ROCHESTER BUSINESS JOURNAL
Part of the BRIDGETOWER MEDIA network
SEPTEMBER 26, 2024

How physical structures can determine legal structures in retail leasing

SPECIAL TO THE RBJ

When typical shoppers head to their local shopping center, they see one cohesive property that is structured to help them do one thing – buy the items and services they are looking for.

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I, however, am not a typical shopper – no, I am a retail real estate leasing attorney. When I meander through a shopping center, I get distracted by the different kinds of legal leasing agreements that must be in place for this particular center to function. I see ground leases, license agreements, common area maintenance (CAM) splits, anchor stores and reciprocal easement agreements (REAs) – so many reciprocal easement agreements!

Unsurprisingly, it takes me a while to get my shopping done.

The point I'm trying to make is that, while a shopping center is often experienced as a single, cohesive development, it is really a patchwork of different legal leasing agreements, and the type of legal structure is often driven by the type of physical structure.

Let's take the national coffee chain building you drive by (or "thru") on your way into the center. This may very well be a fairly standard lease, but with shared CAM responsibilities. In this structure, the landlord owns the land and building and leases the building to the tenant, along with various exclusive rights over the exterior (or common) areas of the center – such as the exclusive use of a drive-thru lane or a patio. In exchange, the tenant is responsible for performing maintenance on those common areas at its own cost, while also making a contribution to the CAM for the rest of the center, as the other tenants do. The maintenance and repair responsibilities for the building can vary as well, depending on the business deal between the parties.

After you grab your coffee, it's time to head to the supermarket to buy your groceries for the week. The supermarket is often the main anchor of the center and was likely one of the first tenants to sign up, with the rest of the retailers following once the anchor was committed. Anchors can also include big box department and home improvement stores, among others. Some anchor retailers prefer to own their real estate, in which case, a separate legal parcel will be created, and the anchor will be the fee owner of the land and the buildings. In that case, no lease is necessary. When a lease is necessary, it is often a ground lease, where the landlord owns the land, but the tenant builds and owns its own building until the end of the term, when the building becomes the property of the landlord. Again, maintenance responsibilities can vary widely.

Once your grocery shopping is done, you take a stroll down the walkway running next to the grocery store, where you pass a series of small retailers – everything from nail and hair salons to clothing boutiques and specialty retailers, perhaps even a fast casual restaurant chain. These are called inline tenants, and the legal structures for these tenants are often the most traditional. The landlord leases the interior spaces to the tenant, who pays rent, CAM, taxes, insurance and utilities. The landlord is responsible for the roof, structure and foundation, while the tenant takes care of the interior of the space.

After visiting a few stores, you're pretty hungry for lunch. Luckily, there's a sit-down restaurant on one of the center's outparcels – a perfect place to rest after your shopping trips. As you walk onto the outparcel, you may notice that the asphalt is a slightly different color, a telltale sign that the outparcel is owned by another party. That party is likely to be a triple net lease investor. In this scenario, the lease is structured so that the tenant is responsible for everything on the property – all maintenance to the building, all insurance payments, and even the direct payment of real estate taxes to the municipality. The property owners are as hands-off as possible, hoping only to collect a gross rent check each month. Triple net properties like these are ripe for transfer as part of a 1031 Exchange as well.

As you get your check (and maybe a mint) from the server, you realize that you need some cash. Luckily, there's a standalone ATM in the parking lot. The legal agreement allowing for the ATM is probably a license, which does not grant as great of property interests as a lease and is typically revocable by either party.

By now, you've got to be pretty exhausted, but you can see the smorgasbord of legal structures and owners that can make up a single shopping center. But how does it appear so cohesive and unified? What are the rules governing this? I'm glad you asked. Often, there is an overarching agreement recorded against the entire shopping center that lays out the rules and regulations for the center – everything from granting parking and access easements to defining architectural requirements to organizing CAM services, among many others. These agreements can be called any number of things – REAs, declarations or covenants, conditions and restrictions (CC&Rs). They can run dozens of pages and go into minute detail, but they are important to ensure that all the various parcels and properties within the shopping center are held to the same standards, quality and rules.

As you wrap up your day at the shopping center, take a look around, appreciate the patchwork and imagine the legal agreements. Just make sure you finish up quicker than I do!

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