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3:30 PM – 4:30 PM

General Session 2

Menus, Venues and Screens: The Impact of Restaurants and Entertainment Uses in Shopping Centers Today

Presented to

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The inclusion of restaurants and entertainment venues (including movie theatres, comedy clubs, family entertainment centers, and sports and music venues) has increased significantly over the last several years. This general session will discuss the impact of these uses on shopping centers with a focus on three major themes:

I. Evolving Concepts

II. Risk Factors for Landlords and Tenants

III. Exit Strategies and Repurposing of Space

I. **EVOLVING CONCEPTS IN RESTAURANTS, ENTERTAINMENT VENUES, AND MOVIE THEATERS**

A. *The Changing Role of Restaurants in Shopping Centers*

Restaurants are increasingly embracing experiential dining, featuring chef-driven menus, immersive themes, and layouts that appeal to group dining and social media users. The restaurant industry has seen a shift towards fast-casual concepts with simpler menus that emphasize speed and hybrid models such as "eatertainment" hybrids, exemplified by venues like Punch Bowl Social and Dave & Buster's. In response to evolving preferences in the post-COVID environment, outdoor and flexible-format dining options have become more common. Additionally, there is a growing trend toward smaller prototypes, which presents both opportunities and challenges when it comes to space utilization in multi-tenant retail centers.

B. *New Entertainment Models in Retail Spaces*

Retail environments are integrating new entertainment formats, including family entertainment centers with attractions like mini golf, trampolines, go-karts, arcades, esports arenas (i.e., competitive video gaming), and immersive virtual reality experiences. In addition, shopping centers are incorporating athletic facilities, as entertainment (such as pickle ball facilities) into the tenant mix. Retail centers are also incorporating live performance spaces and flexible venues designed to host a variety of events. Theaters, in particular, are being reimagined as multi-functional spaces capable of accommodating corporate events, esports competitions, and streaming events.

C. *Impact of Streaming and Consumer Behavior on Movie Theaters*

The movie theater industry is experiencing consolidation and downsizing, largely driven by shifts in consumer behavior and the rise of streaming platforms. In response, theaters are emphasizing premium experiences, such as recliner seating, dine-in services, and alcohol availability. Lease agreements for these venues are increasingly tied to performance metrics, including attendance rates.

D. *Legal Drafting Considerations*

With these evolving uses of restaurant and entertainment spaces, lease drafting must balance flexibility and exclusivity in use and exclusive clauses, particularly with respect to scope and remedies. For example, if a tenant requires the "permitted use" to be broad to allow for flexibility and evolving concepts, then the landlord will likely require that the exclusive use protection be for a subset of the permitted uses. Further, in these scenarios it will be important to determine appropriate remedies for exclusive use violations; smaller, chef-driven concepts may require more protections to ensure that they can thrive in an increasingly competitive environment. In response to exclusive use violations, Tenants will look for remedies such as rent abatement or payment of a percentage of gross sales in lieu of the contractual rent. However, Landlord's will seek to have such remedies sunset after a period of time and ensure carve-outs for rogue tenant.

Landlords will also need to consider updating the typical/standard prohibited use clauses found in leases and tenants will need to open minded in reviewing such changes. For example, older prohibited use clauses often prohibit arcade games or educational/training facilities. However, they do not address current gaming uses or alternative theatre uses for corporate "training or inspirational" events.

Co-tenancy clauses will also require special consideration for entertainment and anchor tenants. With respect to new leases, landlords need the flexibility to find appropriate replacement tenants when existing anchors fail—particularly in the current environment where traditional big box retailers are struggling to adapt to the evolving retail trends. Not only do landlords need the ability to carve up larger spaces into multiple spaces to address, among other things, changing prototypes, but also landlords will need to include a broader list of acceptable replacement tenants. On the other hand, with respect to existing co-tenancy provisions, landlords are often in an untenable position because existing leases did not contemplate new, evolving uses and do not permit the same to be considered as suitable replacement tenants. Conversely, entertainment and restaurant tenants need thriving consumer environments that draw attract customers and guests, so in the absence of abstract sales tests these tenants may require bright-line co-tenancy conditions (i.e., minimum operating hours operating square footage) as the obligation to pay full rent.

