
Retail and Shopping Center Acquisitions: Negotiating the Purchase and Sales Agreement, Conducting Legal Due Diligence

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Today's faculty features:

Corey J. Wilk, Director, **Goulston & Storrs**, Boston

Michel P. Williams, Director, **Senn Visciano Canges**, Denver

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**STRUCTURING RETAIL CENTER
PURCHASE AND SALES AGREEMENTS:
NEGOTIATING AND DOCUMENTING TRANSACTIONS,
CONDUCTING LEGAL DUE DILIGENCE**

Presented by Strafford Publications

Corey J. Wilk, Director
Goulston & Storrs PC
400 Atlantic Avenue
Boston, MA 02110

Michel P. Williams, Director
Senn Visciano Canges P.C.
1700 Lincoln St., Suite 4500
Denver, CO 80203

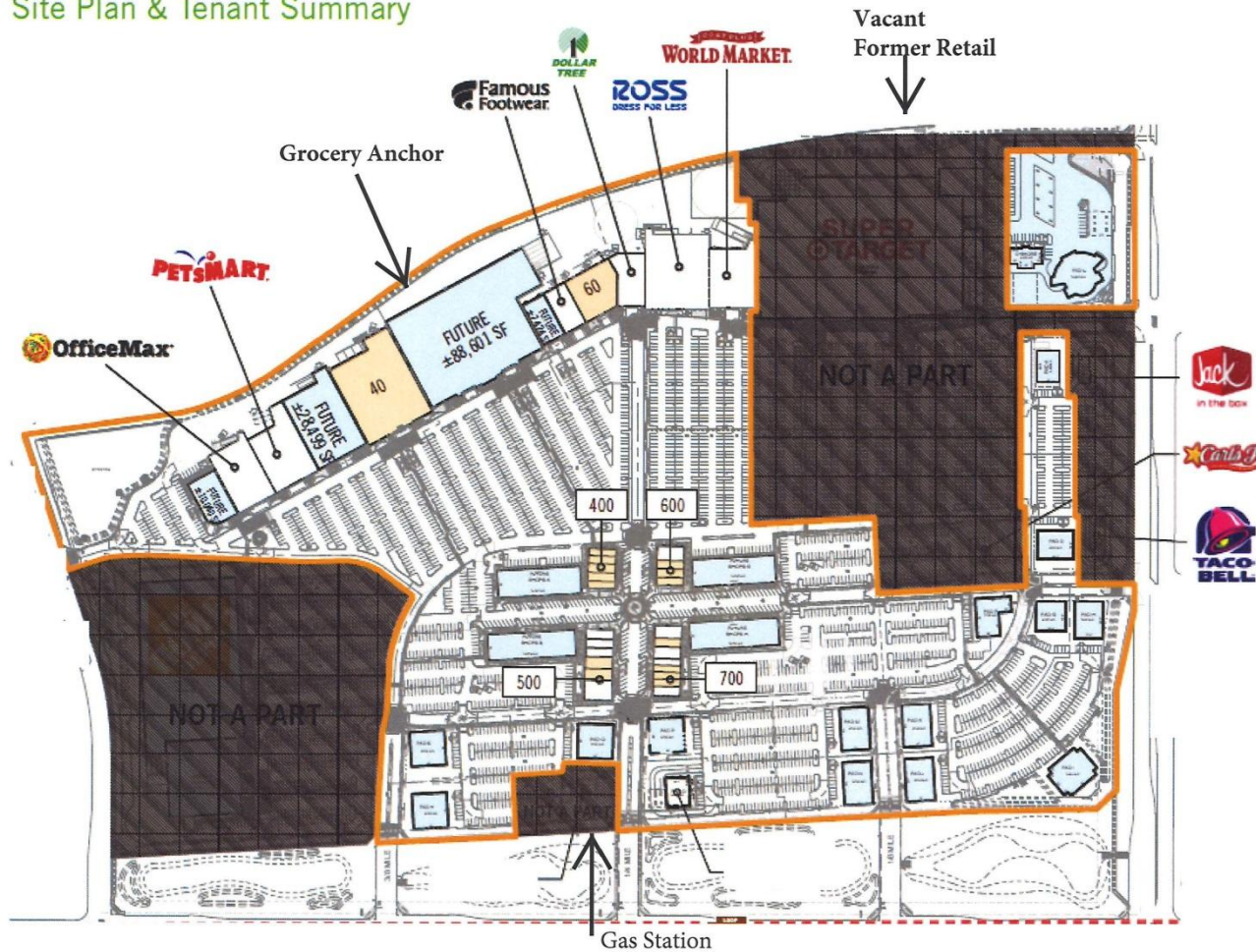
Current Market Trends for Retail/Shopping Center Sales

