

## **Mixed-Use Development Leases: Tailoring Provisions to Address Unique Legal and Ownership Structures**

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Today's faculty features:

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**Mixed-Use Leasing:**  
**Tailoring Provisions to Address Unique Legal**  
**and Ownership Structures**

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Pircher, Nichols & Meeks

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- I. **Negotiating and drafting leases for mixed-use projects can be challenging because a number of different variables are involved, some of them relating to unknowable future events**
  - A. Potential multiple phases.
  - B. Potential use changes; including change from retail only to mixed-use.
  - C. Potential entitlement risks.
  - D. Potential changes in density mix.
  - E. Potential separate ownerships of different parcels (often devoted to different uses).

## **II. Need for REA if separate ownerships (or even separate parcels, to plan for future separate ownerships)**

- A. A rose is a rose; other names for similar documents.
- B. Purpose of REAs and topics frequently included.
- C. If future conveyance is to an affiliate (for example, for estate planning reasons), it is tempting to avoid creating REA, but affiliate may later sell to a third party.

### **III. Exclusives and prohibited uses**

- A. Should the exclusive or other use restriction apply to entire project?
- B. Dealing with breach of exclusive or prohibited uses on parcel that has been conveyed
- C. Beware of imposing use restrictions on the project that could prohibit mixed uses

## **IV. Operating expenses and taxes pass throughs**

- A. Potential gap can occur upon conveyance when an REA allocates operating expenses to a parcel in a different manner than the lease or leases on that parcel
- B. Different types of tenants use different services and calculate their share of costs in different way
- C. Basis for allocating costs among different uses

## V. Co-tenancy rights

- A. What areas of project should be included in co-tenancy provision?
- B. If a tenant's co-tenancy rights are based on a percentage of tenants or (floor area) in a project being operated, what happens when a parcel is sold?

## **VI. Impact of use, design and similar restrictions in future REAs on existing tenants**

- A. Do restrictions in a future REA bind a tenant without its consent to the restrictions?
- B. Restrictions on Tenant Uses

## **VII. Drafting leases for a project that is subject to an existing REA**

- A. Enforcement issues: consider whether a tenant should:
  - 1. Have direct enforcement rights.
  - 2. Have the right to cause the landlord to (use commercially reasonable efforts to) enforce.
  
- B. Tenant's right to review underlying documents, including REAs.

## VIII. Air rights subdivisions and condominiums

- A. Should a tenant have the right to approve future imposition of a condominium regime? Approve the condominium documents themselves?
- B. From the developer's perspective, whether to utilize air rights subdivisions or condominiums is substantially impacted by state law, but there are a few generic considerations.
- C. Many real estate transactional or leasing attorneys are not conversant with condominium statutes.
- D. Tenants must be subject to the condo association rules and regulations.

## IX. Parking Issues

- A. Each category of tenants will have concerns that there is sufficient parking available for its use.
  - 1. Residential users will want exclusive parking; be sure retail leases don't preclude reserved or exclusive parking.
  - 2. Hotel users will want valet services; be sure retail leases don't preclude designation of parking areas for valet.
  - 3. Retail users (particularly anchors) are concerned about poaching by office users who might otherwise have to pay higher office parking rates.