Zoning, licensing and prohibited use issues have become more prevalent for non-traditional restaurant and entertainment uses. Landlords and tenants will need to do their research into existing documents (including title documents) and local law and regulations to determine whether some of the non-traditional are permitted or if waivers and consents will be required.

Force majeure and impossibility clauses have also gained importance—addressing scenarios where product shortages or lack of new content affect operations, and analyzing what conditions should be considered foreseeable or truly impossible.

II. **RISK TO LANDLORDS AND TENANTS IN RESTAURANT AND ENTERTAINMENT LEASES**

A. *Operational, Business and Construction Risks*

Restaurant and entertainment concepts tend to be volatile, with particularly high failure rates during the first three years. The permitting process can be lengthy and construction costs significant, which raises questions about whether tenant or landlord should manage the build-out, each with its pros and cons. Smaller, less capitalized tenants may require high tenant improvement allowances in order to offset construction costs, however, this will likely result in higher rental charges. Alternatively, a Tenant may desire to streamline construction by allowing the Landlord to perform certain work on behalf of Tenant's (such as delivery of utilities and construction of parking areas). As second-generation spaces become more and more available, lease-up in "as-is" condition also carries the risk of latent defects and a requirement to remediate hazardous materials.

B. *Legal and Financial Risks*

Key legal and financial concerns include the structure of rent payments, with percentage rent creating different exposures than fixed rent. Guarantees, security deposits, and letters of credit are common tools, but what is considered standard continues to evolve. Landlords may face liability for issues related to crowd safety, noise, nuisance complaints, and alcohol-related incidents.

C. *Regulatory Compliance and Public Safety*

Operators must navigate complex regulatory requirements including ADA compliance, building and fire codes, alcohol licensing, and health inspections. Entertainment venues must also develop event safety protocols. Post-COVID expectations have introduced new standards such as improved ventilation systems, contactless

technologies, and appropriate physical spacing. In some cases, tariffs may also impact business operations and construction.

D. *Legal Drafting Considerations- Risk-Shifting Strategies*:

It is essential to address risk allocation early in the lease negotiation process, especially for experiential or complex concepts. Lease clauses should be tailored with specific indemnity and insurance provisions suited to higher-risk uses. Landlords might require larger security deposits and letters of credit (which are better protected from bankruptcy) to offer protection against failed concepts and provide landlord's with the ability to repurpose the space (as further described below). Clauses ensuring compliance with laws, rules and regulations may need to be modified to account for additional risks and may include enhanced penalties for violations which disrupt the remainder the retail center.

Further, from a landlord perspective, the ability to require a tenant to modify its operations to reduce or altogether eliminate disruptions to other tenants is critical, especially in light of the new evolving uses which create nuisances that may be unknown at the onset. Conversely, Tenants will always strive to establish clear operational restrictions so that they can maximize the use of their spaces within reason without the fear of being placed in default due to perceived disruptions by co-tenants.

Latent defect clauses should be considered carefully. Tenants leasing second generation space, such as after a new restaurant concept has vacated or an entertainment facility has ceased to operate, may be willing to lease the space as-is and take on the construction risk, but what about the unknowns. A latent defect provision can help protect the tenant that discovers grease traps that are not working, post-tension slabs, and load bearing floor slab issues. However, Landlord's may look to shift the risk of inadequate utilities or the presence of hazardous materials requiring remediation to the Tenant by granting Tenants time to perform inspections and due diligence for a limited time before losing all rights to terminate the Lease. The determination of who can and should bear these risks is critical in each lease negotiation, but may also determine how the broader shopping center is developed.

As these uses evolved, the work letters become more critical and may require specific provisions to address acoustic renovations, including adequate sound-proofing and vibration mitigation.

Continuous operation clauses must strike a balance between ensuring occupancy and allowing for flexibility in evolving concepts and consumer trends.

Exit clauses may be tied to licensing outcomes, financial performance, or occupancy levels. Negotiating and drafting these kinds of provisions will require a unique understanding of both landlord and tenant goals in order to provide flexibility and protection at the same time. These provisions need to be drafted keeping in mind which party has paid for initial improvements, recapturing such costs and offsetting the cost of re-tenanting and remodeling tenant specific improvements.