Seller's Market

- Pre-Load Listings:
 - Updated title, survey
 - Updated Phase I
 - Dropbox due diligence materials
- A final and best offer with PSA markups
- Quick due diligence and close
- Larger earnest money and increasing at end of due diligence period

Scenario

Site Plan & Tenant Summary



Regional Shopping Center

Tenant composition:

- Anchor organic national grocer – 50,000 rsf.
- 20-30 inline tenants including: national, regional and local tenants
- Several pad sites including FAR and one national coffee shop with drive through
- Gas station with 6 pumps and underground storage tanks
- Not part of sale, but within center are national big boxes on their own pad site

A Typical Deal

- Brokers negotiate the Letter of Intent (“LOI”)
- If possible, attorneys for both Buyer and Seller should participate during LOI phase to avoid issues in the Purchase and Sale Agreement (“PSA”)
- Once LOI is signed, typically Seller’s counsel generates the first draft of the PSA
- Issues to consider in the LOI and PSA process
 - Timing needs of clients
 - Timing needs of lenders (breakage fees and costs)
 - Realistic timing needs for due diligence (more to come).
- We will address various key topics from the seller and buyer’s prospective.

DUE DILIGENCE: RIGHTS, TIMING AND SCOPE OF REVIEW

- **Seller**

- Indemnification
- Insurance
- Specific list of due diligence deliverables
- Limited period for due diligence

- **Buyer**

- No Buyer liability for pre-existing conditions
- Seller to deliver all property-related information to Buyer prior to PSA execution
- Extension rights to due diligence period

DUE DILIGENCE: CONTINUED

- **Seller**

- No Phase II testing without consent
- Provide third-party reports to Seller
- Financial reports (copies and without representation as to content)

- **Buyer**

- Buyer right to conduct Phase I and Phase II environmental testing
- Seller to pay for copies of third-party reports
- Seller representations (more to come)

TITLE AND SURVEY

- **Seller**

- Select Title Company
- Buyer to pay for all endorsements
- Survey:
 - New ALTA/NSPS standards February 23, 2016 – issues updating prior surveys
 - Buyer's cost for any Table A Items

- **Buyer**

- Select Title Company
- Seller to pay title costs (if local custom)
- Title/Survey review period to commence upon receipt of updated title commitment and Survey
- Seller obligated to cure all encumbrances securing payment of money

CCR AND DECLARATION REVIEW

- **Seller**

- Concerns regarding Buyer contact and access
- Cross access – REA issues and concerns

- **Buyer**

- Estoppels
- Redevelopment issues (e.g., approvals)
- Cross parking – REA issues and concerns
- Prohibited uses

LEASE ABSTRACTING, CAM AND EXCLUSIVE USE CONDITIONS

- **Seller**

- Provide only source leases (not abstract or exclusive use abstracts)
- Record of production
- PDF of any Excel spreadsheet of CAM report and budget
- Buyer pay all transaction costs associated with new leases (date of contract)
- Buyer liability pre-close commission allowances
- Limit liability rent audit

- **Buyer**

- Seller may not enter, modify or terminate any Leases after Effective Date
- Seller may not enter, modify or terminate any Contracts after Effective Date
- Seller may not apply any Security Deposits absent Buyer consent
- Buyer to receive purchase price credit for all outstanding TI Allowances
- Seller post-closing liability for rent audits

DEALING WITH ANCHORS AND OTHER 800 POUND GORILLAS

- **Seller**

- Pre-Listing negotiated Estoppel, SNDA (incorporate in PSA)
- If condition of close right to extend close
- Smaller national tenant's issues – Estoppels, SNDAs, Timing
- Carve outs in Lease not assignable, review and advise Seller
- Exclusive use concerns

- **Buyer**

- Lender's form Estoppel and SNDA
- Conditions to close
- All tenants
- Exclusive use concerns
- Restrictive covenant issues

ESTOPPELS AND TENANT INTERVIEWS

- **Seller**

- Restrict to Lease form
- Percentage of Estoppels required (if below Seller Estoppels)
- Avoid lender form
- Recently acquired blackline of prior signed Estoppel
- Delivery to Tenant post-inspection
- Tenant interview with Seller's representative post-inspection

