Probate & Property
March/April 2020 | Vol. 34, No. 2

Thinking Outside the Box for Anchor Retailer Closings: Is There Anything in the Box Anymore?

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> *When one door closes, another opens; but we often look so long and so regretfully upon the closed door that we do not see the one which has opened for us.*
> - Alexander Graham Bell

The Door That Closes: The Impacts of Losing an Anchor Tenant

The problem: anchor retailers are closing in ever-increasing numbers. Anchor boxes are being redeveloped for many new uses. Consider what happens when a shopping center owner (the developer) gets the news that an anchor retailer is closing its store at a shopping center. There can be numerous direct and indirect impacts on the property.

This proposition has struck fear into developers since the beginning of the great recession in 2008. If the anchor retailer is operating under a lease (i.e., it doesn't own its own pad), the developer will experience the direct impact of losing the rental income and contribution to common area maintenance costs (CAM), insurance, and tax programs from the anchor (assuming the anchor's lease is terminated and they are not just "going dark"). Additionally, the loss of an anchor tenant could result in a loan default or trigger cash management provisions under the developer's loan documents.

As bad as that sounds, the indirect impacts of losing an anchor can be substantially more painful to the developer than the direct consequences. The two most significant indirect impacts of losing an anchor are (i) the reduction in activity and shopping traffic in the vicinity of the anchor location at the property (a.k.a. the "death spiral"), and (ii) the co-tenancy rights triggered in other leases as a result of such closure. Note that both of these issues are heavily compounded when the anchor tenant closes its store but the developer is unable to recover the space, either because the anchor owns its own space or because the anchor is operating a lease with remaining term and simply closes the store without negotiating or exercising a lease termination with the developer.

Analyzing the co-tenancy impact of losing an anchor is typically the first legal analysis conducted by a developer when it learns that the store is in jeopardy of closing. Co-tenancy is one of the most heavily covered topics in retail leasing presentations at conferences of the International Council of Shopping Centers. This is for good reason. In many respects, co-tenancy is a house of cards upon which the shopping center industry is built. Co-tenancy impacts of losing an anchor can be painful for developers in most shopping center formats, whether in power centers, lifestyle centers, malls, or single or shadow anchor centers.

It is worth noting, however, that in the case of the enclosed mall, co-tenancy is very important because for decades, most of the in-line tenants agreed (and paid very high rents) to be near the anchors, which historically have drawn most of the shoppers to the project. This can be seen in relation to the rent differences at a single mall relative to proximity to the most successful anchor store at that project. When enclosed malls were constructed, even though anchor tenants typically had (and still have) little or no obligation to continuously operate, the mall owners felt comfortable granting strong co-tenancy rights based upon the operation of the anchor tenants, because, at the time, it was inconceivable that the department store anchors would ever cease to exist (or even close at the rapid pace that has occurred recently and which will continue to occur for the foreseeable future).

The co-tenancy analysis conducted when losing an anchor store typically includes the following key areas: (a) understanding the type of co-tenancy requirements and what causes a co-tenancy failure (e.g., required or named co-tenants, percentage of occupancy co-tenancy, or a combination thereof); (b) evaluating what is required to cure a co-tenancy failure; and (c) identifying tenants' rights upon and during a co-tenancy failure.

Understanding the Co-Tenancy Requirement

In a case of co-tenancy that requires specific named anchor co-tenants or specific types of replacements for the anchor co-tenants, one needs to consider what types of re-tenanting of the anchor box would cure the co-tenancy failure. By now, it is not uncommon in the retail leasing industry to have some flexibility to divide the anchor box into some number of smaller spaces (subject to specific parameters) and for the developer to have some discretion in the use operated by the replacement tenant, as long as the replacements are regional or national retailers and replace a large portion of the vacant box.

Nonetheless, there are still many centers where the legacy leases have very stringent replacement tenant requirements. For example, by far the most challenging aspect of co-tenancy issues in enclosed malls is how the co-tenancy provisions (most of which were drafted when department stores were never expected to fall out of favor) address replacement options for the vacated anchor. There are numerous varieties of replacement requirements. Some relate to the percentage of the anchor space that must be backfilled; some relate to how much (if any) of the space can be subdivided and leased to multiple tenants; and some (the most dangerous in the mall context) relate to the type of use and so-called quality requirements for replacement tenants.

Probably the worst language for developers is a requirement that a department store anchor can be replaced only with a similar department store tenant. Based upon this requirement, it will soon be the case that many co-tenancy conditions may never be able to be re-satisfied, and, as a result, there may be a perpetual co-tenancy failure. This can be very frustrating for developers because they may still receive reduced rent (and risk lease termination) from tenants with stringent co-tenancy requirements, even if they replace a vacant department store with a tenant that produces a significantly better use mix and even drives higher revenue for the tenant availing itself of the co-tenancy rights.

