypothetical explores the troubled tenant's decision to enter into a long-term sublease with its most successful "pop up" and the "pop up's" (surprising) desire for a recognition agreement from the master landlord.

Fact Pattern 1

Landlord owns a Life Style Center ("Center") in a major city located on the edge of downtown in a dense area populated by young professionals. Tenant is a privately held women's fashion retailer known for its trendy offerings and low pricing. Tenant leases its prototypical 30,000 square feet in the Center. Tenant's sales in the Center and its stores in general have been disappointing and a survey of its customers indicated that the size of the store was overwhelming to customers, making it "too much work to shop there". Tenant would like to sublease approximately 10,000 square feet of its space and wants to select one or more retailers who will draw Tenant's target customers to the Center. Tenant has decided to enter into agreements with pop-up tenants for occupancy terms of three (3) to six (6) months each and ultimately select one with whom to negotiate a long-term agreement. Interested parties include: (i) a stationary bike retailer with a limited amount of locations that also offers group exercise classes and has a health food and smoothie bar open to the public; and (ii) a women's jewelry and accessories store started by two recent Harvard graduates that advertises by word of mouth only and offers a unique selection of goods from around the world. Tenant is also considering partnering with several make up brands to use a portion of its space to open pop-ups providing affordable make up in a casual setting that enables customers to sample it before purchasing. The stationary bike retailer has asked for its pop-up term to be longer than six months given its initial upfront time and effort spent in obtaining the necessary health and construction permits for the health food and smoothie bar, as well as the costs involved in its set up.

ASSIGNMENT/SUBLETTING LEASE PROVISION

Tenant shall not assign or transfer this Lease or any interest therein, or sublet all or any part of the Premises, without obtaining on each occasion the prior written consent of Landlord, such consent not to be unreasonably withheld. The transfer of any corporate stock, partnership interest or membership interest in Tenant, or a merger, consolidation, acquisition or liquidation of or by Tenant, either voluntarily or by operation of law, shall be deemed an assignment and shall require Landlord's consent, except if Tenant is a public corporation and such transfer of stock is through a recognized stock exchange. In no event shall any assignment or sublease release Tenant from any of its obligations or liabilities under this Lease. Any permitted assignee must assume this Lease in writing in an assumption agreement in a form reasonably satisfactory to Landlord.

PERMITTED USE

"Permitted Use" means the sale of women's apparel and accessories and, at Tenant's option, such other ancillary uses as are consistent with the majority of Tenant's other stores operating under the same tradename used by Tenant at the Premises.

QUESTIONS

1. Are Tenant's proposed pop-ups subject to the assignment and subleasing provisions of the Lease? If so, which pop-ups are subject and why?

2. Assume the assignment and subleasing provision has been revised to extend to license agreements. Landlord knows Tenant has the wherewithal to meet its lease obligations and would like to withhold consent to each of these pop-ups. Knowing it must be reasonable in withholding consent, Landlord calls you for advice. Name three additional Lease provisions you would review before answering and why?

3. Landlord, pleased with your past assistance, hires you for his next lease negotiation with a hot new retail tenant popular with Millennials and their Generation Z successors. The lease proposed by tenant allows for future pop-ups within its space and Landlord has conceptually agreed to this in the letter of intent. Tenant's proposed language is very broad and open-ended. Name three limitations you would recommend adding to this Lease provision to protect Landlord and retain him as a client?

Fact Pattern 2

Landlord and Tenant ultimately agreed on terms to allow for each of the pop-ups. The stationary bike retail concept with its exercise classes and health food and smoothie bar was the most successful and the pop-up and Tenant want to enter into a sublease. Landlord has agreed to consent to the sublease after researching the concept and discovering its growing popularity. Subtenant has hired you to represent them in negotiating the sublease agreement with the Tenant. You explain to Subtenant that the sublease is conditioned upon the terms of the prime lease between Landlord and Tenant and, absent a "recognition" agreement directly with the Landlord, if that Lease is terminated for any reason, the sublease will also terminate. Subtenant has asked that you also negotiate a recognition agreement in addition to the sublease.

1. What do you anticipate are the Landlord's arguments against granting Subtenant the recognition agreement? What are your arguments to convince Landlord that a recognition agreement is warranted?

2. Assuming you successfully cajole the Landlord and its counsel into sending you their form of Consent and Recognition Agreement, you know you must limit your comments to just a few. Pick no more than three of the following terms to further negotiate with Landlord in the event of termination of the Lease:

(i) Subtenant shall not violate any of the terms of the Lease;

(ii) Subtenant assumes, for the term of the Sublease, the performance of all the terms of the Lease to be performed on the part of the tenant to the extent such terms are applicable to the Subleased Premises (including the payment of rent, operating expenses and taxes as provided under the Lease);

(iii) Subtenant shall have no rights of renewal or expansion provided to Tenant under the terms of the Lease;

(iv) Landlord may withhold its consent to any assignment or sublease in its sole and absolute discretion;

(v) Subtenant agrees to promptly deliver to Landlord a copy of all notices of default and all other notices that Subtenant sends to Tenant under the Sublease;

(vi) Subtenant shall provide to Landlord annual statements of Subtenant's Gross Sales generated from the Subleased Premises within ninety (90) days following the expiration of each calendar year during the Term;

(vii) in no event shall the parties be permitted to record a memorandum of sublease;

(viii) Landlord is not a party to the Sublease and except as specifically set forth in this Consent, is not bound by the provisions thereof, and Landlord has not, and will not, review or pass upon any of the provisions of the Sublease.

Thursday, October 25, 2018
9:00 – 10:15 AM

Peer to Peer 3

I Surrender, but I'm Not Giving Up! Drafting and Negotiating Effective Surrender Provisions

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DESCRIPTION OF SESSION

For the most part, lease surrender provisions are not heavily negotiated. Should they be? Attend this peer to peer session to discuss topics such as (a) whether surrender occurs upon the vacation of the space, or the satisfaction of specified conditions; (b) which improvements must be removed upon expiration or earlier termination of the lease (with a special focus on whether an item constitutes a "fixture"); (c) whether a failure to surrender in accordance with the requirements of the lease constitutes a holdover; and (d) potential damages in connection with a failure to vacate.

FACT PATTERN 1

Flourless Chocolate Cake Factory ("Tenant") is a big-menu theme restaurant that serves 45 different kinds of flourless chocolate cake and is decorated in a style that manages to be simultaneously reminiscent of Alice in Wonderland, the architecture of Washington, D.C., and a hookah lounge. There are currently four locations, all located in enclosed malls, but the chain intends to close all four of its existing locations and open a single, stand-alone location. One of the locations that Tenant intends to close is located in Generic Mall in Anytown, U.S.A. ("Shopping Center"). The Shopping Center location (the "Premises") spans two floors, and Tenant installed an elevator in the Premises to move between the two floors. The restrooms feature expensive stall doors that, while not trademarked, are consistent in all four Flourless Chocolate Cake Factory locations, and will be used in the new location that Tenant is currently constructing. The surrender provision of the lease pursuant to which Tenant leases the Premises from the Shopping Center owner ("Landlord") provides in part as follows:

> *"Upon the expiration or earlier termination of the Term, Tenant shall surrender the Premises to Landlord in good order, condition and repair, reasonable wear and tear excepted. Tenant shall be required to remove all of its personal property, inventory, furnishings and equipment from the Premises, and shall be entitled to remove all trade fixtures."*

On the last day of the term, Tenant returns its keys to the assistant manager of the Shopping Center. When the mall manager walks through the Premises, she discovers that Tenant has removed all of the stall doors from the restrooms. She also discovers that there is staining in the elevator pit that suggests a possible environmental issue. Landlord intends to split the Premises into two one-floor spaces, and would like the elevator to be removed.

QUESTIONS FOR FACT PATTERN 1:

1. What are Landlord's arguments that Tenant has not effectively surrendered the Premises?
2. What are Tenant's arguments that it has effectively surrendered the Premises?
3. Is Tenant entitled to remove the stall doors?

FACT PATTERN 2

Golden Opportunity, LLC ("GO") operates a high-end rare coin retail outlet in the lower level of a regional shopping mall that is undergoing a complete transformation. GO's lease expires on March 30, 2019. Mall Owner Enterprises, LLC ("MOE"), the landlord, has repeatedly rebuffed GO's requests for a lease extension, but has not issued any written reminders of GO's obligation to vacate the premises in accordance with the Lease. In November 2018, unable to persuade MOE to extend the lease, GO acquires property near the mall and begins constructing a new store. Construction is expected to take 6 – 7 months. GO has not shared its construction timetable with MOE.

GO's space in the mall is located in the heart of a planned new food hall and brewery that is intended to attract millennials. Extensive ventilation and brewery equipment cannot be installed until GO surrenders its space to MOE. The leases of three new tenants that are key to the rebranding of the mall include opening co-tenancy provisions that require the simultaneous opening of the food hall and brewery. Two of those tenants' leases also include provisions delaying until the following spring the required opening date of their stores if the co-tenancy provision is not satisfied on or before November 1, 2019. Construction of the food hall and brewery is expected to take 6-7 months.

GO's space is lavishly appointed. It has private viewing rooms for appointments with GO's exclusive clientele of numismatists and it has a very heavy bank-type walk-in safe that was built into the premises (thus its location on the lower level). GO has no intention of removing the safe but does intend to remove the crystal chandeliers that are the sole lighting within the private viewing rooms. They intend to stay in the mall space and continue to operate until their new building is ready. They have found that people have a greater desire to acquire collectibles (often purchasing with cash) around April 15 tax deadline, making March, April and May some of their most profitable months.

The Lease provisions read:

> ***"Section 17. Surrender of Premises; Holding Over.***
>
> *A. **Surrender**. On the date of expiration of the Term or earlier termination of this Lease: (i) Tenant shall remove all Alterations (except those that Landlord has agreed in writing may remain, or requires to remain pursuant to this Section 17.A.), all of its equipment, trade fixtures and personal property, and any voice or data cabling installed by Tenant in the Building, and repair any damage caused by the removal, and (ii) immediately deliver possession of the Premises to Landlord in the same condition as existed on the Date of Possession and otherwise in a neat and broom-clean condition, ordinary wear and tear excepted. However, at Landlord's option, to be exercised in writing by the date of expiration or earlier termination, Landlord may require Tenant to leave any Alterations, in which case Tenant is not required to remove those Alterations. If any of Tenant's personal property remains on the Premises after the expiration of the Term or earlier termination of this Lease, then at Landlord's option (as to each item of personal property), either (I) that personal property will be deemed abandoned and become the property of Landlord, or (II) Landlord may remove the personal property on behalf of Tenant (but shall have no duty to store the same) in which case Tenant shall pay Landlord's cost of removal. The obligations of Tenant under this Section survive the expiration of the Term and any earlier termination of this Lease.*
>
> *B. **Holding Over**. This Lease automatically terminates and becomes null and void without further notice upon the expiration of the Term. If Tenant holds over after expiration of the Term or earlier termination of this Lease, the holding over will not constitute a renewal hereof or give Tenant any rights under this Lease. Instead, at Landlord's option, to be exercised by giving notice to Tenant, Tenant will be deemed either (i) a tenant at-sufferance, or (ii) a tenant from month-to-month; commencing on the first day following the date of expiration or earlier termination, except that the Base Rent shall be 150% of the Base Rent applicable on the date of expiration or earlier termination and no Operating Expenses Cap shall apply to Tenant's Share of Operating Expenses; furthermore, Tenant shall indemnify and hold Landlord harmless from all loss or liability, including without limitation, any claims made by any succeeding tenant founded on or resulting from such failure to surrender. The obligations of Tenant under this Section survive the expiration of the Term and any earlier termination of this Lease."*

QUESTIONS FOR FACT PATTERN 2:

1. What exposure does GO have if it overstays the lease expiration date of March 30, 2019?
2. What should MOE do when it sees that GO is making no moves to pack up its business (assuming GO does not share its plans with MOE, or GO assures MOE that is "intends" to get out)? What should MOE do before and after the expiration of GO's lease?
3. When MOE moves out, are there any other issues with the condition of their premises upon surrender?

