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Site Plan

A. Overview

The most critical component when marketing a potential shopping center is the design and layout of the site plan. The site plan is the first item that is requested by potential occupants of the shopping center and provides them with a picture of what the Developer initially intends to construct and how the shopping center will operate. This article will outline examples of the various issues raised when attempting to resolve the conflicting interests between Developer and Tenant. We will also include discussions relating to modifying the site plan once a lease or occupancy agreement has been finalized as well as some potential remedies for site plan violations.

B. Site Plan Requirements

When formatting and drafting a site plan to present to a potential tenant, the Developer needs to adhere to some general requirements.

1. General Requirements:
 - a. Small location map.
 - b. Parking details, including layout, design and size of parking spaces.
 - c. Statistical data and proposed parcel lines, including the following:
 - (i) Floor area of:
 - major tenants
 - actual building areas (including potential outparcels)
 - future expansion area, if any
 - (ii) Parking:
 - required ratio
 - actual parking by parcel
 - show all parking runs including future layouts with dashed lines.
 - indicate all end islands and buggers that are concrete curbed.
 - indicate area parking counts by fields.
 - indicate accessible parking spaces and routes.
2. Entrances: Roads and median widths should be labeled and outlined in order to understand the ingress/egress patterns into the proposed shopping center.
3. Circulation Roads: Dimensions of all circulation roads should be outlined to understand their capacity.
4. Buildings:

- (i) identify all major anchors
- (ii) indicate any future permissible building areas and maximum size. Height limitations may also be listed.
- (iii) indicate all service areas
- (iv) outline sidewalks with minimum widths.

5. Miscellaneous:

- (i) outline landscaping
- (ii) outline the location of any freestanding signs
- (iii) outline any existing easements, if necessary.

Generally, the site plan will be constantly modified and updated with each particular deal until such time as both parties have reached agreement.

C. General Considerations

The Tenant's perspective is simple, the more restrictive the better. Any tenant is going to want maximum control over the site plan. Any tenant, regardless of size, is going to insist that the following are protected:

- (i) visibility of their store;
- (ii) parking—both number of spaces, design and location;
- (iii) permissible building areas
- (iv) "no build areas"
- (v) critical service and access drives, both within the shopping center and with respect to the adjacent right-of-ways.
- (vi) location of any pylon/monument/direction signs
- (vii) height limitations for buildings, including outparcels.

For the Developer, the issue is flexibility. Therefore, a Developer is going to resist any restrictions on modifying the site plan both from the initial construction of the shopping center to subsequent modifications once the Developer is forced to re-tenant some of the spaces.

One of the most debated items listed above is the permissible building areas to be shown on the site plan. Therefore, the site plan must address the limitations imposed upon the Developer for the overall buildings. Areas on

the site plan are generally depicted as "permissible building areas", which areas may encumber more area than what will actually be developed, or intended to be developed. The Tenant will seek to limit the overall square footage of each particular "permissible building area". Visibility and parking issues critical to the Tenant will need to be addressed when determining what may be a "permissible building area". For the Developer, it's going to be difficult to agree upon the actual square footage of each permissible building area, especially when the Developer may not have the area(s) leased. Developers must be careful not to be backed into a corner here as tenant footprints and rosters may change, forcing an expansion of these areas. With respect to outparcels, depending on the size of the applicable outparcel, more than one (1) "permissible building area" may need to be created. If the Tenant is not willing to give the Developer complete flexibility as to the layout of permissible building areas upon the outparcels, one potential option is to agree upon two or more alternative layouts. This can be accomplished in the initial lease or REA by either providing for two separate site plans, both of which the parties agree are acceptable, or by providing in the applicable document that certain specified changes may be made to the outparcels.

In addition to establishing the "permissible building areas" on each particular parcel, the Tenant will require that the site plan contain height restrictions on the buildings to be constructed.

Probably the most critical item relating to the site plan which coincides with the outline of the permissible building areas relates to "no build areas", "critical access ways" and other restrictions commonly found within the common areas. Tenants will seek as many restrictions as they can obtain relating to these areas. However, the Developer needs to be careful not to overly restrict the common areas thus prohibiting some future development or redevelopment within the shopping center. The Developer must provide itself with some potential alternative roadways, critical access ways, etc. The Developer needs to consider temporary outside sales areas, outdoor seating areas for restaurants, cart corrals and landscaping issues. In addition, staging areas for the initial construction and subsequent construction within the shopping center should also be considered by the Developer.