III. **LEASE EXIT STRATEGIES AND REPURPOSING OF VACATED SPACES**

A. *Common Lease Exit Scenarios*

Exit strategies commonly include natural lease expiration, early termination rights, and landlord recapture provisions, such as when a tenant "goes dark" or seeks to assign its lease. In addition, bankruptcy can lead to lease rejection under Section 365 of the Bankruptcy Code. Some leases also include event-triggered termination rights based on gross sales performance or co-tenancy failures. Ultimately, even if a Tenant has a termination right, they must balance potential cost savings arising from exiting the lease against loss of sales, the cost to wind-down operations, brand damage associated with dark boxes, and relocation costs. However, if a Landlord has the right to kick-out a Tenant, they must weight recapture costs against the cost to relet and up-fit the space for new tenants.

B. *Consequences and Challenges Post-Vacancy*

Vacated spaces—especially those with commercial kitchens, theaters, or unique features like foam pits, trampolines, or stadium seating—can be particularly difficult to repurpose. These dark spaces may negatively impact neighboring tenants and reduce the overall vitality of the shopping center. Additionally, the departure of a large or anchor tenant can trigger a redistribution of CAM (common area maintenance) fees and tax burdens.

C. *Repurposing and Redevelopment Opportunities*

Vacated restaurant and entertainment spaces offer opportunities for conversion into uses such as medical retail ("medtail"), co-working spaces, fitness and wellness centers, tech showrooms, and incubators. These areas may also be used for seasonal pop-ups or short- term flex concepts. Broaching these conversions and navigating these negotiations will be fraught with significant challenges, including retrofitting the structure, addressing zoning, obtaining waivers and consent from other tenants, occupant and neighbors. For instance, the proposed redevelopment—though consistent with prevailing retail trends—may disrupt customary business operations for existing tenants both in the short term and the long-term, create new or unanticipated CAM costs inconsistent with the original economics of the lease, and invite competing uses that (although not expressly prohibited) alter the nature of the shopping center. However, landlords often see the benefit outweigh the challenges when it comes to re-tenanting with scalable, lower-CAPEX concepts, or introducing features like expanded drive-thru facilities increasing traffic in the retail center.

D. *Legal Drafting Considerations*

Leases should include clearly defined surrender conditions and restoration obligations. Spaces for entertainment and "eatertainment" uses may be highly specific to the use. Understanding the nature of the tenant improvements, will result in a better and more realistic surrender provision upon the natural expiration of the term or in the event that a tenant vacates the space as a result of a special termination right (i.e., gross sales termination, go dark recapture). Determining which party will bear the costs and responsibility of returning a space to a shell condition that can be repurposed can have an important economic impact on the parties. Consider the cost of bringing stadium seating to grade level, filling in foam pits with concrete, removing bowing lanes and related equipment, to name a few issues.

Drafting lease clauses in a way that provides landlords the flexibility to adjust prorata shares of CAM, taxes and insurance in a manner that does not adversely impact existing tenants is increasingly important as entertainment centers become the new "anchor tenants" and the traditional movie theatre anchor tenants disappear or evolve. Smaller national and regional tenants who object to such provisions will create challenges for landlords who will otherwise be unable to adequately recover operational costs if they are prevented from making appropriate adjustments.

Assignment provisions should balance tenant flexibility with landlord rights to protect the tenant mix. This balance can often be achieved by providing broad assignment rights for alterative uses that restrict tenants only from violating then-existing restrictions and prohibitions.

As landlords rethink shopping center uses and redevelopment opportunities, it will become increasingly important to add provisions into leases that allow for such redevelopment. Preemptively permitting the redevelopment in new leases will serve landlord's well. For example, carving out a future pad site or double-lane drive throughs, will make it easier to attached tenants for those spaces and eliminate the need to obtain waiver and consents from multiple tenants in the future. However, restaurant and entertainment tenants who are making significant capital investments in centers may desire some control over the future redevelopment of the shopping center in order to protect operations and preserve their preferred operating environment.

SAMPLE PROVISIONS

Permitted Use. *Tenant shall use the Premises solely for the operation of a full-service experiential restaurant with integrated entertainment elements (e.g., arcade games, virtual sports). Landlord agrees not to lease any other space within the Shopping Center for use as an experiential restaurant combining similar entertainment features, for a period of five (5) years from the Commencement Date*.