Thursday, October 25, 2018
9:00 – 10:15 AM

Peer to Peer 4

Never Accept "NO" as an Answer (Unless you Really Have to): Negotiating Representations and Warranties in Shopping Center Purchase and Sale Agreements

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DESCRIPTION OF SESSION

Through hypotheticals, this Peer-to-Peer Workshop will identify and discuss certain key issues that buyers and sellers face when negotiating a deal for the purchase and sale of one or more shopping centers. Our topics will include loan assumption issues, seller liability (and the limits imposed) for seller's post-closing obligations in a world where almost all sellers are single purpose vehicles, and how seller's knowledge definitions affect liability. In doing so, we will discuss the desires and needs of buyer, seller and other 3rd parties, and we will explore different solutions in an attempt to reach a reasonable compromise acceptable to all parties.

FACT PATTERN 1

Buyer and Seller are negotiating a purchase and sale agreement ("PSA") for a regional shopping center located in New Jersey, the purchase price is $300M and the Buyer is required to assume a mortgage loan with a balance of $100M. The down payment is $15M. The mortgage loan is at an above market interest rate, and while in the open period, cannot be prepaid without a significant yield maintenance pre-payment premium.

Sellers draft of the PSA requires that the Buyer "use best efforts to complete the loan assumption" and execute all documentation required by the lender to complete the loan assumption. The PSA requires the Buyer to pay all costs associated with the assumption, including the 1% of loan balance assumption fee, and lender expenses (primarily attorney fee and title endorsement). The Buyer is required to accept the loan documents as is, without negotiation of changes to the loan terms. In addition, the PSA contains Buyer representations that Buyer has reviewed the loan documents, and that Buyer meets the "Qualified Transferee" test that is set forth in the loan documents for a loan assumption upon a property transfer, and that Buyer has an affiliated company, with sufficient assets to meet the requirements of a "Replacement Guarantor" as described in the loan documents.

The Qualified Transferee definition has a two prong test: (i) the proposed transferee must be an experienced manager of regional shopping centers, such as the property subject to the mortgage, as evidenced by the ownership and operation of at least five regional shopping centers, containing five million square feet in the aggregate, and (ii) be otherwise acceptable to lender. The acceptable Replacement Guarantor definition has a test of a net worth at all times of $500M with $25M in cash or cash equivalents.

Buyer is a real estate fund that sells limited partnership interests to third party investors in order to grow. As part of its due diligence, Buyer reviewed the loan documents, which in addition to permitting the one time transfer of the property that Seller and Buyer are relying upon to complete the loan assumption, permits the sale of publicly traded stock, which Seller, as a publically traded REIT, negotiated when the loan was made, in order to permit Seller to continue to sell REIT shares. Other than the expressly permitted transfers, any transfer of direct or indirect interests in the borrower is prohibited.

QUESTIONS FOR FACT PATTERN 1:

1. Do you agree with the Seller's PSA that Buyer "use best efforts to complete the loan assumption" and execute all documentation required by the lender to complete the loan assumption. If not, what counter-proposal would you make as Buyer?

2. As Buyer, how comfortable are you with the representations that Buyer has reviewed the loan documents, and that Buyer meets the "Qualified Transferee" test that is set forth in the loan documents for a loan assumption upon a property transfer, and that Buyer has an affiliated company, with sufficient assets to meet the requirements of a "Replacement Guarantor" as described in the loan documents. Which of those representations is more troubling?

3. As Seller, what reaction would you have if the Buyer stated it cannot make those representations?

4. As counsel to Buyer, what advice would you give Buyer regarding the $15M down payment, if the Buyer made the representation that Buyer has reviewed the loan documents, and that Buyer meets the "Qualified Transferee" test that is set forth in the loan documents for a loan assumption upon a property transfer, and the lender subsequently turned down the assumption, on the grounds that Buyer was not a qualified transferee.

5. As Seller, what is your position on the Buyer insisting that the transfer clause of the mortgage must be modified to accommodate Buyer's need to sell limited partnership interests in Buyer's upstream owner? If Seller said no, would you as Buyer move ahead with the transaction?

FACT PATTERN 2

Buyer and Seller are negotiating a purchase and sale agreement ("PSA") for a regional shopping center located in New Jersey. The purchase price is $300M. Seller is a single-asset entity 100% owned by a significant institutional investor that purchased the center two years ago. The letter of intent calls for $1,000,000 in earnest money; gives Buyer a lengthy due diligence period; grants Buyer access to the property, subject to the rights of tenants in possession, and extensive due diligence rights including the right to conduct environmental studies and inspect the physical condition of the property; and contains a condition that Buyer must receive "clean" estoppels from certain specified tenants and from tenants occupying at least 80% of the remainder of the leased space. However, the letter of intent prohibits Buyer from contacting tenants directly. In the letter of intent Seller agrees to provide Buyer with copies of certain listed due diligence items that Seller has been able to locate in its files and also agrees to give Buyer access to Seller's files and the property manager's files regarding the property. The letter of intent is silent about any limitations on Seller's post-closing liability under the PSA.

Seller's draft of the PSA is consistent with the letter of intent but also provides that all of Seller's representations and warranties survive the Closing for ninety (90) days, Buyer may not bring an action against Seller for a breach of any representations or warranties unless the reasonably estimated aggregate damages exceed $100,000, and that in no event will Seller's liability under the PSA or any documents executed pursuant thereto or in connection therewith exceed $1,000,000.

QUESTIONS FOR FACT PATTERN 2:

1. Is 90 days a reasonable amount of time for Seller's representations and warranties to survive the Closing? If not, what would be a reasonable compromise? What circumstances, from either Seller's or Buyer's point of view, might affect the party's position as to how long Seller's representations and warranties survive the Closing? If Seller is going to take the position that its representations and warranties will not survive the Closing, or that they will only survive for a very short period of time, should that be addressed in the letter of intent?

2. Regardless of how long Seller's representations and warranties survive, what must Buyer do to maintain its rights with respect to any representations or warranties that it believes may have been breached?

3. Is there any legal justification for "floors" and "caps" on liability or are these purely business points? Is there such a thing as what is "market" for floors and caps? If Seller is going to insist on floors and caps, should that be addressed in the letter of intent? What factors might affect what buyers and sellers, respectively, believe are appropriate floors and caps? What is Buyer's reaction if Seller argues that Seller's liability should be capped at $1,000,000 since that is Buyer's maximum exposure (the earnest money) under the PSA?

4. Seller is a single-asset entity. Should Buyer be concerned about its ability to realize on a successful claim for a breach of a Seller representation or warranty discovered post-closing? If so, what types of security might Buyer suggest and how might Seller respond?

FACT PATTERN 3

Buyer and Seller have executed a purchase and sale agreement ("PSA") for a regional shopping center located in New Jersey, the purchase price is $300M, many of the Seller's representations and warranties are qualified as being to "Seller's knowledge".

Definition of Seller's Knowledge. Any representation and/or warranty made "to Seller's knowledge" will not be deemed to imply any duty of inquiry. For purposes of this Agreement, the term Seller's "knowledge" means the actual knowledge of the Designated Representative of Seller, without taking into account any constructive or imputed knowledge, and will not be construed to refer to the knowledge of any other officer, director, agent, employee or representative of the Seller, or any affiliate of the Seller, or to impose upon such Designated Representative any duty to investigate the matter to which such actual knowledge or the absence thereof pertains, or to impose upon such Designated Representative any individual personal liability. As used herein, the term "**Designated Representative of Seller**" refers to Tommy Pinball Wizard.

Contrast the foregoing definition of Seller's Knowledge to a PSA provision where certain representations contain a qualification as follows: To the best knowledge of Seller….

The PSA also has a provision as follows: Notwithstanding anything herein to the contrary, if Buyer has Actual Knowledge prior to the Closing that any representation or warranty of Seller set forth in this Contract is not true and Buyer proceeds to close, Buyer shall be deemed to have unconditionally and irrevocably waived its right to assert any claim against Seller after the Closing relating to such breach of a representation or warranty of Seller.

For purposes of this Contract, Buyer shall be deemed to have "actual knowledge" of (x) all actual knowledge of either of the Buyer Representatives (without investigation or inquiry, and which shall not be construed, by imputation or otherwise, to refer to the knowledge of any other officer, agent, manager, representative or employee of Buyer or any affiliate of Buyer, or to impose upon such Buyer Representatives any duty to investigate the matter as to which such Actual Knowledge, or the absence thereof, pertains) and (y) all information set forth in the due diligence materials contained in the Data Room, provided such due diligence materials were in the Data Room at least three days prior to the Due Diligence Expiration Date, and/or in any lease files provided by Seller to Buyer (individually or collectively, "Actual Knowledge"). As used in this Contract, the term "Buyer Representatives" shall refer to Joe Acquisition and Tony Grimaldi.

Please contrast the foregoing provision to the following: In the event that Purchaser becomes aware during the pendency of this Agreement prior to Closing of any matters which make any of Seller's representations or warranties untrue in any material respect, Seller shall bear no liability for such matters (provided that such untruth is not the result of Seller's breach of any express covenant set forth in this Agreement), but Purchaser shall have the right to elect in writing on or before the Closing Date, (i) to waive such matters and complete the purchase of the Property without reduction of the Purchase Price in accordance with the terms of this Agreement, or (ii) as to any matters disclosed following the expiration of the Due Diligence Period, to terminate this Agreement.

QUESTIONS FOR FACT PATTERN 3:

1. One of Seller PSA representations is “Seller, to its knowledge, has not received a notice from a governmental authority asserting that there is an environmental violation at the property.” Purchaser completes the transaction, and learns that the EPA sent a letter to Seller three months before the PSA stating that a dry cleaner which was a tenant on the property poured Perc into the dry well in back of its store for years, and the Perc leached into the ground water and travelled through the property and onto adjacent properties. Seller responds that the letter was received by a disgruntled employee, who stashed the letter in his desk, and never informed anyone of its contents. What exposure does Seller have, and how does that differ with the two descriptions of Seller’s knowledge.

2. After receiving Purchaser’s notice, Seller discovers that one of Purchaser’s engineering consultants, in conducting a Phase I study of the property, viewed and downloaded the EPA letter. The consultant went to a cocktail reception, forgot about the letter, and sent a report to Purchaser which did not mention the EPA letter. Can Seller assert that Purchaser waived the presence of the EPA letter, because it knew of it prior to closing and closed anyway? Is Seller’s argument better depending on the two definitions of Buyer’s knowledge?

Thursday, October 25, 2018
10:30 – 11:45 AM

Peer to Peer 5

One Man's Trash is Another Man's Treasure
(The Art of Shopping Center Maintenance and Repair)

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DESCRIPTION OF SESSION

To maintain, repair or replace – that is the question. While it may seem obvious to some, with differing standards and expectations, shopping center maintenance is much more an art than a science. This Peer to Peer session will give you the chance to dig deep into the nuances of shopping center maintenance, while working through a series of hypotheticals that illustrate the most current issues.