- **Buyer**

- Form of Estoppels – see Lender's requirements
- Required Estoppels / No Seller Estoppels
- Condition Precedent – provisions in Estoppels
- Buyer right to interview tenants

SELLER REPRESENTATIONS AND WARRANTIES

- **Seller**

- “AS IS”
- Limit representations:
 - Entity (authority)
 - Litigation
 - Encroachment (Seller’s knowledge)
 - Compliance (Seller’s knowledge)
 - Leases (Seller’s knowledge)
- Limitation of duration
- Cap on liability

- **Buyer**

- Made as of Effective Date and remade at Closing
- Expand representations:
 - Rent Roll / Tenant defaults
 - Violations of law
 - Environmental matters
- Survival / guaranty or holdback

CONDITIONS PRECEDENT

- **Seller**

- Delivery of funds – timing
- Estoppels/SNDAs
- Dry close

- **Buyer**

- Delivery of Title Policy a condition to Closing
- No notices of violations of law or leases
- All representations and warranties true, including underlying facts
- No adverse change in condition of Property

BUYER'S LENDER DEMAND FOR SNDA AND OTHER LENDER CONCERNS

- **Seller**

- Avoid SNDA as condition of close
- Financial contingency within due diligence period
- Filter contact with Buyer's lender
- Address Seller 1031 issues in PSA and effect extension on identified property

- **Buyer**

- Required SNDAs
- Financing contingency or Closing Date extension right

DEFAULTS AND REMEDIES

- **Seller**

- Specific performance of Contract or termination of agreement and return of earnest money
- If required, pay Buyer's due diligence costs with a cap

- **Buyer**

- Seller default / Buyer remedies to include specific performance and all other rights and remedies under law
- Seller default / Buyer remedies to include reimbursement of all transaction costs
- Buyer default limited to failure to close on Closing Date
- Seller's sole remedy is deposit
- No obligation to deliver Buyer reports unless reimbursed costs

POST-CLOSING ISSUES AND TRUE-UPS FOR TAXES AND OPERATING EXPENSES

- **Seller**

- Tender CAM over-expended to Buyer to true-up with Tenants
- Have accurate records for expenses for true-ups
- Delinquent rents
- Taxes, CAM and insurance true ups
- Avoid any obligation regarding exclusive use

- **Buyer**

- Seller to pay all assessments
- Buyer's obligations regarding delinquent rents
- No Seller rights post-closing regarding Tenants
- Seller obligation to cooperate with Buyer audits

Other Items/Issues Concerning Sale

- Seller's covenants pre-Closing:
 - Operation of premises
 - Insurance
- Post-Closing breach of representations and warranties:
 - Guaranty
 - Holdback
- Assignment of Purchase Agreement

Our Presenters

Michel P. Williams, Director
Senn Visciano Canges P.C.
1700 Lincoln St., Suite 4500
Denver, CO 80203
303-298-1122
mwilliams@sennlaw.com

Mike's practice is, in some fashion, connected to real estate. This includes extensive experience in commercial leasing and tenant relations, acquisition and disposition of office, industrial, retail and multi-family properties, representing real estate professionals, and advising homeowner associations in disputes with developers and members. In addition, Mike assists lenders in pre-foreclosure workouts, foreclosures, loan modifications and servicing REO property needs. Mike represents owners of single assets to national REIT's and assist them in their acquisition/disposition and leasing needs across the country as well as assisting these clients with purchase money debt needs. Over the past several years, Mike has been involved in numerous commercial property acquisitions ranging from several hundred thousand dollars to several hundred million dollars, providing due diligence, title, loan and closing assistance. Recently Mike was lead counsel on a 20 state 80 property acquisition project.

Corey J. Wilk, Director
Goulston & Storrs PC
400 Atlantic Avenue
Boston, MA 02110
617-574-6569
cwilk@goulstonstorrs.com

Commercial real estate, hospitality and retail matters are at the center of Corey Wilk's practice. Corey has a particular focus in the areas of acquisitions, dispositions, financings and leasing, as well as liquor licensing, hotel managements, and hotel franchise agreements. *Chambers USA* sources are impressed, stating that Corey is "very articulate, very quick with his work but very accurate and has great expertise in the hotel space and dealing with brands." Corey is a Director with the firm.