When establishing the height restrictions on the buildings within the shopping center, including any outparcels, determining what is included in defining the height limitations is critical. The parties must not only agree upon the building heights, but also whether the height includes architectural features, roof-top equipment, etc. The height of the buildings should be measured perpendicular to the finished floor of the building. Architectural features, screening, parapet, mechanical equipment or similar appurtenances located on the roof of such building is an issue that will also need to be considered. Generally, a percentage of the building height (i.e. at not more than ten percent (10%) of the building height) may be permitted for these additional features and equipment.

In addition to the actual physical layout of the shopping center, the site plan may also be utilized to establish limitations on certain permissible uses. Most, if not all tenants, seek a representation that the shopping center will be used for "retail purposes" only. However, as is often the case, a carefully drafted lease will permit a portion of the shopping center to be used for certain "non-retail" uses. These carve-outs benefit both parties in their ability

to subsequently replace existing space, as well as provide potential assignment and subletting rights for the anchor tenant(s). Often times, a square footage limitation is established as a compromise for these "non-retail" uses.

In addition to the smaller, "non-retail" uses, the proposed shopping center may also provide for larger, "non-retail" uses such as movie theaters, day-care centers and health clubs. Tenants need to recognize that some larger, "non-retail" uses in the shopping center may be needed to lease a significant portion of the available space. Tenants are concerned with parking issues, and the proposed use is also a major concern. Therefore, the parties should consider designating locations on the site plan to reserve these particular uses within the permissible building areas.

In addition, the site plan may also address restaurant uses. The likelihood of a new shopping center being developed without the presence of several restaurant uses is very remote. Outparcels within the shopping center are often times reserved for restaurant uses, as well as portions of the in-line buildings. A radius restriction on restaurant uses is often established in order to satisfy both the Tenant and Developer. For example, the Tenant may restrict a Developer from a restaurant within three hundred (300) feet of the Tenant's premises. The Tenant is concerned that sufficient parking may not be available if restaurants are located within a close proximity. This radius restriction, however, should be qualified to permit smaller restaurants or some traditional "take-out" restaurants such as submarine shops, coffee shops, etc. within the prohibited area.

In addition to prohibiting restaurant uses, the Tenant may also attempt to restrict the sale of alcohol for both on-premises and off-premises consumption, i.e. a prohibition on a "bar, tavern or nightclub". The Developer must be careful in consenting to this prohibition as it may present a problem for the Developer either leasing or selling a portion of the Developer's Parcel to full-service restaurants.

Any such restriction should provide that notwithstanding the prohibition on "bars, taverns or nightclubs", the sale of alcohol for on-premises consumption by a restaurant shall be permitted, with a restriction on the amount of alcohol devoted to the overall gross sales of such restaurant.

The percentage of gross sales devoted to the sale of alcohol is often a subject of negotiation. However, the Developer should recognize that most full-service restaurants that sell alcohol will require that a significant portion of their gross sales be reserved for the sale of alcohol for on premises consumption.

In addition to restricting the amount of alcohol sales by a restaurant, often times the anchor tenant may attempt to limit this carve-out to only a "national or regional" restaurant. The Developer needs to be careful to avoid agreeing to qualify this carve-out with the term "national or regional restaurant" as some local restaurants may be excluded by this restriction.

Finally, the prohibition on "arcade and amusement" uses should also be addressed when preserving restaurant uses within the shopping center.

In addition to building restrictions, the site plan may also be utilized to identify the number and location of any pylon/monument/directional signs serving the shopping center. The Developer should be careful not to over commit to the Tenant by agreeing to permit the Tenant to place its identification panel(s) on all such signs. If there are multiple signs placed within the shopping center, the Developer needs to make sure that the site plan accurately reflects only the location of the particular Tenant's panel(s).

D. Modifying the Site Plan

During negotiations, the parties will attempt to allow themselves as much flexibility within the established standards in order to handle future vacancies and potential re-development plans for the shopping center. A re-development or re-tenanting of the shopping center may require modifications to the site plan. A reasonable consent standard should be imposed when considering a request to a modification to the site plan, as well as attempting to impose some "material" and "adverse" affect on the Tenant's use of its premises and/or common areas as a result of the proposed change. The Developer may find it difficult to obtain a response to a proposed modification. Therefore, a time-period should also be imposed when a request is made for a consent to a modification.

E. Remedies

The parties should plan for what happens in the event that Developer does not comply with the provisions of the lease that deal with the site plan. There are a number of potential remedies that can be included in the lease, such as lease termination, liquidated damages, monetary abatement, injunctive relief, and termination of any restrictions imposed by the lease or any operating covenant of Tenant.

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