FACT PATTERN 1

Your client is a real estate investor, who has just acquired a large mixed use shopping center development. The development includes mid box retail, grocery, small shop retail, a bank, restaurant outlots, a medical office building (with parking structure), a fitness facility and a multi-family apartment complex (see attached site plan). Though the development is technically multiple separate tax parcels, because the developer owned the entire project (and was lazy), he never put an REA into place. Instead, he managed and maintained the entire project, and recovered operating expenses from the tenants pursuant to the terms of each lease.

Your client is forward thinking, and know he may very likely sell off separate tax parcels and retain others. However, in order to do that, you will need to prepare a very comprehensive REA to deal with the complexities of the various uses and separate tax parcels, in order to address future repair, maintenance and replacement issues.

QUESTIONS FOR FACT PATTERN 1:

1. In a development of this size and complexity, how to manage the parking areas is sure to be a hot topic. Who should maintain each part? When is a repair ok v. replacement (who decides and how)? Who should pay the cost? Are all users in the development equally affected?

2. Trash removal can be a messy issue. Should this be an REA issue or delegated to parcel owners? How is trash removal from common areas handled? Is trash like a utility where each user pays for its own removal, or is it part of CAM where each pays pro-rata based on store size or some other method of allocation? Should the landlord unilaterally determine who owes what? How are restaurant users treated vs. the small shops they abut? Consider unique issues facing the multi-family, medical office, fitness and grocery.

3. Should trash removal be an "uncontrollable expense" that is not subject to a cap?

4. If the parcels are sold off, who makes sure this development remains "first-class"? How are the center's monument signage, landscaping, and building exteriors uniformly maintained?

FACT PATTERN 2

Your client developed a parcel and sold it to Big Box Retailer, but has retained the "developer parcel" for its own mixed use development. At the time of the sale, Big Box Retailer placed an REA over the yet undeveloped developer parcel. Now your client has created a mixed use development consisting of mid box retail, outlots, a hotel, a multi-family development and a fitness development (see attached site plan). The development is served by two detention ponds. The multi-family and the fitness developments were sold. Now that the development is fully built, your client's property manager has several issues as to how to maintain this new development.

QUESTIONS FOR FACT PATTERN 2:

1. The North Pond is used by Big Box Retailer, the Shopping Center, and the West Outlot Parcel. The South Pond is used by East Shops Parcel, East Outlot Parcel, and the Hotel Parcel. How do you account for and manage the ponds? What if Big Box Retailer's REA requires the North Pond Parcel owner to maintain the pond at its sole cost? What if the North Pond Parcel and the East Outlot Parcel (at the time of the Big Box Retailer REA) were one lot? Who should own the North Pond Parcel and why?

2. The Big Box Retailer REA says that no parcel may drain storm water over any other parcel (but at the time of the REA, there were only 2 parcels, Big Box Retailer and the developer parcel). Now we have all the parcels shown on the site plan. How do you maintain storm water without violating the REA (or is that possible)?

3. The Joint Access is the only access point to the East Outlot Parcel. Who should maintain? Who pays? What rights/remedies are afforded to the benefitted parcels?

4. If the building on the East Outlot Parcel burns down, what should the owner do with the parcel? Does the owner of the East Shops have any valid concerns?

5. What unique CAM issues does each parcel have? Are there any special considerations due to the development and separate ownership of the Multi-Family Development or the Fitness Development?

FACT PATTERN 3

As big box retailers are shuttering, owners are finding creative ways to re-purpose their centers. With the economics such as they are, simply demising the space and re-tenanting is not always an option. And with municipalities increasingly being unwilling to subdivide a shopping center into separate tax parcels to be sold off, commercial condominiums seem to be on the rise.

Your client demises a vacant big box store and leases just over half of the space to a major national retailer (see page 1 of attached site plan). Unable to find a user for the balance of the box, your client finds an owner/operator who wants to purchase the remainder of the building (with associated parking). The municipality requires you to create a commercial condominium to accomplish this (see page 2 of attached site plan). Since this is a condominium, you must now prepare a Condominium Declaration (which in effect acts like a regular shopping center REA). However, with only 2 owners and an existing retail lease in place, certain maintenance, repair and replacement issues arise.

QUESTIONS FOR FACT PATTERN 3:

1. The national retail tenant (which now occupies Unit 1 of the condo) is of the opinion that the parking lot is a mess and must be replaced. When they signed the lease, the entire lot and building was part of the "Shopping Center", and the lease requires the landlord to maintain it all. However, the new owner of Unit 2 of the condo thinks the parking lot is just fine, and simply needs some minor repair work. How do you handle such a quandary in the Declaration?

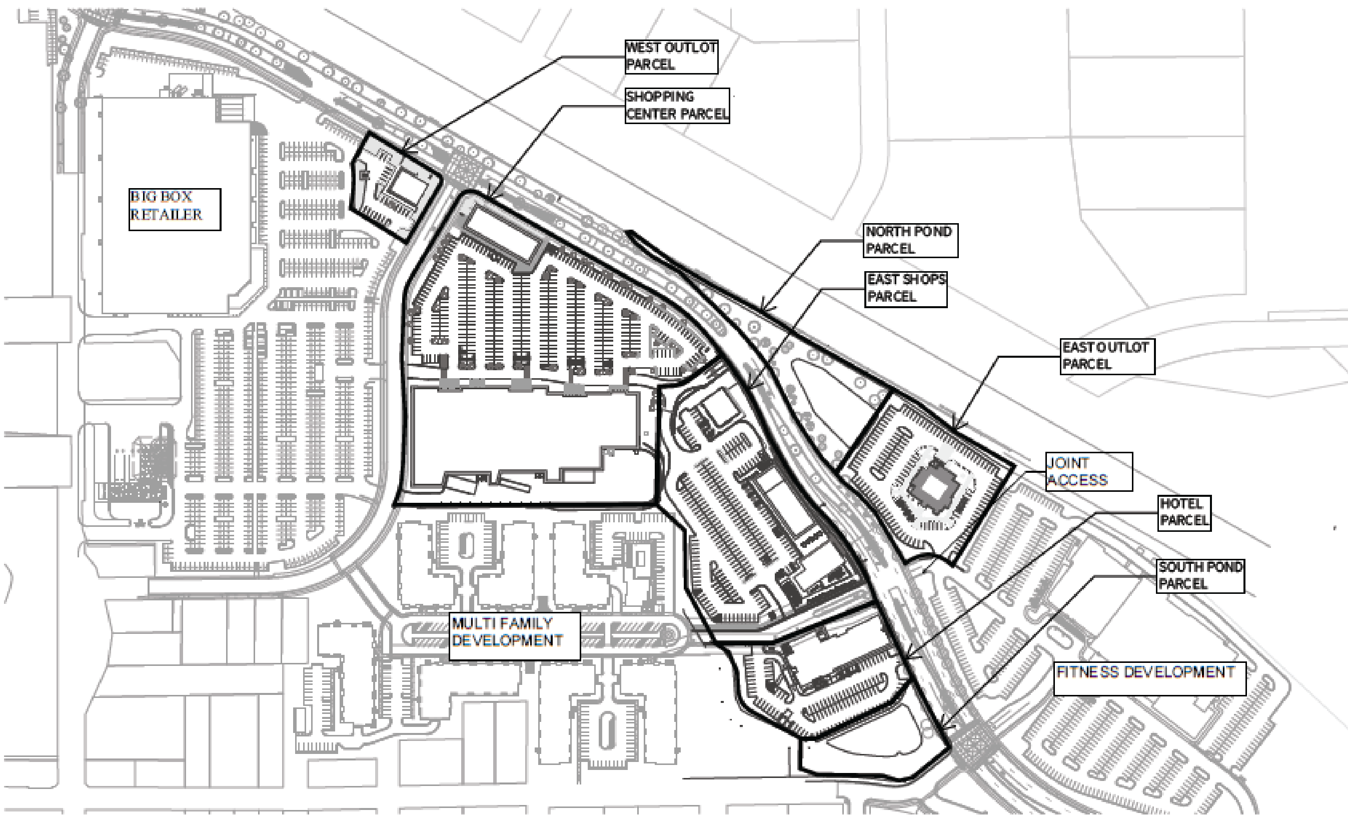
2. Consider the pros/cons of creating general common elements v. limited common elements. In doing so, consider the existing national retail tenant's expectations under its lease.

3. Since the "interior corridor" is used by both Units, are there alternative ways in which to maintain and divide up responsibility for the costs? Should it be part of a Unit? Common Element? Limited Common Element? Subject to an easement? Consider rights/remedies for failure to maintain.

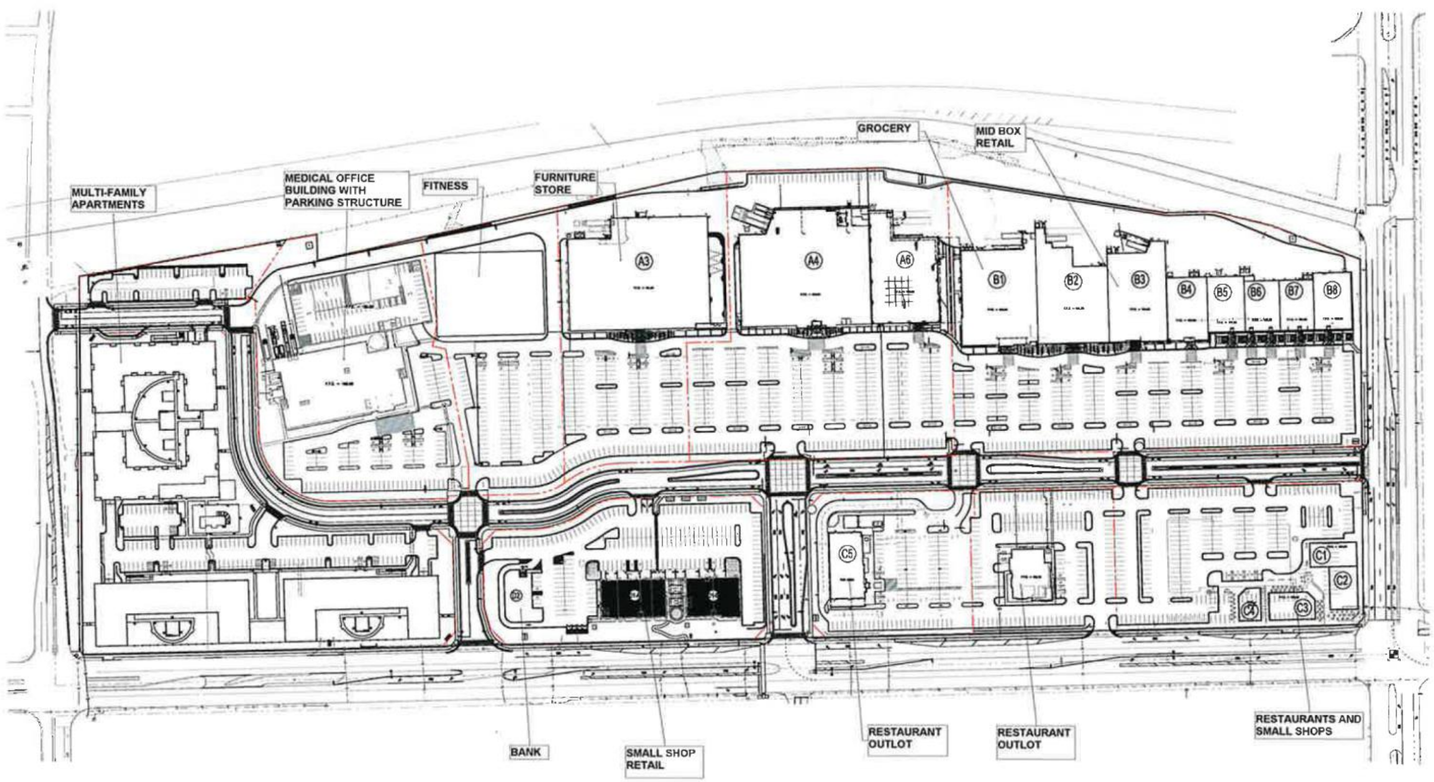
4. Currently the light poles are all on one meter. Should we separate? If not, how do we maintain and address the costs? Consider lighting requirements for different users, and the costs to replace bulbs and fixtures.