GLA*" means the number of gross leasable square feet of enclosed (i.e., within a building) floor area within the various leasable premises of the Shopping Center (intended for the exclusive use by a tenant and its customers), whether or not actually leased or occupied. GLA shall not include: (i) penthouses or other areas used for common mechanical, electrical, telephone or other operating equipment serving in common multiple tenants, (ii) outside selling areas which are not heated or air conditioned, (iii) loading docks and truck ramps which are not enclosed, (iv) management offices of the Shopping Center, (v) community rooms, if any, and public restrooms, (vi) residential space, (vii) any building interior Common Areas (e.g., corridors, bathrooms, and common utility rooms), or (viii) the GLA of buildings not owned by Landlord. GLA shall be measured from the exterior face of the exterior walls and from the centerline of interior or party walls. No deduction from GLA shall be made for columns, stairs, or any interior construction or equipment. All rents and charges herein calculated on a "**per square foot**" of the Premises basis shall be calculated using the GLA of the Premises. From time to time Landlord may adjust the GLA of the Shopping Center, at a given time or for a given period of time, due to additions or reductions to the Shopping Center, as may be permitted by this Lease. From time to time Landlord may, subject to Tenant's Proportionate Share GLA Floor Restriction (as hereinafter defined), adjust the GLA of the Shopping Center, at a given time or for a given period of time, due to additions or reductions to the Shopping Center, as may be permitted by this Lease. At Landlord's sole discretion, Landlord may, subject to Tenant's Proportionate Share GLA Floor Restriction, render certain otherwise leasable floor areas in the Shopping Center as "dark space" and elect not to lease such areas, in which case the GLA for the Shopping Center will decrease proportionately by such dark space. Notwithstanding anything to the contrary in this Lease, for purposes of Tenant's Proportionate Share of the Common Area Maintenance Costs, Real Estate Taxes and Landlord's insurance, the GLA of the Shopping Center (the denominator in the fraction used to compute Tenants Proportionate Share) shall not be less than 400,000 square feet ("**Tenant's Proportionate Share GLA Floor Restriction**"). All such adjustments shall be reflected in an amendment to the Lease. As of the Effective Date, the GLA of the Shopping Center is 437,304 square feet.*

Future Development*: Landlord shall have the right to develop a pad site, reconfigure the existing pad site and construct improvements in the building area shown on the Site Plan as the "**Future Pad Site**" (future construction work being hereinafter referred to as the "**Future Pad Site Construction Work**"). The Future Pad Site Construction Work shall be completed by Landlord, at Landlord's sole cost and expense, in a diligent and timely manner. The Future Pad Site Construction Work shall be completed at no cost or expense to Tenant. In connection with the Future Pad Site Construction Work Landlord agrees: (i) to erect construction barriers during the Future Pad Site Construction Work as necessary; (ii) that Landlord will not demolish or close (other than temporarily) any existing entrance to the Shopping Center and the Future Pad Site Construction Work shall not unreasonably interfere with or impede customer ingress to or egress from the Premises and/or the Shopping Center, and Landlord shall take all reasonable steps to eliminate any such interference, provided however that the Future Pad Site Construction Work may result in temporary closure of portions of the Future Pad Site, including the drive aisle located directly in front of the building being constructed on the Future Pad Site; (iii) to take all necessary steps to prevent any construction vehicles or equipment from being located in any portion of the Common Areas other than the Common Areas within the immediate vicinity of the Future Pad Site; (iv) to ensure that substantially all portions of the Common*

Areas other than those within the Future Pad Site shall remain open and available for Tenant's customer and employee parking at all times during the Future Pad Site Construction Work when Tenant is open to the public, and that the same shall be maintained in a clean and safe manner and shall be swept as often as necessary to ensure that no unreasonable amounts of debris or other materials resulting from the Future Pad Site Construction Work accumulates within the Common Areas; (v) that the Future Pad Site Construction Work shall be conducted in a safe, good and workmanlike manner in accordance with industry standards, and in accordance with all applicable laws, ordinances, codes, regulations and insurance requirements; and (vi) that Landlord's performance of the Future Pad Site Construction Work shall not disrupt any connections or otherwise interrupt any utility service (including, without limitation, water and sewer connections) to the Premises. Any building constructed on the Future Pad Site shall not be more than one-story tall and not more than twenty-seven (27) feet in height measured from the finished floor elevation of Tenant's Premises. Notwithstanding anything to the contrary in this Lease, under no circumstance shall Landlord perform any alterations, modifications, or improvements to the Shopping Center that will permanently result in less than one hundred thirty-six (136) parking spaces being available in the area within 175 feet of the Premises.



