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When the Lights Go Off: Successfully navigating through the current economic climate

During the days which preceded the economic downturn, shopping center owners enjoyed full, or close to full, occupancy levels at their projects. Owners rarely had to worry about the impact of a particular tenant permanently closing its store for business because the chances of it happening were minimal. Tenants of all varieties had plenty of capital and were enjoying substantial financial success in the then-thriving retail industry.

Today, the economy is sluggish, and many retail stores have gone and/or will go out of business. In light of this reality, shopping center owners are revisiting some of the more critical provisions in their leases. Whether negotiating with a small regional tenant or large national tenant, the current environment has forced owners to protect themselves against the potential that a tenant may go out of business during their lease term. For owners facing this unwelcome



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situation, there are several lease issues that should be considered to increase the likelihood that they, and their projects, will be successful. Attention to the issues below will increase the chances that a shopping center owner will successfully navigate through the current economic climate.

Co-Tenancy: Now more than ever, with the grim reality facing shopping center owners that many tenants are closing their stores, the "co-tenancy" provision has become one of the most

heavily negotiated provisions in retail leases. A co-tenancy provision allows a tenant to exercise set remedies if certain conditions are not met with respect to the presence of other tenants in the project. Specifically, co-tenancy provisions are typically tied to the existence of certain named tenants or to an occupancy threshold based on a percentage of total tenants (i.e., they require that certain named tenants remain, or a minimum number of tenants be open and operating). Because more tenants are going out of business, owners must draft and structure co-tenancy provisions carefully. If not handled correctly, owners may be faced with tenants having the ability to terminate their lease and/or pay reduced rent because the agreed-upon co-tenancy requirements are not met.

Exclusive: In today's leasing market, owners also must pay particular attention to the "exclusive"

provision in leases. Many tenants, for obvious reasons, want the exclusive right to sell and/or provide a particular product and/or service at their center. Since vacancies are at an all time high, and owners are constantly using their efforts to lease up vacant space, owners need to exercise caution when deciding whether or not to give a tenant an exclusive (and, if one is granted, owners must limit its scope to reduce the number of restrictions it can create). During these times, it is crucial that shopping center owners take great caution with exclusive provisions so that owners can continue to have the flexibility to lease up vacant space, while at the same time retaining full control over the tenant mix in their projects.

Continuous Operation: Finally, shopping center owners must pay attention to "continuous operation" provisions. These provisions require tenants to maintain business operations during set hours, with minimal interruption, throughout the

lease term. In today's market, owners should include these provisions in its leases to ensure, if at all possible, that all tenants operate during shopping center hours, as having all stores open will (1) lure more customers, and (2) be much more inviting to prospective tenants. Because certain leases contain co-tenancy provisions, if tenants are not obligated to operate continuously, i.e., have the right to "go-dark", remaining tenants may be entitled to invoke the co-tenancy provision, causing financial hardship for the owner.

The above, although not exhaustive, are some of the more critical provisions that shopping center owners should pay particular attention to in these difficult times. By being aware of these issues, owners will be in a better position to ensure that their projects prosper and flourish in this troubled economy.

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