5. What happens if there is a fire and Unit 2 is destroyed?

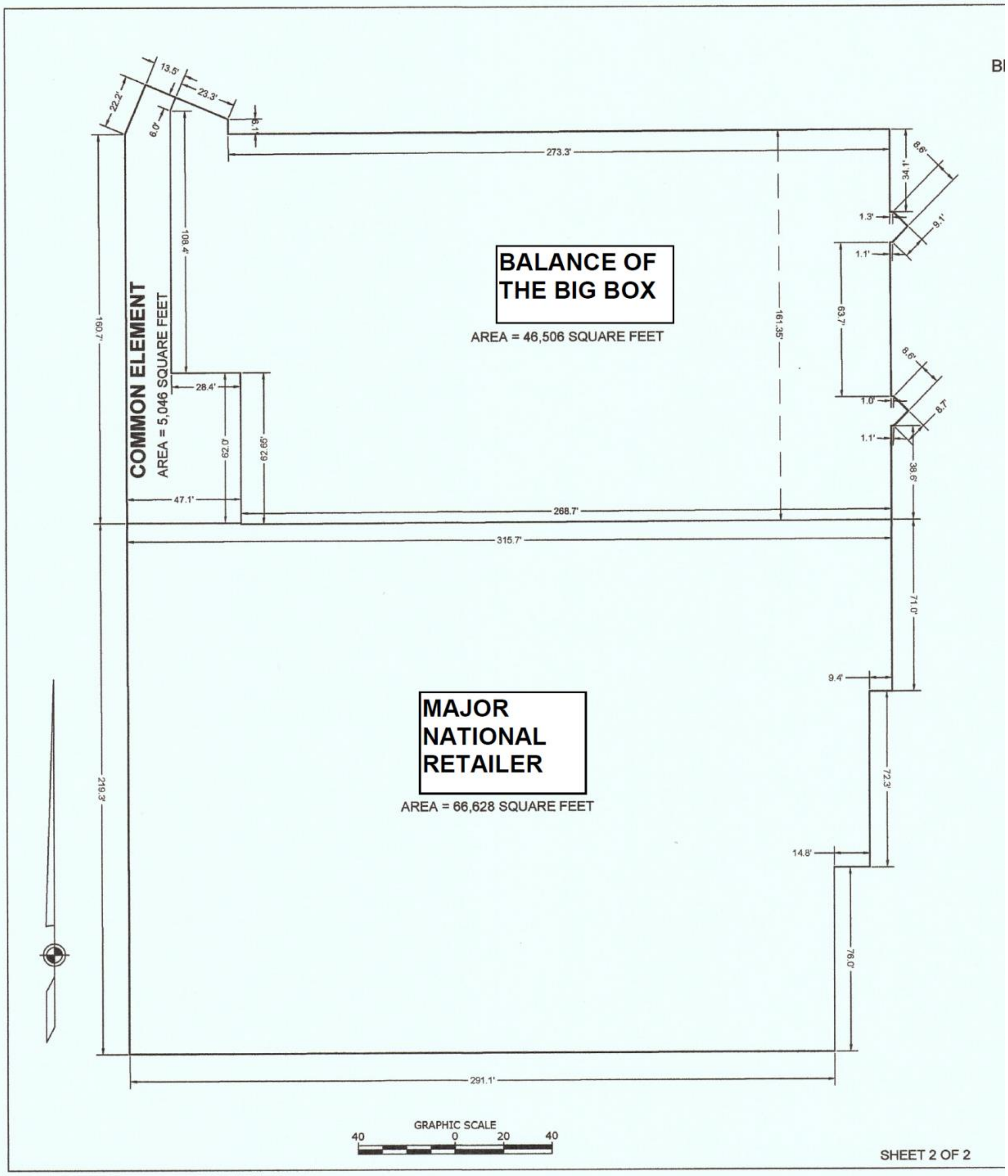
FACT PATTERN 2 - SITE PLAN



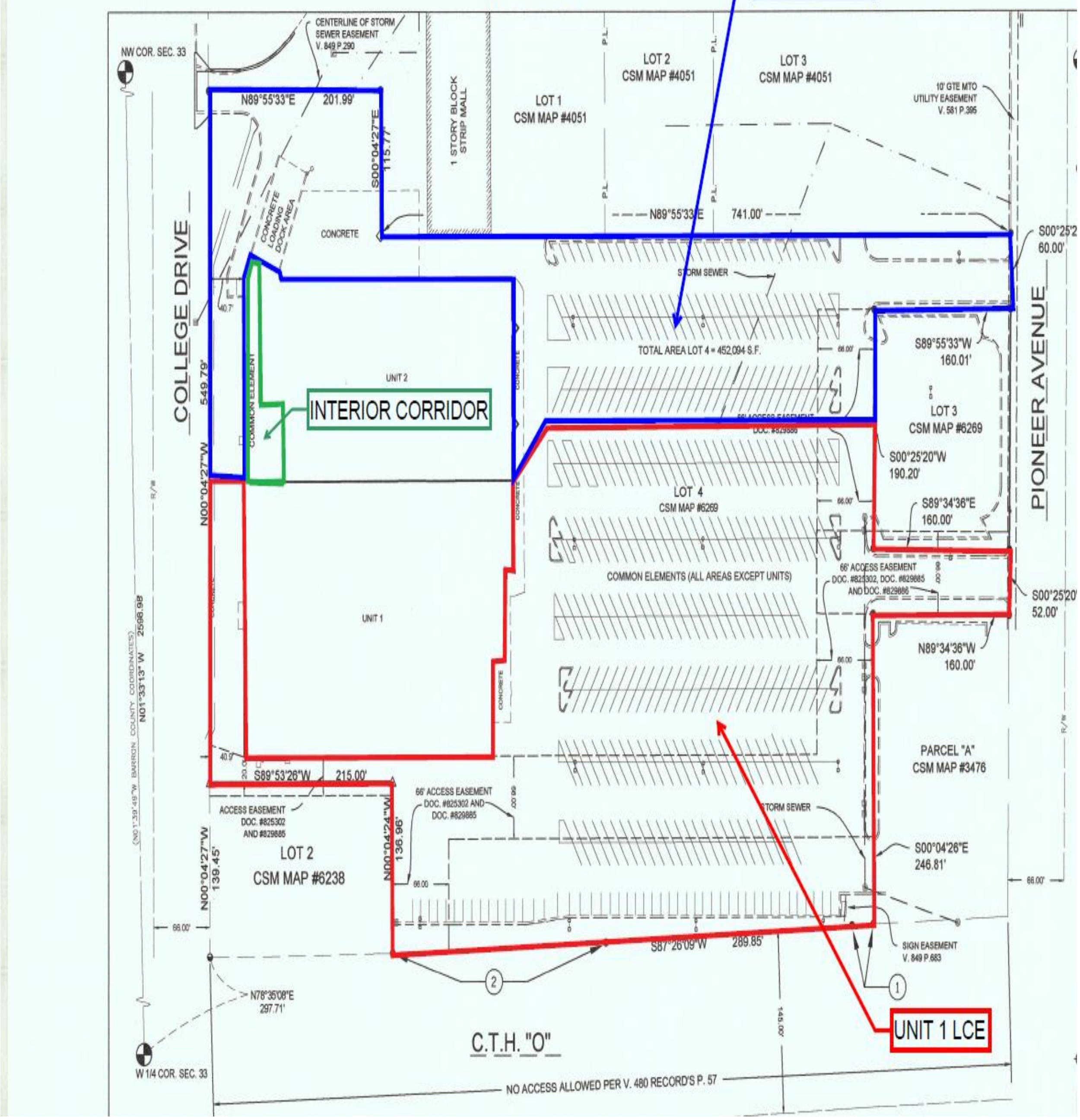
FACT PATTERN 1 - SITE PLAN



Fact Pattern 3 - Site Plan (page 1)



Fact Pattern 3 - Site Plan (page 2)



Thursday, October 25, 2018
10:30 – 11:45 AM

Peer to Peer 6

The Sleeves off Your Vest? Think Again: The Latest on Non-Recourse Carve-Outs in Loan Documents

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DESCRIPTION OF SESSION

This peer to peer session will examine the liabilities undertaken in a so-called "non-recourse carve out" loan. We will seek to gain a deeper understanding of the risks a lender seeks to mitigate as well as the risks on the flip side of that mitigation for borrowers and guarantors. We will examine the latest trends in real estate loan covenants the breach of which can lead to full recourse or a damages remedy in favor of the lender.

FACT PATTERN 1

Donald, the founder and CEO of Dingbat Development Company, executed and delivered a non-recourse carve out guaranty on a $20,000,000 mortgage loan to Dingbat's affiliate Dullsville Plaza LLC with respect to Dingbat's Dullsville Plaza Shopping Center. The carve out guaranty included a guaranty of any loss, damage, cost, expense, liability, claim or other obligation incurred by Lender (including attorneys' fees and costs reasonably incurred) arising out of or in connection with, among other things, "physical waste of the Property or any portion thereof (to the extent cash flow available to Borrower from operations of the Property is sufficient to prevent such waste), or after an Event of Default the removal or disposal of any portion of the Property." As luck would have it, Dullsville Plaza had a vacant 20,000 square foot box on an end cap and Donald was honing in on a new lease with Shifties, a new online retailer looking to expand to the brick and mortar world. Shifties wanted 50,000 feet. Donald hatched the brilliant idea of razing that 20,000 square foot box and replacing it with a 50,000 square foot box to meet the needs of Shifties. Shifties was in a big hurry and wanted the lease finished in time to occupy the premises for the Christmas selling season. The loan documents provided that leases for premises exceeding 10,000 square feet required the approval of CD Servicing LLC, the servicer of the loan.

After exchanging 18 drafts of the lease, Donald was assured that Shifties was satisfied and would be executing and returning the lease any day. So, on October 1st, Donald cut loose his contractor to begin the construction—the first step being the razing of the 20,000 foot box. So, in due course, the box was razed. After the last truckload of debris from the former 20,000 foot box was carted off site, Donald received the bad news that Shifties had filed for bankruptcy and was liquidating—needless to say, Shifties would not be entering into a lease for premises at Dullsville Plaza. A week later, a full on recession hit and Dullsville Plaza started losing tenants daily. In short order, Dullsville Plaza LLC could not pay its loan. Donald figured, at that point, he'd just hand the keys to the place to CD Servicing and that would be that.