Surrender. *Tenant shall vacate the Premises not later than 11:59 p.m. on the last day of the Term. At the expiration or earlier termination of the Term, Tenant shall quit and surrender the Premises broom-clean, free of debris and litter, and in good condition, reasonable wear and tear excepted. Tenant shall remove all or any items of personal property, including but not limited to Tenant's trampolines and trampoline mounting equipment ("**Removable Personal Property**") prior to or at the expiration or earlier termination of this Lease. Tenant shall, at Tenant's sole cost and expense, immediately repair any damage occasioned to the Premises and/or the Shopping Center by reason of the removal of any Removable Personal Property, including but not limited to the damage caused by Tenant's trampolines and trampoline mounting equipment and Tenant shall restore the floors and any other elements of the Premises affected by the installation of the trampolines to the condition in which they were delivered to Tenant on the Delivery Date, ordinary wear and tear excepted. All improvements made to the Premises by Tenant, including but not limited to, ceilings, rooms, light fixtures, wall coverings, floor coverings and partitions and other items comprising Tenant's Work, but excluding Removable Personal Property shall become, at Landlord's sole discretion, the property of Landlord upon the expiration or earlier termination of this Lease. Alternatively, Landlord may require Tenant to remove, at Tenant's sole cost and expense, any and all improvements, trade fixtures and personal property, including, but not limited to, ceilings, rooms, light fixtures, wall coverings, floor coverings and partitions and other items comprising Tenant's Work, to repair any damage to the Premises or to any part of the Shopping Center caused by such removal, and to restore the Premises to the condition it was in on the Delivery Date. All fixtures, furniture, equipment and other personal property that remain within the Premises following the expiration or earlier termination of this Lease may be disposed of by Landlord in such manner as Landlord may determine in the exercise of its sole and absolute discretion, and Landlord shall have no liability whatsoever for any damage or loss which may be caused with respect thereto. Tenant shall be liable to Landlord for any moving and storage costs or expenses. If such items continue to remain within the Premises or otherwise within a separate storage area for a period of 10 days following written notice to Tenant given in accordance with this Lease, then, at Landlord's option, all or only such portions of such fixtures, furniture, equipment or other personal property as Landlord may select, shall be deemed abandoned by Tenant and shall become the property of Landlord.*

Noise Mitigation. *Notwithstanding the foregoing, Landlord acknowledges and agrees that Tenant's Permitted Use will involve music, cheering and other noises customary in an entertainment use. Tenant shall keep the front doors closed to prevent sound from leaving the Premises. However, provided that the entrance doors to the Premises are closed, no noise from Tenant's Permitted Use shall be audible from outside the Premises or within adjacent Tenant spaces. In the event of: (i) the emission of audible noise caused by Tenant's Permitted Use outside the Premises or said noise disrupting tenants in the adjacent tenant spaces despite the doors remaining closed and proper installation and maintenance of the agreed upon sound insulation, (ii) Landlord receives legitimate complaints from any adjacent tenant or other occupants of the Shopping Center about the noise level, or (iii) such noise is in excess of 65 decibels for more than 15 consecutive minutes at any time during operating hours, Tenant shall immediately reduce the noise level and shall work in good faith with Landlord to resolve the noise issues. Failure to immediately reduce the noise level while Landlord and Tenant are working in good faith to resolve the noise issues or failure to implement the reasonable solutions proposed by Landlord to reduce the noise level outside the Premises or eliminate the disruption in in any adjacent tenant's space shall result in a default under this Lease.*

