Drafting and Negotiating Commercial Leases

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Drafting and Negotiating Commercial Leases

- Introduction to Drafting Commercial Leases
- Lease Provisions
Introduction to Drafting Commercial Leases

• Types of Leases

• The Drafting Process

• Commercial Lease Checklist
Types of Leases

- Retail
- Office
- Restaurant
- Mixed Use
- Additional Forms and Types
The Drafting Process

• The Letter of Intent (LOI)

• Protecting the Unknown Interests of the Client
Lease Provisions

- ‘Basic’ Lease Provisions
- Insurance and Casualty
- Subordination
- Construction
‘Basic’ Lease Provisions

• Rate and Description

• Term and Renewals

• CAM Expenses

• Guarantees

• Abatements

• Real Estate Taxes
Commercial Lease Checklist

• Financial Terms
• Terms of the Premises
• Common Areas and Their Expenses/Charges (CAM)
• Assignment and Subletting
• Default
• Repairs and Physical Alterations
• Insurance and Indemnification Provisions
• Subordination and Attornment Provisions
• Casualty, Condemnation and Eminent Domain
• Signage and Parking
• Relocation
• Miscellaneous Provisions
Easements and Other Servitudes in the Commercial Context
Easements and Other Servitudes in the Commercial Context

- Servitudes and Rights Associated With Them
- Terminology: Easement v. Covenant v. License v. Lease
- Creation of Servitudes
- Altering a Servitude
- Abandonment and Extinguishment
Servitudes: Rights and Types

- Easement
- Covenant
- License
- Lease
Easements

• Privilege without profit

• Right to use but NOT right to possess

• Servient v. Dominant

• Express Easement

• Appurtenant v. In Gross
Creation of the Easement

• Express Easement
• Implied Easement
• Easement by Necessity
• Prescriptive Easement
  • Adverse
  • Under Claim of Right
  • Exclusive
  • Continuous
  • Uninterrupted
  • Knowledge & Acquiescence
The Covenant

• Agreement between one or more parties that governs how real property will be utilized

• Right to use but NOT a possessory interest

• Affirmative Obligations

• Negative Covenants
Creation of the Covenant

• Restrictive Covenants

• Running with the Land

• Equitable Easements or Equitable Servitudes

• Enforcement of the Covenant
  – Privity – Horizontal
  – Privity – Vertical
  – Intent
  – Touches and Concerns
  – In Writing
The License

• Right to utilize but NO interest in the real property at all

• Conditional Time and Use

• Creation of the License
  – Express agreement
  – Actions of the owner

• Practical Examples in the Commercial Context
The Lease

• Right to possess AND utilize

• Interest in the real property conditioned upon time and use

• Interest that can be superior to future conveyance or liens

• Back to example of License v. Lease

• Creation of the Lease
  – Oral v. Written
Can a Landowner Alter a Servitude?

- Easements
- Covenants
- Lease
- License
Abandonment and Extinguishment

• Covenants
• Easements
• Licenses
• Leases
Purchase and Sale Agreements
Purchase and Sale Agreements

• Price and Payment Terms
• Representations and Warranties, Conditions and Covenants
• Timing for a Smooth Transition
• Real World Remedies
• Risk of Loss
• Negotiation of Other Provisions
• Sample Purchase/Sale Agreement Review
Spelling out the Price and Payment Terms

• Price

• Deposit

• Payment Terms
Reps and Warranties / Covenants and Conditions

• Representations and Warranties

• Covenants

• Conditions

• Importance of Each

• Examples of Each
Getting Timing Down for a Smooth Transition

• Contingency Periods
• Study Period
• Financing Contingency
• Appraisal Contingency
• Negotiation of Time Periods
• Interests of Each Party
Real World Remedies

• Monetary Damages

• Specific Performance

• Tying up the Deposit

• Negotiating the Default Provisions
Risk of Loss

• Common Law Rule

• Negotiating the Risk

• Assumption of the Risk

• Transfer Date & Time

• Recordation v. Delivery of the Deed
Negotiating Other Provisions

- Title
- Time of the Essence
Sample PSA Review

• Attached Purchase and Sale Agreement

• Discussions with the Client

• Knowing What to Fight / Pick the Battle
Questions
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