QUESTIONS FOR FACT PATTERN 1:

1. Is Dullsville Plaza LLC liable for the costs of restoring the 20,000 foot box?

2. Is Donald?

3. Are Donald and Dullsville Plaza LLC liable for the losses to be suffered by the bond trust that is the ultimate lender here for "changes to the mortgaged collateral?"

4. What facts would turn the result the other way?

FACT PATTERN 2

Lender made a $10,000,000 loan to Jinxed LLC which was secured by a mortgage encumbering Ignite Shopping Center. The loan was guaranteed by Larry Luckless pursuant to a non-recourse carve-out guaranty which made Jinxed LLC and Mr. Luckless personally liable for, among other things, the failure to obtain and maintain the insurance policies required by the loan documents.

Two years after the loan was made, the anchor tenant for Ignite Shopping Center filed for bankruptcy and stopped paying rent. The anchor tenant was also responsible for the payment of real estate taxes on its parcel and for insuring its building.

Upon vacating its premises, the anchor tenant left certain merchandise, including fireworks, at Ignite Shopping Center. The fireworks exploded and caused a fire that substantially damaged Ignite Shopping Center. When investigating the casualty, Jinxed LLC discovered that the anchor tenant had allowed its insurance to lapse. The estimated cost to restore the damage was $5,000,000, and no insurance proceeds were available to cover such loss.

Following the anchor tenant's bankruptcy, the cash flow from Ignite Shopping Center was not sufficient to pay the debt service on the loan, and Jinxed LLC defaulted on the loan. In Lender's enforcement proceedings, Lender made a claim against Mr. Luckless in an amount equal to the difference in the value of Ignite Shopping Center as appraised at the origination of the loan and the value of Ignite Shopping Center as damaged.

QUESTIONS FOR FACT PATTERN 2:

1. Should Larry Luckless be liable for the damages claimed by Lender? If so, is Lender's claim for the loss in value the correct measure of damages?

2. Would the results be different if the anchor tenant was not responsible for insurance, but Jinxed LLC failed to pay due to lack of cash flow from Ignite Shopping Center?

3. As counsel for Larry Luckless, what language would you have advocated for to protect Larry Luckless from this liability?

Thursday, October 25, 2018
12:00 – 1:15 PM

Peer to Peer 7

Any Which Way but Use:
Prohibited and Exclusive Use Provisions in the Evolving Landscape of Retail Development

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DESCRIPTION OF SESSION

In this Peer-to-Peer session we will explore how we as lawyers can assist our clients in achieving flexibility and adaptability when negotiating use restrictions, while preserving essential protections. We will discuss and evaluate the risks of common and uncommon use restrictions. And, we will examine our role as advocates and the part we play in balancing the legal and business considerations during negotiations.

FACT PATTERN 1

New Owner has recently acquired an aging center in a neighborhood which is experiencing a revitalization. The aging center has lost quite a few tenants and has a mix of anchor space, small shop space and outparcel vacancies. The prior owner allowed the center to fall into disrepair and many of the existing tenants are paying reduced rent. Due to the close proximity to the downtown area and thanks to a new charter school, both millennials and young families are moving into the neighborhood. New Owner intends to redevelop portions of the center and is optimistic that due to the resurgence of the neighborhood, the center can attract a mix of national, regional and local tenants. New Owner is concerned that, with the state of the retail industry, leasing only to traditional brick and mortar retailers could be a mistake. New Owner is trying to be forward thinking and is looking at a variety of tenants, which are listed below, to fill the vacancies and to bring value to the community.

Many of the existing tenants currently have exclusive use provisions in their leases (many of which were originally negotiated over 20 years ago). The existing exclusives are set forth on Exhibit A.

New Owner's attorney, who has been in the retail leasing business for quite a while representing both landlords and tenants, has suggested to New Owner that, in connection with any new leases to be negotiated, New Owner use a standard form lease that includes a list of prohibited uses commonly found in retail leases. Based on her lengthy experience, New Owner's attorney has assembled an exhaustive "grab bag" list of prohibited uses for New Owner's consideration knowing that some of the suggested prohibited uses are more favorable to tenants and will need to be modified. The attorney's list of prohibited uses is set forth on Exhibit B.

Potential New Tenants:

Anchor Space:

- Outdoor equipment and apparel retailer
- Gym
- Shared Workspace Facility

Jr. Anchor:

- Various Shoe Stores (discount and branded)
- Apparel Retailers
- Pet Supply Store

- Pet Daycare facility

Outparcels:
- Quick Service Asian Restaurant
- Fast Casual Burger Restaurant
- Urgent care facility/medical
- Food Truck Park

Small Shop:
- Brew Pub
- Smoothie Shop
- Yoga Studio
- Nail Salon
- Dentist Office
- Eye care/vision office
- Tesla show room

1. Which of the new potential tenants will have the least difficulty overcoming the exclusives? Which of the suggested prohibited uses will be barriers to the potential new tenants?

2. Knowing what we know now, how could each of the exclusives have been tailored to allow the landlord more freedom but still provide the tenant with adequate protection against competition? Answer this from both the landlord perspective and the tenant perspective.

3. As the New Owner, how would you modify, add or subtract from the suggested list of prohibited uses to protect yourself against some of the tenants' requested open use clauses but giving yourself flexibility to adjust to changing market trends? Are there any prohibited uses that have out lived their usefulness?

FACT PATTERN 2

Same facts as Fact Pattern 1.

A new company ("Start Up"), which has a focus on "experiential" retail in the world of books, music and consumer electronics, is seeking to lease 10,000 sf in the center. The owners of the company are young, entrepreneur millennials who want to create a new kind of retail experience. Start Up envisions a space that will serve as a "living room" and a show room for its customers, and will include a coffee shop that serves food and beverages and a wine bar.

Start Up wants to enter into a short-term lease (5 years) with 3 options to renew for 5 years each. Start Up wants an exclusive on the sale of books, music and consumer electronics, as such products may evolve, and seeks to prohibit future book stores, coffee shops and any store which sells consumer electronics; in addition, Start Up wants the right to operate under an "open use" clause, subject to existing exclusives and prohibited uses in place at the time the lease is signed.

The odd numbered tables represent the New Owner. You know that the center has (or will have) a variety of constituents that need protection, and that New Owner is concerned about creating and then maintaining a first class center.

The even numbered tables represent Start Up. You know that Start Up is still inventing itself and flexibility will be the key to their success.

1. How does leasing to Start Up affect your responses to Question #3 in Fact Pattern 1? Are there any prohibited uses that Start Up cannot or should not accept?

2. As for the exclusives, which restrictions, if any, should Start Up seek a waiver? Should New Owner cooperate?

3. What other "use" considerations from either New Owner's or Start Up's perspectives need to be considered?

EXHIBIT A
EXISTING EXCLUSIVES

Off Price Jr. Anchor clothing store:
Without the prior written consent of Tenant, no tenant or occupant of the Shopping Center (other than Tenant) whose premises exceeds 15,000 square feet may use, and Landlord shall not permit any other tenant or occupant to use, its premises for the display and/or sale of apparel on an off-price basis ("Off-Price Use").

Grocer:
Landlord covenants and agrees that during the Term, Tenant shall have the exclusive right within the Shopping Center to: (i) operate a grocery supermarket, bakery, delicatessen, fish market, and on-premises photo finishing facility; (ii) sell drugs or other products which are required by law to be dispensed by a registered pharmacist; and (iii) engage in retail sales of items of food for "off-premises" consumption.

Notwithstanding the foregoing, occupants of the Shopping Center shall not be prohibited from engaging in the operation of: (i) a sit down restaurant offering prepared ready-to-eat food items for consumption either on or off the premises; (ii) a delicatessen or sandwich shop type restaurant; (iii) a health food store, franchise doughnut shop (equivalent to a Dunkin' Donut or Krispy Kreme operation), bagel shop, candy store, or a pizza pickup or delivery outlet, all of which may offer the sale of food items of consumption on or off the premises; and (iv) a combination gas station and convenience food store operation, provided that the floor area devoted to the sale of food and beverage products shall not exceed 1,000 square feet.

Chicken Restaurant:
Landlord covenants and agree that no "out-parcel" or free-standing building on the Adjoining Property shall, during the term of the Lease, be leased, used or occupied as a restaurant selling or serving chicken as a principal menu item, unless the tenant, assignee or sublessee of such out-parcel or free-standing building is permitted to do so under the present terms of a lease thereof which existed on the date of the Lease.

Cell Phone Store:
Landlord agrees that it will not enter into a lease or consent to the use and occupancy of any other space within the Shopping Center by a tenant, subtenant, assignee, licensee or concessionaire (collectively "Occupant) whose primary business is the retail sale of wireless communication products and services (the "Exclusive Use").

Mexican Restaurant:
No part of the Shopping Center shall be used for the sale or consumption of prepared Mexican food. This restriction shall not apply to a sit-down, waiter served Mexican restaurant.

EXHIBIT B
PROHIBITED USES

The following uses (collectively referred to as “Prohibited Uses” and individually as a “Prohibited Use”) are prohibited during the Term in any portion of the Shopping Center:

(1) Any use which emits an obnoxious odor, obnoxious noise, or obnoxious sound which can be heard or smelled outside of any building in the Shopping Center; or any use which creates a noise or sound that is objectionable due to intermittence, beat, frequency, shrillness or loudness;

(2) Any use which creates a fire, explosion or other hazard;

(3) Any use which constitutes a public or private nuisance;

(4) Any operation primarily used as a storage warehouse operation and any assembling, manufacturing, distilling, refining, smelting, agricultural, or mining operation;

(5) Any omission of microwaves, radio waves, or other similar electronics, light or noise radiation at levels which are dangerous to health or which interfere with the proper operation of electronic, telephone, computers or other business equipment of tenants of the Shopping Center;

(6) Any “secondhand” store whose principal business is selling used merchandise, thrift shops, salvation army type stores, “goodwill” type stores and similar businesses and retail operations;

(7) Any mobile home park, trailer court, labor camp, junkyard or stockyard;

(8) Any dumping, disposing, incinerating or reducing of garbage;

(9) Any fire, going out of business, relocation, bankruptcy, lost-our-lease or similarly advertised sales, or auction house operation;

(10) Any central laundry, dry cleaning plant, coin-operated laundry or laundromat;

(11) Any establishment selling or leasing new or used automobiles, trucks, motorcycles, boats, trailers or recreational vehicles;

(12) Any bowling alley, skating rink, roller rink;

(13) Any dance hall, discotheque, night club, or pool room;

(14) Any carnival, fair, amusement park, circus, amusement gallery, shooting gallery, paint ball facility, miniature golf facility, laser tag facility, or similar sports or entertainment facility;

(15) Any video arcade or video game room; or

(16) Any auditorium, meeting hall, catering or banquet hall, live performance theater, or facility hosting sporting events;

(17) Any children’s entertainment or activity facility;

(18) Any restaurant;

(19) Any cocktail lounge, bar or tavern;

(20) Any package store or liquor store;

(21) Any veterinary hospital or animal raising or boarding facilities;

(22) Any cemetery, mortuary, funeral home or similar service establishment;

(23) Any adult book store or establishment selling, displaying or exhibiting pornographic materials or materials depicting lewd and lascivious acts;

(24) Any establishment which stocks, displays, sells, rents or offers for sale or rent any merchandise or material commonly used or intended for use with or in consumption of any narcotics, dangerous drug or other controlled substance;

(25) Any flea market or swap meet;

(26) Any a store primarily selling merchandise which is classed as “odd lot,” “close out,” “clearance,” “discontinued,” “cancellation,” “second,” “factory reject,” “sample,” “floor model,” “demonstrator,” “obsolescent,” “over stock,” “distressed,” “bankruptcy,” “fire sale” or “damaged”;

(27) Any massage parlors or similar establishments;

(28) Any health spa or beauty spa;

(29) Any fitness center or workout facility;

(30) Any residential use, including but not limited to any hotel, motel, living quarters, sleeping apartments or lodging rooms;

(31) Any tattoo parlor, pawn shop, check cashing or payday loan establishment, or gun shop;

(32) Any church or other place of religious worship, religious reading room, school or related religious or educational facility or other training or education facility;

(33) Any gambling facility or operation, including but not limited to: off-track or sports betting parlor; table games such as black-jack or poker; slot machines; video poker/black-jack/keno machines or similar devices; or bingo hall;

(34) Any car wash, tire change center, automobile repair shop, body shop operation, or any business servicing motor vehicles in any respect;

(35) Any general or professional office facility;

(36) Any cinema or movie theater;

(37) Any day care center or nursing home;

(38) Any business operated only on a seasonal or part-time basis;

(39) Any separately demised newsstand;

(40) Any governmental facility, recruiting center or employment center;

(41) Any facility relating to the occult sciences, such as a palm reader, astrologer, fortune teller, tea leaf reader or prophet;

(42) Any non-retail use; and

(43) Any other use inconsistent with the operation of a high-quality retail shopping center.