Tenant Rights for a Co-Tenancy Failure

Tenants have two primary rights for a co-tenancy failure. These are often mistakenly referred to as "remedies," which is a misnomer because a co-tenancy failure really isn't a default by the landlord. Rather, it is a failure of a condition that causes certain rights to spring into effect. The first such right is reduced rent or a right to terminate (typically after some lengthy period of failure). In many cases, there is a cure or vacation period after the commencement of the co-tenancy failure during which the developer has the right to re-satisfy the co-tenancy condition. This is logical because it is not possible to backfill a newly vacant anchor box immediately upon the closure of the vacant tenant. In the best-case scenario, there will be fairly significant downtime even if the developer was able to sign a replacement lease prior to the vacation by the prior anchor. The time to recover possession, complete a likely elaborate construction project, and allow for the replacement tenants to open for business will be substantial. At the same time, there are a number of powerful retailers who have negotiated for co-tenancy rights to commence immediately upon the occurrence of the co-tenancy failure. From the retailer's perspective, their traffic and sales would be affected immediately upon the closure of the anchor, not after some period of time. This negotiating point in leases is an allocation of risk that comes down to relative negotiating strength.

There are numerous variations on the payment of alternative or reduced rent. Is rent payable based upon a reduced percentage of existing base rent? Is base rent replaced by a percentage rent? Does the payment of alternative rent replace only base rent or are CAM, insurance, taxes, and other pass-through expenses also abated? When negotiating tenant rights upon a co-tenancy violation, it is important to also consider whether the tenant must be open and operating itself in order to avail itself of its co-tenancy rights. From the developer's perspective, this would be favored, especially as it relates to the right to pay alternative rent based upon a percentage of gross sales. One middle ground to this approach is that the tenant pays alternative rent based upon a percentage of gross sales while it is operating, but if the tenant exercises its right to "go dark," then the alternative rent changes to a reduction in the base rent amount.

Another commonly negotiated point is whether the rent reverts back to full rent after some period of paying alternative rent (e.g., after X months of reduced rent or if tenant elects to renew the lease at the end of the term) or whether reduced rent continues indefinitely if the co-tenancy requirement is not re-satisfied. These are often referred to as "fish or cut bait" or "sunset" provisions, and developers will negotiate hard to include them.

Further, after a sustained period of co-tenancy failure, very often the tenant will have the right to terminate the lease. The parties must decide if a termination right is ongoing or if tenant must elect at some point (e.g., 12 months, 24 months, 36 months, etc., following expiration of the cure period), or else the tenant loses its termination right. Some very powerful tenants have negotiated for a negative termination provision, under which the tenant pays ongoing alternative rent during the continuance of a co-tenancy failure, but the developer may have a right after a period of time to terminate the lease unless the tenant reverts to full rent. This is somewhat of a game of chicken for the developer, because it must call the tenant's bluff that it will choose to revert to full rent over losing the lease.

Another consideration is that the nature of replacement tenant requirements for re-satisfying the co-tenancy requirements may affect the nature of a proposed redevelopment that might otherwise be a huge improvement for the overall shopping center. It is not uncommon for developers or anchor retailers to plan massive redevelopments on the pad of an anchor retailer, which might include entertainment, multi-family, hotel, or other uses that could drive traffic and fulfill the dream of experiential retail. Though that concept may appear to be the dream solution to an ailing shopping center, it does no good for curing the developer's co-tenancy failures if it has a large group of tenants with co-tenancy provisions requiring that named department store anchor co-tenant to be replaced with a "department store of equal or better quality." This does not mean the developer should give up on a major redevelopment plan. Instead, it simply means the process will be more complicated because it will involve negotiating lease amendments with potentially material financial implications for the tenants with co-tenancy rights.

Below we discuss the silver lining to the closure of a struggling anchor retailer and the ability to create value by redeveloping the pad of the anchor. This can be a redevelopment by the developer, assuming it regains control of the space under a lease termination or purchase of the anchor's property, or by the anchor retailer (or other third party transferee of the anchor retailer).

The Door that Opens: Opportunities to Create Value by Redeveloping the Anchor Store Location

One only needs to read the headlines of current media to understand that anchor boxes are being used and re-used in a wide variety of ways. The former Sears store in the Northwest Arkansas Mall in Fayetteville, Arkansas, is being redeveloped into a co-working space and event center. At the Hawthorn Mall in Vernon Hills, Illinois, the developer is proposing to redevelop the former Sears store and former Carsons store into residential apartments and a supermarket. In McAllen, Texas, a closed Wal-Mart was redeveloped into the city's main library. In one of the larger redevelopment projects, the entire second level of One Hundred Oaks Mall in Nashville, Tennessee, was redeveloped into medical offices for Vanderbilt University Medical Center. These are just a few of the ways that anchor boxes are being replaced with other retail, restaurant, residential, or hospitality users. Even if the anchor store remains open, it may desire to sell off a portion of its parking area for use as an outparcel.

