The Flip Made Easy (or Easier)—Part 2

Preparing for Sale—The Seller's Concerns

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Since it is inevitable that a shopping center will be sold, the whole process will run more smoothly if the center's leases are drafted with that sale in mind. Part 1 of this article discussed the ways in which leases should consider buyer concerns. The conclusion, Part 2, addresses seller concerns.

The Leases Should Anticipate the Seller's Concerns

When a shopping center is sold, the seller does not want to continue to be liable to its tenants for the new owner's lease violations. For this reason, the lease should provide that when each successive owner of the center sells it, the seller is automatically released from all liability under the lease, and the tenant must automatically pay its rent to and perform its lease obligations in favor of the new owner.

Of course, a sophisticated tenant will add that after a sale, the tenant retains its right to make claims against the proceeds of the sale for defaults that occurred before the sale. If the estoppel certificates are sufficiently detailed and are obtained from all of the tenants, the landlord should know its post-sale liabilities at the time of the sale and be able to make arrangements for them.

The standard provision stating that the landlord's liability is limited to its equity interest in the premises is also helpful when the center is sold. When an owner sells the center, it no longer has an equity interest in the center, and it can assert that it is, therefore, no longer liable under the lease, or, at least, not liable beyond the proceeds that it received from the center.

Additional Ways to Facilitate a Sale

An owner can make a sale proceed more quickly and efficiently in other ways as well. Most buyers wish to review the sales figures of all of the tenants, not just the tenants that pay percentage rent. Landlords, therefore, may wish to include in their leases a requirement that the tenant provide the landlord with its monthly or annual sales figures either automatically or on request. Of course, a large national tenant will not want to provide its sales figures, but may be willing, upon receipt of a written request, to provide the landlord with its latest annual financial statement. If these figures are to be kept confidential, then the landlord should be sure that potential buyers, lenders, as well as their financial and legal consultants are permitted to view the sales figures, notwithstanding this confidentiality agreement.

A property owner also should be careful in structuring its agreements with the center's manager and its other service agreements for the center. A buyer is unlikely to want to continue using the present manager and other contractors, Therefore, each of these contracts should provide that it may be terminated on short notice by the owner, and that, at the owner's option, it will terminate automatically upon a sale.

Purchase agreements also frequently require that a seller provide a buyer with a great deal of documentation with respect to the center and its operator. A lack of documentation may lead to a demand for extensive representations and warranties by the seller. An owner should expect this request and be sure that the following documents are delivered to it when it acquires the property, are retained as this documentation is received during the term, and can be located and copied easily:

Each of the current leases, and all correspondence to and from the current tenants;

- All current permits and licenses with respect to the center and its tenant spaces;
- All correspondence from governmental authorities with respect to the center;
- All construction contracts, and the plans and specifications for the center (unless it is an old center), and
- All environmental reports, surveys, title policies and other documents that it obtained when it acquired the center or that it received later.

Conclusion

Having leases that anticipate a buyer's demands and that provide that the seller will be released upon the sale will make the sale proceed smoothly and with minimal risk for both the buyer and the seller. ■

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