Friday, October 26, 2018
9:00 – 10:15 AM

Peer to Peer 8

Remedies, Recoverable Damages and Creative Solutions: What You Want vs. What You Need vs. What You Can Get

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Description of Session: Clients sometimes present dispute scenarios that do not fit neatly into the "Default" box. Worse, a breach, violation, default, or "occurrence" may be clear, but the remedy provided in the lease may be much less than ideal. The litigation process presents its own uncertainties, expenses and delays. Participants in this "Peer to Peer" session will examine several dispute scenarios, common lease provisions and state law questions. We will then roll up our sleeves to confer and collaborate on Plan A, Plan B and Plan C solutions looking at the risks and benefits that each might afford, what can be reasonably achieved and managing expectations.

FACT PATTERN 1: The Elusive Exclusive

In 2009, a brew pub called "Crafters," specializing in "craft beers" signed a 10 year lease with three (3) options of five (5) years each (exercisable on not less than 270 days' notice) for a 20,000 square foot, two story location at a regional shopping center. Crafters is a restaurant, but its true spirit, theme and focus is its offering of more than 300 craft beers, 200 non-craft beers and 100 beers on tap. It is a beer lovers dream come true. To protect itself, Crafters negotiated for an exclusive that provided that the Landlord would not lease to any other tenant at the shopping center whose primary use would include offering more than 25 craft beers, allowed more than 25 beers on tap and also provided that no other tenant could operate so as to be considered a "beer centric" facility. Violation of the exclusive by the Landlord would allow the Minimum Rent to be reduced by 50% (after 180 days to cure) and allows Crafters to terminate its Lease after one (1) year on 365 days' notice, if the violation continued. The remedies sunset after two (2) years and do not carry over into any option period if a violation occurred beforehand and tenant exercises its option anyway, unless the landlord's violation is found to be willful.

Crafter's business has been very good and growing the last nine years. Unfortunately, the shopping center itself cannot say the same. Over the course of the last three years, two anchor department stores there have closed as well as a movie theater, a big box sporting goods retailer and a big box toy store. Each of the anchor stores owns its own parcel and has been looking for ways to redevelop or sell their parcels. The REA for the shopping center that covers each anchor actually expired in 2017, but did allow for any lawful retail use by the anchors consistent with a regional shopping center development, but also provides the Shopping Center owner with a right of first refusal for the sale of the anchor parcel. Negotiations have been underway to extend the REA, but have not been completed.

The anchor store nearest Crafters (250 feet away) announced that it was selling its parcel to an owner/operator called Beer World for a 100,000 square foot market themed use focusing on the beers of the world. It would house its own craft beer brewery in addition to offering nearly every craft beer available, estimated at over 500 craft beers together with 300 non-craft beers and 150 beers on tap. It will also feature a craft beer college where patrons can learn the finer points for brewing, tasting and become micro-brewers themselves. The "world market area" will allow for retail sales of cases and kegs for off premises consumption as well as a food market area focusing on deli items, baked goods, snack foods and other items to bring delight to beer fans. The Rathskeller area provides room for on-premises consumption in a fun dining environment and will also have rooms designated for private functions. There will be areas for billiards, darts and other games. There is also a sufficient parking field to allow periodic outdoor activities such as an Oktoberfest. Nightly entertainment will also be provided at the Rathskeller. Its site plan also includes pickup and drop off areas for Uber and Lyft as well as dedicated parking areas for valet parking. Beer World announced that its grand opening will be in September of 2019 for the “greatest Oktoberfest” the area has ever seen starting with a charity kickoff.

Crafters called the Landlord to complain about what they considered an impending violation. The Landlord told them that while “sympathetic,” the matter was out of their hands. The department store owns its own building and pad and the Landlord has no control over the use. Further, the Landlord stated, the new owner of the real estate is not considered a “tenant” at the Shopping Center as contemplated by the Crafters Lease, so the exclusive did not apply to the anchors. Even though the REA had expired, the anchor had given the Shopping Center owner the ROFR opportunity, but declined it. Word on the street too is that “Beer World” had approached the Shopping Center Owner first who recommended that they speak with the Department Store to make a deal with them. Tenant’s Lease expires August 31, 2019 and Tenant needs exercise its renewal option by December 1, 2018.

QUESTIONS FOR FACT PATTERN 1

1. As Tenant’s counsel, what are your best arguments supporting Tenant’s position that Beer World’s opening at the Shopping Center will be a violation of the Crafters’ Lease?
2. As Landlord’s counsel, what are your best arguments opposing Tenant’s claims?
3. As counsel for Tenant, what advice would you give your client about how to proceed?
4. What, in your view would be the best way to resolve this dispute?

FACT PATTERN 2: Testing the Outer Limits of a Radius

The Suburban Farmer (“SF”) is a store catering to the needs of the suburban and rural homeowner who loves the land, being handy and enjoys growing their own vegetables, gardening, owning livestock and being self-sufficient. Suburban Farmer sells lawn and garden supplies, animal feed, practical clothing and virtually anything that the customer needs as a “do-it yourselfer.”

In 1979, Suburban Farmer signed a twenty (20) year lease with six (6) five (5) year options for a 15,000 square foot space at the Old Town strip center in the outskirts of a growing area. The lease contains a 10 mile radius restriction. Suburban Farmer has been successful at that location, but has noticed that sales, while still good, were not growing, as the area which had previously been in the “outskirts” had become much more developed, its longtime customers were aging, were less able to remain do it yourselfers and were selling to developers of smaller homes and multifamily projects. SF was actively looking at the market and had identified two ideal locations for a new or additional store. The problem was that they were adjacent store fronts at the New Town Center that is within the radius at just 9.5 miles away. Each location had become available by the closings of a now defunct toy store and a sporting goods store that were each 15,000 square feet. One of the locations in particular was ideal as an endcap that afforded the opportunity for an outdoor display area and additional adjacent area that the landlord was offering for growth potential.

The SF lease provided a liquidated damages remedy for violation of the exclusive that allowed for the sales of the offending store to be added to the sales at the original leased premises. SF believed the new location was far enough away so that the new SF store would not cannibalize sales from the existing store. However, SF was already paying percentage rent (because the minimum rent on the original lease was so low), so adding the sales would be a very expensive choice if the Landlord enforced its rights. The existing SF lease was also coming up for renewal if the fifth of the five year options was to be exercised. SF is aware that the prior owner of Old Town, did not enforce radius clauses for two other co-tenants at Old Town Center who built fast food restaurants each within 5 miles of their Old Town locations when they had 10 mile radius restrictions, so maybe the new Landlord would be similarly cooperative.

While considering its alternatives, SF learned that the Landlord of New Center had been approached by Millennial Harvester for a use virtually identical to SF, but focused on the millennial demographic emphasizing urban agriculture, producing for food banks, social justice and volunteerism in addition to personal use. The MH concept also included the development of an urban farm on site where millennials could be trained using MH brand products and produce could be donated. MH was going to take both spaces for a total of 30,000 square feet AND for that deal the New Town landlord was going to allow MH to farm and maintain the adjacent available space for free for the first 5 years with an option to extend for an additional fee.

The New Town landlord, since discussions had been ongoing with SF and being a good folks, offered the MH opportunity to SF but has only given SF five (5) days to submit an LOI to match the MH proposal.

If MH takes that location and develops it as a superstore with an urban farm, SF fears that MH will materially impact SF sales at Old Town. A new, 15,000 square foot SF, 9.5 miles away, would not have cannibalized sales, but a new 30,000 square foot MH store might eat SF's lunch. SF wants the New Town location, but 30,000 square feet is double the existing prototype and it has not experimented with hosting farm operations with anyone, especially millennials. SF might like to make a go of it, but SF could not handle sales from a 30,000 square foot store being added to the Old Town store sales. SF had planned to keep the Old Town location along with a New Town location, but maybe it needed to move on?

QUESTIONS FOR FACT PATTERN 2

1. As Tenant's counsel, what advice would you give to your client on approaching the landlord in this situation and the risks involved?
2. As Landlord's counsel, how do you advise your client on the decisions it must make?
3. Is litigation an option for either party? If so, as counsel for Tenant or Landlord, what advice would you give your client about the likelihood of success on the merits of any litigation?
4. What, in your view would be the best way to resolve this dispute?
5. What are your thoughts on "best practices" in drafting radius restrictions?

Friday, October 26, 2018
9:00 – 10:15 AM

Peer to Peer 9

Whose Lease is it Anyway? Strategies for Negotiating with a Franchisee and Franchisor

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Session Summary:

This interactive peer-to-peer session will dive into the fast paced, growing area of franchise leasing, and in particular, lease requirements and unique lease issues arising due to the franchisor-franchisee relationship. We will begin by collectively commenting upon a hypothetical lease rider which is includes many customary (and some uncustomary) provisions. We will then transition into a fast-paced, highly interactive review of multiple scenarios arising in a franchisor/franchisee/landlord lease interplay, working to try and bring some sanity and reason to what is often a hectic and unpredictable are of commercial real estate law. Attendees should walk away from the session understanding important terms of lease riders, "hot button" issues for franchisors, and concerns landlords should have before entering into franchise-based leases (and how to best deal with such concerns).

Fact Pattern One:

"Winning!" is a fast-growing fitness brand founded by a group of wealthy former actors and actresses out of Los Angeles, California. Winning! opened its first location in Bakersfield, California on July 4, 2014, and as of October 1, 2018, Winning! has 1,010 open locations in the domestic United States and another 124 locations internationally. Winning! has received multiple awards from the International Franchise Association, including "Best New Brand of 2016" and "America's Hottest Franchise in 2017".

Winning! is a full-service gym which also offers interval and instructor-driven training, and its typically requires a minimum of 7,500 square feet for its operations. Winning! requires all franchisees to maintain a minimum of $5,000,000 net worth throughout the term of its franchise agreement and to invest a minimum of $1,000,000 into the build-out of each fitness facility, with at least fifty percent (50%) of the build-out costs to be funded by equity and not debt. Winning! does not offer any corporate/franchise guaranty or other financial support for its franchisees, though Winning! has quickly gained a reputation of being one of the most supportive and well-organized franchise brands in the industry.