The use and re-use of anchor boxes will affect the practice of every retail real estate attorney. These transactions involve leasing, buying, selling, lending, procuring municipal approvals, obtaining title insurance, and possibly litigation. The transaction will include many other parties such as other occupants of the shopping center, municipal authorities, lenders, and the surrounding community. The client will create the vision for the project, but the attorney will have to help guide the client through the transaction. The attorney will need to identify the various stakeholders and the documents that govern the relationship between the stakeholders. That guidance will arise from reviewing the existing documents (including key leases, loan documents, development agreements, etc.) and suggesting how to memorialize the various agreements for the redevelopment.

When considering redevelopment opportunities, the developer must scrutinize restrictions under existing governing documents and the contractual rights of other stakeholders. At the outset of a planned redevelopment, a thorough review of leases, reciprocal easement agreements (REAs), loan documents, development agreements, full title reports, and surveys is recommended. REA parties and powerful tenants, particularly junior anchor and big box operators, may demand site plan controls, impose limitations on future construction, and enforce prohibited uses that conflict with the developer's vision for the future of the project.

Leases, REAs, and other governing documents at shopping centers often include a number of provisions that affect potential redevelopment, including site plan controls, permissible building areas, height limitations, ring road protections, critical parking areas, and protected areas. Further, most if not all sophisticated lenders will impose stringent requirements for, or limitations on, the developer's ability to undertake modifications to the shopping center, enter into or terminate major leases, and make modifications to any REAs in place at the property. Accordingly, it can be assumed that if there is an existing mortgage loan, the lender's consent will be required in connection with any significant redevelopment.

As a result of the various site plan control and development landmines that may be hiding out there, the developer should scrutinize each existing lease, REA, and title document when considering all potential redevelopment opportunities. This analysis can be one of the more fun and challenging parts of retail law practice. It involves piecing together a complicated puzzle to understand the consent rights of various stakeholders, and it is an area in which a creative lawyer can add tremendous value by identifying ways that a redevelopment plan may be modified to limit the number of required consents.

Once it has been determined what the rights of the various parties are under existing contractual documents, there are a couple of different approaches to the documents involved in redeveloping an anchor box. You could amend the existing REA, restate it, or enter into mini-REAs that govern only the redeveloped box and surrounding area. As you set about documenting the redevelopment of the vacant anchor box, consider that the user and owner of the vacant anchor box might be separate entities. Those entities might be related or unrelated. The owner and user of the vacant anchor box might be separate entities from the developer of the shopping center. As the entities multiply, the complexity of resolution and documentation grows.

Accommodating Stakeholder Concerns

One of the threshold questions is: do the original stakeholders in the existing REA even exist anymore? Are their concerns the same or have they changed? The heyday of building shopping centers ran from the 1950s to the 1990s. The names of retailers who appeared in those original shopping centers but no longer exist are many: Woolworth, WT Grant, Montgomery Ward, Diamonds, and Mervyns to name just a few. Each of those retailers and the many others who have closed had individual business models and concerns with how the shopping center was run. When the mall opened with those tenants, the focus was entirely on retailing, and the shopping center REA might prohibit residential uses, sleeping quarters, distilling, bowling alleys, theaters, supermarkets, and health clubs. Now, those uses are coveted tenants, and the original tenants who sought to restrict those uses are long gone. Even if restaurants and entertainment were not prohibited altogether, the REA might limit the areas within the shopping center where restaurant and entertainment uses might be located or the total amount of leasable area those uses can occupy.

If the stakeholders still exist, do they still want to restrict what used to be considered prohibited uses or do they want to be part of a redeveloped shopping district that sees increased customer traffic? The existing tenants will generally want to see increased traffic, but they will not want that increased traffic to come at an inconvenience to their customers or a decrease in the quality of the surrounding retailers. If a stakeholder still exists, where do its interests align with the entity that wants to redevelop the vacant anchor box and where do its interests conflict?

Various stakeholders will have approval rights over the conversion of parking area or green space that was formerly common area to permissible building area. This may depend in part on whether the anchor seeking to redevelop a pad owns or ground leases its property. In some instances, anchors that lease their property are approving parties under the REA (but not full parties as to all aspects) or their leases require tenant consent to REA modifications. In other instances, both owner and lessee anchors are full parties to the REA. To some extent, this varies by geographical region. If an anchor owns its property and desires to subdivide and sell an outparcel, the other REA parties will most likely have to consent to the redevelopment (or the change in permissible building area or common area reconfiguration) under the REA, and other anchors at the center may have limited approval rights related to relocation of access points or parking easements, parking ratio changes, and other ancillary matters.

