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Tips for Navigating the Complex Web of Shopping Mall Real Estate Agreements

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Many of the 47,000 shopping malls in the United States are struggling to reimagine themselves for a variety of societal and economic reasons. Therefore, now more than ever, it is vital that a real estate lawyer understand the complex web of agreements that govern the operation of these properties to avoid costly and time-consuming litigation.

For example, a client owns a tract of land that it leased to a mall owner and anchor tenants to use for parking and access 25 years ago. Now the mall's lease term is ending. The client assumes it is in for a nice payday because its land has skyrocketed in value and, per the terms of the lease, the mall owner will now have to pay her rent based on current appraisals—over five times more! The mall is owned by a company with limited holdings and cannot afford the new rent. The mall owner retains a savvy lawyer, though, who comes up with a theory that a separate agreement—a perpetual easement—burdens the land regardless of the lease. The mall owner tells your client that he can continue to use the parking and access road after the lease expires without paying your client anything. You counter that the lease agreement between the mall owner and your client must contain controlling language and, besides, it can't be possible that the mall owner gets to use the land for free, right? Turns out it is not so simple.

While few new malls are being built, many mall properties assembled 25 to 40 years ago have long-term easements, operating agreements, and leases that may be reaching the end of their terms. Further, the retail industry, including the structure and role of the traditional shopping mall, has changed drastically. Consumers are now shopping online more and many traditional big box anchors who are the beneficiaries of these complex arrangements have either filed for bankruptcy or are closing many of their stores. In addition, the well-located large mall parking lots are being repurposed as residential or office tracts. This has led to significant shifts in the retail industry. A traditional shopping mall that loses one of its anchor department stores likely will not replace that store with another, similar, anchor tenant. Instead, a developer might choose to redesign the empty space into a mixed-use development. Successful malls are replacing old anchors with upscale restaurants, entertainment centers, and other new retail concepts. Unsuccessful malls are closing, and owners must find completely new uses for the property.

Unraveling the Complex Web

With so many of these agreements ending or becoming obsolete based on the repositioning of malls and dramatic changes in the industry creating the need for redevelopment, sales, or new property arrangements, it is important for the attorneys dealing with shopping mall properties to understand the complex, interconnected web of agreements that govern property rights in a shopping mall. This is true regardless of whether a client is a mall developer, tenant, or third-party landowner and whether she is looking to sell property, enter into a new arrangement, or redevelop existing space. It is imperative to have an accurate picture of exactly what rights a client has in a piece of mall property.

A mall property may be owned by numerous unrelated parties, such as the mall itself, anchors, and even third parties who own surrounding land used for parking or access roads. The anchor tenants, usually major department stores like Macy’s, Dillard’s, or Sears, might own some of the land for their stores or they might lease that land from a separate, third-party landowner, or that private landowner might own some of the surrounding property that the developer needs for parking lots or to connect the mall entrances to the public roadways.

The relationships between these parties are usually subject to leases, reciprocal easements, and other agreements conveying limited rights and excluding uses. Further complicating the relationships between these parties with potentially competing interests is the fact that thirty or forty years ago the real estate involved was worth a fraction of what it is today. As a result of the changing times, a contract that might have been equally beneficial to all of the parties decades ago is likely detrimental to at least one party’s best interest today.

How Can These Agreements Lead to a Dispute?

A variety of property agreements are necessary to ensure the mall can operate properly and customers have access to and across the entire mall. Consider the scenario described at the beginning of this article, which involves a regional mall that includes land owned by the mall developer, several anchor tenants, and multiple third parties. The lease agreements between the client, the mall owner and the mall tenants gave them rights to parts of the mall parking and the access roads and had an initial term of 25 years. The leases could be renewed, but only after the parties went through an appraisal process to determine the appropriate rent for subsequent terms. As part of this mall development, the property owners, anchor tenants, and mall developer also entered into a reciprocal easement agreement that granted perpetual reciprocal easement rights for the mall developer and anchor tenants to be able to cross over and park on each other’s property. Each of these parties also granted an easement in their leasehold and fee titles and the landlords for the leased property agreed to subject their fee titles to the easement should the leases end. The purpose of these provisions was to ensure that if one party terminated its lease with the third-party property owner, then that property owner would not be able to cut off access for the rest of the mall. For example, if the property owner ended its lease with a department store, it could not then refuse to allow the other anchors or the mall developer to cross over the property formerly leased by that department store.

Problems can arise between the client and mall developer in the above scenario when it is time to renew the mall developer's lease. If the value of the leased property has significantly appreciated from what it was when the initial lease was drafted and the resulting adjusted rent is four times higher, the mall owner may choose to avoid payment of rent by arguing it doesn't need to renew its lease because its easement rights are broad enough to make its leasehold rights unnecessary. In response, the property owner may threaten to cut off access and parking by the mall's patrons over the leased property. Ultimately, the parties may become embroiled in an expensive dispute.

How Can You Avoid These Disputes?

If a client is entering into agreements for a new mall development, then these problems are best avoided by taking the time to address the interrelation of the various documents in order to ensure they are consistent. For example, in the hypothetical above, the opportunity for a dispute could be reduced by expressly addressing the interplay between any independent lease agreement and easement documents.

Currently, because fewer malls are being developed and many redeveloped, the source of most disputes stem from existing agreements that are expiring or need to be revised to accommodate new uses. In these cases, counsel should undertake a comprehensive review of the agreements with the goal of understanding their interrelation and the potential for conflicts between the past, present, and future stakeholders.

A property owner seeking to revitalize a mall with reconfigured space and/or new experiential tenants must understand exactly what rights each relevant stakeholder has in relevant parcels, and how those rights can be lost or extended. For example, if the owner chooses to redevelop that old anchor store into a new multi-purpose space, are all the necessary easements and leases in place to ensure access to parking, roads, and the rest of the mall for their customers? This information is important to know before entering into any transaction or making any promises.

If an owner wants to sell the property, he must understand exactly what he owns. For example, if a third-party landowner has an expiring lease and no longer wants to be involved, what rights are available to be conveyed to a purchaser? Is the land subject to perpetual easements that will restrict what a potential buyer could do with it? The answers to these questions will affect the value of the land.

Whatever a client's specific needs, if he has land that is in any way involved with a shopping mall, it is important to know exactly what the terms of relevant agreements are and how that affects the client's property rights. With this information in hand, a real estate litigator can counsel her clients about their best course of action in any one of these situations.

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