Winning! prefers to identify locations in mixed use or traditional shopping center developments as it is found synergies for retail and restaurant users within such developments. While Winning! will entertain locations identified by for its franchisees, Winning!'s typical process is that a real estate director (and broker) engaged by Winning! will find a viable location, and then once a location is identified, Winning! will offer the location to its franchisees (and there is currently a wait list of 210 qualified franchisees as of October 1, 2018). Once a franchisee identifies/accepts a location, the franchisee is responsible for negotiating its LOI and, once complete, the lease. The franchisor's only involvement in lease negotiation is to (i) refer an attorney if requested for assistance with franchisee lease negotiation, and (ii) review the final lease to confirm that "franchisor's leasing standards" are met.

The "franchisor's leasing standards" are set forth in the franchise agreement between each franchisee and corporate Winning!,specifically as Exhibit R to the franchise agreement, where Winning!'s lease rider is attached and incorporated. The express terms of the franchise agreement require that the terms of the rider be expressly incorporated, unmodified, into each franchisee-negotiated lease. However, as a matter of course, Winning! is known for working with landlords of its franchisees to incorporate terms of Exhibit R into the body of a lease when the relevant landlord has a standing policy against lease riders. Winning! is generally less willing to concede many substantive points of the rider.

Walden Schmidt is a new franchisee of Winning! based in Wichita, Kansas and is working to finalize four new locations in that market. Walden has successfully negotiated LOIs with each of the following landlords and has asked that his broker provide Exhibit R to each landlord:

1. <u>Location 1: 21st Street and Rock Road</u>: High end, established, large mixed use development where Walden is securing a larger-than-regular premises (10,000) on a prime corner in the premier retail development in Wichita. Walden anticipates this location will be his first-to-open Wichita location. Rents are at a premium and tenant improvement allowances are minimal. The landlord is a large pension fund which is partner with a local brokerage/property management firm; however, all leases are required to be on the pension fund's base lease form with limited modifications.

2. <u>Location 2: K-96 and Greenwich</u>: A newly-constructed, ground-up shopping center which is being developed in multiple phases. The project is being developed by a local, well-established developer which privately funds all development from family oil money. There is no debt on the property and the developer intends on holding the project into the foreseeable future following completion. Walden is taking a traditional 7,500 square foot premises in this location, and landlord is paying a sizeable tenant improvement allowance. The project has gotten good local press, is competitive for tenants, and is large (400,000 square feet). Walden is required to use landlord's base lease form as a starting point for negotiations.

3. <u>Location 3: Old Town</u>: Former abandoned warehouse in downtown Wichita, KS which was purchased for pennies-on-the-dollar at a bankruptcy auction in April, 2018 by two recent high-school graduates using graduation money. The graduates initially intended on using the warehouse as a recording studio but quickly discovered that the location was too profitable not to lease. Walden is taking the entire warehouse (6,800 square feet) and there will be no other occupants. The graduates have never negotiated a lease and have no legal documentation from which to start negotiations with Walden.

4. <u>Location 4: Main Street Mall</u>: TTM, the third largest mall owner in the country, owns this mall which at one time was the marquee-shopping venue in the State of Kansas. The mall is still profitable and is over 80% occupied, but has recently had a premises vacated by *Sears* as part of its national closures. TTM has agreed to subdivide the former *Sears* premises, and Walden is taking 7,500 of ground floor space with exterior exits to the parking lot. Walden was reluctant to agree to the LOI for this location because of concerns about malls generally (as well as about opening too many Winning! locations too quickly), but TTM offered a very low rental rate and a very high allowance to induce Walden to proceed. TTM insists on using its form lease in all negotiations and, as a policy, does not agree to any riders/addenda to its lease.

Per the terms of Walden's Market Development Agreement (MDA) with Winning!, Walden is required to open at least three (3) locations in the Wichita market by no later than December, 2019. The four locations listed above are the <u>only</u> possible locations in the Wichita market which Winning!'s corporate office will approve.

<u>Questions for Fact Pattern One</u>:

1. Compare and contrast the acceptability of the terms of the Winning! rider from the perspective of the owners of each of the four (4) Wichita, Kansas locations. Are there any terms of the rider that are universally acceptable? Unacceptable? Why?

2. What is the rationale of Winning Exercise Systems, LLC in requesting the collateral assignment of lease? Rights of notice and cure? Rights of entry to remove trademarks? Third party beneficiary rights?

Fact Pattern Two:

"Water has a Taste" is a newly-created concept with two (2) corporately-owned locations in operation in Phoenix, Arizona. Water has a Taste ("WHAT") was founded in February, 2017 by Frankie Schitteno (age 21, son of the *Concordia* captain) and his girlfriend, Haley. WHAT is a flavored-water bar, where patrons can order water (hot or cold) in thirty (30) different flavors, many of which are organic and are produced using natural ingredients. WHAT is highly leveraged, as Frankie and Haley have been using all available profits from the operating locations to fund a lavish lifestyle and to otherwise perform "market research".

As of September 1, 2018, WHAT had not sold any franchises, but over the Labor Day weekend, Ed Thatch of Charleston, South Carolina visited both locations and was intrigued by the concept. Ed immediately contacted Frankie and Haley and asked to have the right to franchise the brand in Charleston. Although WHAT did not have any franchise paperwork prepared, Frankie quickly pulled together paperwork by copying the FDD and Franchise Agreement from "Winning!", a franchise brand out of California (which Frankie and Haley were exploring as franchisees until they discovered that their $100,000 cumulative net worth did not meet the minimum franchisee criteria for Winning! franchisees). WHAT generally incorporated the Winning! franchise agreement without change, but Haley (also a residential real estate broker in Tempe) decided to supplement Exhibit R (the lease rider/addendum) with the following provisions:

9. Permitted and Exclusive Use. Tenant shall have the right to use the premises for any use that is legal, though when Tenant first opens, it will open as a WHAT franchise that primarily sells water (the "Permitted Use"). Tenant shall have the exclusive right to sell water and any other flavored beverages in the shopping center.

10. Permit Contingency. Tenant cannot operate its business without permits. Accordingly, Tenant shall have the right to terminate this Lease at any time before opening if Tenant cannot secure permits. Tenant shall further have the right to terminate this Lease during the Term if Tenant loses its operating permits at no fault of Tenant.

11. Marijuana and Other Offerings. Landlord acknowledges that it is part of Tenant's business plan to offer marijuana-flavored water in states where recreational marijuana use is legalized.

12. Sales Kickout. Tenant will have the right to terminate this Lease at any time Tenant's sales are not $1,000,000 per year or greater. Tenant shall also have the right to terminate this Lease if Tenant's sales do not increase in any year by 5% over the prior year.

Frankie and Haley did an excellent job of selling WHAT to Ed, and Ed immediately signed the franchise agreement (with Exhibit R and Haley's new provisions included). Identical to Winning!, the WHAT franchise agreement requires Ed to incorporate all provisions of the lease addendum into each lease, unmodified.

Last weekend, Ed identified his first Charleston location, a relatively new (2015) shopping center in which WHAT will occupy the final in-line vacancy in phase one of the shopping center (which landlord has found very difficult to lease because of the limited visibility of the space from the main highway). Ed will be taking 1,200 square feet of the 220,000 square feet comprising phase one. Ed is paying competitive rents, receiving a moderate tenant allowance, and is signing a full-term personal guaranty. Ed is very wealthy, as he is a fourth-generation Charleston native, from a family who earned all of its wealth in the shipping and transportation business. Landlord is a regional developer which is well funded, using equity and debt to construct the shopping center (the debt is from a well-known traditional, regimented lender based in San Francisco, California).

Ed has completed LOI negotiations and has presented the WHAT lease rider to his potential landlord for review and incorporation into the Lease.

Questions for Fact Pattern Two:

1. How should the developer approach Ed regarding the WHAT rider? Are there any terms of the WHAT rider which the developer to which the developer can easily agree?

2. You have been asked to become the new outside counsel for WHAT. How would you modify the lease rider? Why?

EXHIBIT R

WINNING EXERCISE SYSTEMS, LLC'S
REQUIRED FRANCHISOR LEASE ADDENDUM

RIDER AND SPECIAL STIPULATIONS

TO LEASE AGREEMENT DATED ____________________
BY AND BETWEEN

_______________________________________, AS "LANDLORD"
AND

____, AS "TENANT" FOR THE DEMISED PREMISES ("PREMISES") DESCRIBED THEREIN

This Rider and Special Provisions (the "**Rider**") and the provisions hereof are hereby incorporated into the body of the lease to which this Rider is attached (the "**Lease**"), and the provisions hereof shall be cumulative of those set forth in the Lease, but to the extent of any conflict between any provisions of this Rider and the provisions of the Lease, this Rider shall govern and control.

1. Consent to Collateral Assignment to Franchisor; Disclaimer. Landlord acknowledges that Tenant intends to operate an WINNING!® studio in the Premises, and that Tenant's rights to operate an WINNING!® studio and to use the trade and service marks set forth on Exhibit "A" to this Rider are solely pursuant to a franchise agreement dated __________, 20__ (the "**Franchise Agreement**") between Tenant and Winning Exercise Systems, LLC (the "**Franchisor**"). Tenant's operations at the Premises are independently owned and operated. Landlord acknowledges that Tenant alone is responsible for all obligations under the Lease unless and until Franchisor or another franchisee expressly, and in writing, assumes such obligations and takes actual possession of the Premises. Notwithstanding any provisions of this Lease to the contrary, Landlord hereby consents, without payment of a fee and without the need for further Landlord consent, to (i) the collateral assignment of Tenant's interest in this Lease to Franchisor to secure Tenant's obligations to Franchisor under the Franchise Agreement, and/or (ii) Franchisor's (or any entity owned or controlled by, or under common control or ownership with, Franchisor) succeeding to Tenant's interest in the Lease by mutual agreement of Franchisor and Tenant, or as a result of Franchisor's exercise of rights remedies under such collateral assignment or as a result of Franchisor's termination of, or exercise of rights or remedies granted in or under, any other agreement between Franchisor and Tenant, and/or (iii) Tenant's, Franchisor's and/or any other franchisee of Franchisor's assignment of the Lease to another franchisee of Franchisor with whom Franchisor has executed its then-standard franchise agreement, Landlord, Tenant and Franchisor agree and acknowledge that simultaneously with such assignment pursuant to the immediately preceding sentence, Franchisor shall be released from all liability under the Lease or otherwise accruing after the date of such assignment (in the event Franchisor is acting as the assignor under such assignment), but neither Tenant nor any other franchisee shall be afforded such release in the event Tenant/such franchisee is the assignor unless otherwise agreed by Landlord. Landlord further agrees that all unexercised renewal or extension rights and other rights stated to be personal to Tenant shall not be terminated in the event of any assignment referenced herein, but shall inure to the benefit of the applicable assignee.