Latent Defects. Subject to the terms and conditions set forth herein, Lessor shall warrant the Building and the Leased Property against any Latent Defects (as defined below) first discovered by Lessee or its agents, employees, contractors or vendors, within the first one hundred eighty (180) days following the Delivery Date (the "***Warranty Period***") and provided Lessor has received written notice of such Latent Defect within the Warranty Period. As used

in this Section 6, a "***Latent Defect***" shall mean a hidden or concealed defect which could not be discovered by reasonable and customary observation and inspection. The parties acknowledge and agree that Lessee shall have the opportunity during the Inspection Period to inspect and evaluate the following with respect to the Leased Property and Building (without limitation):

1. parking lot paving, cracking, potholes, stripping;
2. light poles;
3. landscaping, including irrigation;
4. fire hydrants;
5. roof;
6. interior walls, including inspection for water damage and mold;
7. HVAC units;
8. electrical panels;
9. plumbing fixtures and service, including size of service;
10. scope interior and exterior sanitary line;
11. grease trap;
12. hot water tank;
13. Kitchen Fire suppression (Halon);
14. fire alarm system;
15. windows and doors; and
16. floor, including determining moisture levels in the floor.

Notwithstanding anything to the contrary contained in this Lease, in no event shall a Latent Defect include any defect, issue or repair needed to any of the foregoing items unless such defect could not have been discovered by reasonable and customary observation and inspection. If a defect, issue or repair of any of the foregoing items could have been discovered had Lessee performed the Preliminary Inspections (as defined in Section 47(A)(v) below), then the same shall not be categorized as or deemed a Latent Defect. If a defect, issue, or repair is needed with respect to the foregoing items, and such defect, issue, or repair could only have been discovered after the commencement of demolition, construction or operations in the Leased Property [and could not and would not have been discovered by the Preliminary Inspections](but in no event after the expiration of the Warranty Period), then provided Lessee notifies Lessor of the same within the Warranty Period, the same may be categorized as a Latent Defect.

If a Latent Defect is first discovered in the Leased Property during the Warranty Period then Lessee shall notify Lessor in writing of the same within ten (10) days following such discovery and in any event prior to the expiration of the Warranty Period ("***Latent Defect Notice***"). The Latent Defect Notice shall include a reasonably detailed estimate (the "***Estimate***") from Lessee's general contractor and/or architect (provided for purposes of this Section 6(L), such general contractor and/or architect must be reasonably acceptable to Lessor) of the reasonable cost to correct and/or otherwise repair such Latent Defect in accordance with applicable law (the "***Repair Work***") and the following terms and conditions shall apply:

(i) In the event the Estimate is less than $100,000.00 then Lessee shall perform the Remediation Work at Lessor's cost; provided, however if the actual cost of the Repair Work exceeds the cost of the Estimate then Lessor shall be responsible for such overage up to a total contribution of $100,000.00 and Lessee shall be responsible for the costs in excess of $100,000.00.

(ii) In the event the Estimate exceeds $100,000.00 then Lessee shall have the right to either (A) perform the Repair Work, in which event Lessor shall contribute to the cost of the Repair Work in an amount equal to $100,000.00, and Lessee shall be responsible for all costs of the Repair Work in excess of $100,000.00, or (B) terminate this Lease upon written notice to Lessor delivered within 30 days following Lessee's delivery of the Latent Defect Notice to Lessor. If Lessee elects to terminate this Lease pursuant to this Section 6(L), then within fifteen (15) days following Lessor's receipt of Lessee's termination notice, Lessor will be entitled to void Lessee's termination by sending Lessee a notice stating that Lessor agrees

to reimburse Lessee for the total cost of the Repair Work set forth in the Estimate, in which event Lessee shall perform the Repair Work at Lessor's cost; provided, however if the actual cost of the Repair Work exceeds the cost of the Estimate then Lessee shall be responsible for all such costs in excess of the amount of the Estimate. The total amount of Lessor's required contribution to the cost of the Repair Work as set forth herein, as applicable, is referred to as "***Lessor's Contribution***".

(iii) Lessor shall pay to Lessee Lessor's Contribution within thirty (30) days following the completion of such work and Lessor's receipt of (x) copies of lien waivers from Lessee's general contractor and any subcontractors providing labor or materials in excess of $5,000.00; and (y) a certified statement by Lessee of the total cost of the Repair Work and/or copies of paid invoices evidencing the total cost of the Repair Work.