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ARRESTED REDEVELOPMENT

Law360, New York (November 09, 2011, 7:44 PM ET) — Up and down Peachtree Street, Atlanta—Georgia’s glitzy artery near our firm’s offices—only a few years ago cranes speckled the skyline as monuments to groundbreaking ceremonies that occurred long before anyone knew of the economic downturn that loomed. The cranes hovered over new high-rise condominium and office projects, as the buildings below reluctantly continued their skyward climb. Back at ground level, their low-lying neighbors were taking note, dreaming of their own potential for property redevelopment to a “higher” use. That redevelopment will certainly not occur this year, and probably not the following year, but maybe a year or two after that, when consumer confidence has returned, demand has gained on supply, and Atlanta’s previously insatiable appetite for the newest, tallest and best has returned.

Though that day may seem far off now, those property owners who missed the last wave are looking forward and positioning themselves to reap the benefits when order is restored and new projects once again take to the drawing boards. The forward-looking property owner is constantly balancing the current situation or deal against future agreements affecting their properties to ensure maximum flexibility when that redevelopment opportunity comes knocking.

A property owner should resist encumbering a parcel with agreements and restrictions making it unattractive to potential purchasers and their lenders. Agreements placing restrictions on a property may serve an immediate purpose; however, a potential purchaser may look unfavorably upon agreements which burden a property for an extended period of time or unduly limit future development.

For example, a seemingly innocuous agreement to provide parking spaces to a neighboring business owner could delay or even prohibit the redevelopment of a strip center into a high rise condominium project or office building. A drainage easement granted to an adjoining property owner could prevent redevelopment to retail use by limiting the owner’s ability to alter the property’s current configuration. Shared maintenance agreements for drainage, parking or access facilities can also make a property economically unviable for redevelopment, especially in times where financing options are limited.

During property ownership, attractive quid-pro-quo opportunities may develop between neighboring landowners allowing one to accommodate the request of the other in exchange for some monetary or reciprocal



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consideration. While potentially necessary for an immediate transaction, any such encumbrance on a parcel could potentially restrict its future marketability. Fortunately, there are a few steps that a conscientious property owner can take to provide flexibility for redevelopment, thereby reducing the potential negative impacts of such agreements.

The most advantageous provision for the burdened property owner to include in any such agreements is a sunset period, whereby, the easement, covenant or restriction would cease to be effective after a given date or upon the occurrence of a specific event. Typically, unless the agreement is temporary in nature (e.g. a construction crane swing easement), set dates are not practicable since property features like access ways and drainage fields are designed to exist in perpetuity. However, the inclusion of a provision which removes an encumbrance upon the occurrence of a specific event is a means to inject adequate flexibility into such agreements.

For instance, an easement which provides for a neighbor's use of parking spaces should terminate in the event the neighbor acquires or constructs additional parking facilities, or if there is a reduction in parking ratio requirements applicable to the neighboring property. Stormwater drainage easements can be eliminated if the property owner obtains alternative drainage facilities. Use restrictions should automatically terminate in the event the neighboring property ceases the protected business operations, or in the case of design restrictions, when the neighboring property is redeveloped.

Termination provisions aside, an accommodating property owner should insist upon the inclusion of a right of relocation in any easement agreement placed on its property. A right of relocation provision should grant the accommodating property owner the right to relocate easements and/or facilities to a location which will provide similar access or services to the neighboring property. Such provisions permit the necessary flexibility of continuing the agreed upon encumbrance, while maintaining flexibility and potentially allowing a contemplated redevelopment to occur. Accommodating property owners should expect to be required to absorb the costs and expenses arising from the relocation, to make covenants not to disturb the business operations of the neighboring property owner, and to indemnify the neighbor for any damages to its property or business during the relocation.

In addition to the redevelopment considerations which should be given the underlying land itself, property owners should also attempt to retain flexibility with regard to any tenants upon the land. A prospective purchaser will most certainly perform an examination of the leases encumbering a property to determine the flexibility available to redevelop. The potential purchaser will evaluate termination dates, renewal options, and use and exclusivity clauses for potential issues that would impede the prospect of moving ahead with a redevelopment project.

A property owner hoping to make its property more appealing to a redeveloper will often utilize a redevelopment lease buy-out clause in its lease form. This is an emerging trend in leases of volatile property that is located in the path of future development. These clauses are nothing new, but there is no mistaking their increased popularity as landlords look toward the future of their portfolios, are ready to change, and intend



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to remain poised and flexible for the day when the market turns. True, a project's dramatic redevelopment may seem a lofty aspiration today, but many landlords insist upon holding the line when a potential tenant inevitably requests the deletion of the landlord's right to terminate the tenant's lease in the event of project redevelopment.

A tenant's reluctance to agree to a redevelopment clause is understandable. In the early stages of deal-making, landlords market their properties as uniquely suited to offer the tenant the best chance of success. When a landlord subsequently sends to the tenant an initial lease draft containing a redevelopment clause (and possibly imposing upon the tenant the obligation to relocate to another shopping center down the road), an obvious contradiction to the landlord's initial message arises.

Arriving at a mutually acceptable redevelopment clause will require a landlord to retain its necessary flexibility of termination, while compensating, and potentially rewarding, the tenant for the cost, trouble and inconvenience associated with temporary closure and relocation. At the very least, a tenant should receive compensation for the unamortized costs of its out-of-pocket leasehold improvements. Landlords frequently require these costs to amortize over the lease term and/or place "caps" on these amounts to allow for predictability of expenses in the event of project redevelopment. The more aggressive tenant may secure additional pre-determined and stipulated amounts as compensation for its relocation and moving expenses, lost sales, and various other hassles associated with locating to a comparable new location.

Before signing a lease containing a redevelopment clause, a tenant will often request some assurance from the landlord that the redevelopment will not occur before a date certain, so as to guarantee to the tenant a minimum amount of use of the premises prior to the landlord's exercise of its termination rights. It is not uncommon for a landlord to represent to the tenant that a redevelopment buyout will not occur during the first three or more years of the lease term.

The current market is challenging, but days of growth and expansion are certainly ahead. Mindful landowners are already positioning themselves for the turn. Keeping flexibility in mind when negotiating agreements that will affect one's property will provide a proactive strategy and the necessary flexibility to take advantage of the inevitable upward phase of the real estate cycle.

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