2. Notice and Cure Rights to Franchisor. Prior to exercising any remedies hereunder (except in the event of imminent danger to the Premises), Landlord shall give Franchisor written notice of any default by Tenant, and commencing upon receipt thereof by Franchisor, Franchisor shall have five (5) additional days to the established cure period as is given to Tenant under the Lease for such default, provided that in no event shall Franchisor have a cure period of less than five (5) days after Franchisor's receipt of such notice. Landlord agrees to accept cure tendered by Franchisor as if the same was tendered by Tenant, but Franchisor has no obligation to cure such default. The initial address for notices to Franchisor is as follows:

   Winning Exercise Systems, LLC
   5055 Santa Monica Boulevard
   Hollywood, California 90038
   Attention: Legal Department
   legal@iamwinning.com

3. Franchisor's Right to Enter. Landlord acknowledges that, under the Franchise Agreement, Franchisor or its appointee has the right to assume the management and operation of the Tenant's business, on Tenant's behalf, under certain circumstances (to-wit: Tenant's abandonment, Tenant's failure to timely cure its default of the Franchise Agreement, and while Franchisor evaluates its right to purchase the WINNING!® studio). Landlord agrees that Franchisor or its appointee may enter upon the Premises for purposes of assuming the management and operation of WINNING!® studio as provided in the Franchise Agreement and, if it chooses to do so, it will do so in the name of the Tenant and without assuming any direct liability under the Lease unless Franchisor exercises such rights to assume the Lease as set forth in Section 1 of this Rider. Further, upon the expiration or earlier termination of this Lease or the Franchise Agreement, Franchisor or its designee may enter upon the Premises for the purpose of removing all signs and other material bearing the WINNING!® Trademarks or other commercial symbols of Franchisor.

4. Third Party Beneficiary. For so long as Franchisor holds a collateral assignment of the Lease, Franchisor is a third party beneficiary of the Lease, including, without limitation, this Rider, and as a result thereof, shall have all rights (but not the obligation) to enforce the same.

5. Amendments. Tenant agrees that the Lease may not be terminated, modified or amended without Franchisor's prior written consent, nor shall Landlord accept surrender of the Premises without Franchisor's prior written consent. Tenant agrees to promptly provide Franchisor with copies of all proposed modifications or amendments and true and correct copies of the signed modifications and amendments.

6. Default Under Franchise Agreement. Any default under the Lease which is not cured by Tenant within any applicable cure period also constitutes grounds for termination of the Franchise Agreement.

7. Remaining Provisions Unaffected. Those parts of the Lease that are not expressly modified by this Rider remain in full force and effect.

8. Counterparts. This Rider may be executed in one or more counterparts, each of which shall cumulatively constitute an original. PDF/Faxed signatures of this Rider shall constitute originals of the same.

AGREED and executed and delivered under seal by the parties hereto as of the day and year of the Lease.

LANDLORD:	**TENANT**:
______________________________	______________________________
Address:______________________	Address:______________________
______________________________	______________________________
Phone;_______________________	Phone:_______________________
By:___________________________	By:___________________________
Name:________________________	Name:________________________
Title:_________________________	Title:_________________________
Date:_________________________	Date: _________________________

Friday, October 26, 2018
10:30 – 11:45 AM

Peer to Peer 10

A Sneaky Peek and a Little Fib: Nothing Wrong with that—Right?

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DESCRIPTION OF SESSION

You've seen what you shouldn't see—now what?

Something about your client's story doesn't seem quite right—do you check it out?

The veracity of your client's sworn testimony is challenged by other credible sources—is it time to "come clean"?

FACT PATTERN 1

You are the chair of your state bar's professional ethics committee. Your client is the developer and owner of a major shopping center in Brevard County, Florida. Following development and opening of the center, a neighboring property owner claims to own a portion of the driveway constituting a major entrance to the center; it flows off of a state highway. The neighbor commences litigation seeking to quiet title. You are called upon to defend title to the entranceway. At the deposition of one of plaintiff's principal partners, you learn that in a related case pending in Indian River County, the plaintiff has presented evidence and made arguments that pertain directly to the issues in your case. You ask opposing counsel, Shark Demaret, for the contents of the file in the Indian River County case. He responds that it may contain privileged information and is under seal and unavailable to you. But you know that certain aspects of any case file, such as the record of who filed what, and when, are not protected by seal. So, you go to the clerk of the Indian River County court where the other case is pending and request "the file." To your surprise, you are given the contents of the entire file. In fact, it is not sealed. You begin viewing the contents of the file, but after seeing about one-third of its contents, find an order directing that the file be sealed. You immediately stop and call your state's ethics hotline. You are told that if the file is not actually sealed, you are entitled to see its contents, even if it was intended to be sealed.

Demaret is outraged. He files an ethics complaint against you in the Indian River court. However, the judge rules that you did nothing improper by obtaining and beginning to review the file, and that if anyone did anything improper, it was the clerk of the court who failed to seal the file. Demaret then files a motion to disqualify you and your firm in the main, Brevard County, case. After hearing oral arguments, the judge in that case asks you (who is sitting outside of the bar) from the bench if you would agree not to disclose what you saw with anyone under any circumstances if he rules that you and your firm will not be disqualified.

QUESTIONS FOR FACT PATTERN 1:

1. Should you have sought the file from the Indian River court when you had been told it was under seal?

2. Was it appropriate to call the ethics hotline when your discovered the "sealing" order?

3. What were you permitted to do with the file in hand?

4. What should you have done?

5. What, if anything, did Demaret do wrong here?

6. How do you respond to the judge's query?

FACT PATTERN 2

Your client runs a successful children's store called "We Are Toys" in a major regional shopping center. As is typical, your client's lease provides for the payment of quarterly installments of percentage rental based upon sales during the previous quarter. "Returns, credit card fees, and telephone orders" are excluded from the definition of "Sales" when percentage rent is calculated. During the fourth quarter of 2017, due to the release of some exciting, popular new product, We Are Toys experienced heavy sales, but also an unusually high rate of returns, which were reflected in your client's statement to the developer/owner, EGUH REIT that owns the shopping center. As required by the lease, your client's quarterly sales report was given under oath. Alarmed by the unusually high rate of returns, the REIT, following an audit, brings an action against your client to recover additional percentage rent. Your client relies upon the high rate of returns to defend against the REIT's claim and asks you to prepare an affidavit by which the client will certify under oath that the returns claimed actually happened. You do so and submit that affidavit to the court, requesting immediate dismissal of the REIT's case. The judge refuses to dismiss the case and notes that she will hear a trial with live witnesses. Accordingly, you begin to prepare your case and engage in discussions with several store employees who you ask to verify the high rate of returns that your client claims. To your surprise, employees refuse to verify the high rate of returns. The employees deny that the claimed returns actually happened. It appears that the client may have lied to you and submitted an affidavit under oath certifying facts that, in fact, may be untrue.

QUESTIONS FOR FACT PATTERN 2:

1. What should you do?

2. Is the falsity protected by the attorney-client privilege?

3. What can you tell the court?

4. Will you be permitted to withdraw?

Friday, October 26, 2018
10:30 – 11:45 AM

Peer to Peer 11

Medical and Healthcare Facility Leasing Issues – Appreciating the Needs of the Parties

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Summary: Medical and health care related leases present unique challenges in the shopping center environment. Understanding why certain issues are important to each side will enable us to simplify the process and finalize the lease. This session will explore commonly encountered issues and will seek to present practical solutions that satisfy all parties.

Hypothetical No. 1:

An enclosed regional shopping mall was developed in the 1980s. The mall is anchored by three Department Stores, each of whom owns its own site and building. The Developer and the Department Stores are parties to a reciprocal easement agreement (REA) with the usual covenants, easements and conditions.

Department Store A is struggling to stay afloat. It has approached the Developer to ascertain its interest in acquiring its site and building which has 100,000 square feet of space. Developer has shown interest in acquiring the same and is ready to send a letter of intent to a group of physicians who has affiliation with the local downtown University Hospital. The physicians intend to form a limited liability company and operate a 100,000 square foot women's health facility. Both the Developer and the physicians group believe they can operate from the 100,000 square foot building but there is internal talk among the physicians that the current building may not be large enough to accommodate expansion needs and they may want to add to the footprint of the building.

Questions:

(1) What issues will the Developer likely encounter when it reviews the REA and what can be done to address these issues?
(2) What issues will the Developer likely encounter with the municipality and other small store tenants of the mall, and what can/should the Developer do to overcome these issues?
(3) What critical issues will the Developer and the physician group need to address during the letter of intent stage, and during the course of lease negotiations?

Hypothetical 2**:**

Tenant is currently operating a 2,500/sf medical clinic in a retail center under a lease that expires in 18 months. The clinic is a top performer for Tenant, but the current location is bursting at the seams, and Tenant needs more space—ideally a 4,500/sf clinic to accommodate its business needs. Tenant has an option to extend the term but must give Landlord at least 9 months' prior written notice. The current landlord does not have any space in the center to accommodate either an expansion or relocation. Tenant's current lease provides for 150% holdover rent for the first three months, and if the delay is longer, Tenant is exposed to damages caused by the holdover, including consequential damages.

Tenant has identified a site in the immediate market area which is perfect for the construction of a new stand-alone clinic. This site is owned by a developer with whom Tenant has worked with in the past. (For purposes of this hypothetical, the site is pad ready, and the proposed use, building height, size, materials, parking, etc., all meet code.) Tenant requires that the new location be open by the time Tenant must vacate its current location. Tenant does not want to be in a situation where it has no presence in the market, even for a short period of time, because Tenant has staff that it needs to relocate and any disruption in employment could lead to the loss of critical employees. Tenant's main competitor is also looking for space in the market, and it is rumored to be looking at Tenant's current location.

Tenant has almost finalized a lease with the landlord ("Landlord") regarding the new site, but the parties are stuck on a number of issues. Counsel for Landlord and Tenant must resolve the following issues.

Construction Process: Tenant insists that all of its leases contain a clause that provides that the lease is contingent upon Tenant receiving all governmental approvals necessary to build out its premises and to operate for business as a medical clinic.

Tenant wants Landlord to be liable for hefty rent penalties if the premises are not timely delivered. Landlord sees the time period as tight. Landlord is hopeful that the approvals are achievable in 6 months, but there is a degree of uncertainty. Landlord must deliver the Premises to Tenant at least 3 months prior to Tenant closing its current location to allow Tenant time to build-out the new clinic. Tenant has expressed that it cannot be out of business in the market.

Environmental: The site is located on a corner, and there are three gas stations on the other three corners. The site has a "No Further Remediation Letter" from 1998, however, the Phase I environmental report recently commissioned by Landlord indicates that there is a recent LUST incident on file with the state EPA and that the groundwater flow runs toward the site. The Phase I report recommends further testing to determine whether the site to be developed has been adversely impacted. To date, Landlord has not commissioned any further testing.

Pass-Thru Expenses: Landlord desires an absolute NNN lease. Tenant is sensitive to the fact that CAM costs can skyrocket and wants to impose controls to prevent CAM charges from getting out of control.

Rent Commencement: Tenant proposes that its obligation to pay rent shall commence ninety (90) days after the later of: (a) the date Landlord delivers possession of the Premises to Tenant, or (b) the date Tenant obtains it building permits. Landlord wants the rent start date to occur as soon as possible.

Tenant and Landlord must reach agreement on the following points:

(1) How might counsel approach the construction process in a manner which addresses the concerns of both parties? If the Landlord is unable to deliver the premises to Tenant at least 3 months prior to the expiration of Tenant's current lease, what remedies should be available to Tenant? What if the delay is 6 months and now Tenant is faced with consequential damages in its current lease?

(2) With respect to the environmental issues raised, what steps should be taken regarding the site, and how might the parties address them in the lease?

(3) How might the parties address their respective concerns in terms of CAM recovery and payment on the part of Tenant?

(4) How should the Rent Commencement Date be structured? How can both parties feel they won (or at least didn't lose)?