Other anchors of the center and the developer of the center may seek monetary compensation in exchange for approving the proposed redevelopment. More often, however, an in-kind exchange of approvals is negotiated. The approving party or developer may want to trade approvals for its own outparcel development at the same center or at a different location where reciprocal approval rights exist. Or the approving party may request something entirely different in exchange, such as relief from an operating covenant at another location, new signage rights, or the like.

One complication to keep in mind is that often consents are packaged. For example, a retailer may offer its consent to the developer's redevelopment in return for a consent at the same property in combination with a lease extension at another property (or some variation on that theme). Developers often own properties in joint ventures, so a concession at a different property may be more challenging for the developer to agree to if it has an adverse effect on other third-party partners or lenders.

If the local jurisdiction requires that the new outparcel be subdivided from a larger parcel in order to be conveyed and developed, this opens the door for additional approving parties to be involved and to use the subdivision process as an opportunity make requests and demands. For instance, if the subdivision requires city approval, the city may ask for additional easements (for sidewalks, public drainage facilities, or similar uses) or for an expanded right of way for future roadway improvements. A city or county might also require a change in landscaping, upgraded parking lot lighting, signage, or other matters. In one recent transaction, a city demanded donation of land for conversion to a public park space. Other demands with high price tags, such as relocation or reworking of utility facilities (such as lines and transformers) and services, could also come into play. Who bears the cost of these requirements will be a matter for the various parties involved to negotiate.

Some governmental authorities may be willing to treat these as post-closing matters, while others will demand that everything be in place before the plat or certified survey map is recorded. There also may be multiple rounds of review by the governmental authorities, each with new comments, which can add seemingly endless delays to a deal. If the parties are successful in pushing the completion of these matters to after closing, they can be memorialized in a variety of ways and may involve an escrow agreement holding back a portion of the sales proceeds to handle certain matters that may take longer to complete (for instance, relocation of utilities or reworking of landscaping). In addition to documentation of any easements and other concessions that may be required incident to the subdivision, many counties also require pre-payment of real property taxes for the current or succeeding tax year in order to approve an outparcel subdivision. Sometimes these can be handled through a bonding process, but in many instances the seller will have to pay the taxes upfront and then get a proration at closing.

If there is a lender involved, either through a traditional mortgage or through a sale-leaseback structure or other synthetic mortgage configuration, there may be additional parties with consent rights. Their approval processes may vary widely and require different concessions (such as partial loan repayment with proceeds from the instant transaction, payment of attorneys' fees and costs for review of the transaction documents, and so on). If the redevelopment might include creation of any outparcel, an anchor or developer should consider possible outparcel development at the outset of the financing relationship so that these issues can be addressed and an approval process can be put in place from the inception of the loan. Looking at the mortgage situation from the perspective of the prospective outparcel occupant, will a consent agreement or subordination agreement be necessary? This may depend on the various parties, whether a franchisor is involved, and the level of investment that the occupant plans to put into the location. If so, it will be an additional level of review and approval for the anchor or developer to secure.

Special Considerations for Outparcels

What if one party owns the anchor or developer parcel, and another party owns the anchor box to be developed? If an anchor or developer desires to sell an outparcel for development, it is most likely not desirable or practical for the purchaser to become a party to the center-wide REA. One way to document this relationship is with a mini-REA between anchor-seller and outparcel buyer. The mini-REA (which may also be called an agreement of restrictive covenants or any number of other names) is a two-party agreement that will be recorded in the real property records against the original larger parcel of which it was a part and the new outparcel. It serves to acknowledge the center-wide REA and then to provide for matters internal to the parent parcel, which will most likely still be documented as one larger parcel in the center-wide REA, and the new outparcel. It may provide for new easements for parking, access, utilities, signage, or drainage and may also address the continuation of easements established under the center-wide

REA upon its expiration or termination. If the center-wide REA does not provide for perpetual easements, the new outparcel could eventually be without access to a public right of way.

This document will operate to protect the buyer as to the seller's exercise of its rights as the controlling party under the center-wide REA; it can prevent the seller from approving changes to permissible building areas, signage, parking, ring road alignment, and increase of CAM charges without buyer's involvement. In addition, the purchaser of the outparcel may be developing for a specific tenant or occupant. If the tenant is the actual party in interest, and will be making payments or reviewing and approving things like changes to protected areas, it may make sense to involve the tenant as a party to the mini-REA. If the tenant is added, any involvement should only be for the term of its lease. Assignment and other terms of the lease may need to be reviewed and evaluated as well.

If there are multiple outparcels, the choice will be whether to have multiple two-party mini-REAs layered on the property or one multi-party agreement covering the entire parent parcel as it is divided up. Depending on the layout of the center and the outparcels and the various easements granted by the mini-REA, it may make more sense to have completely separate documents. If the outparcels are adjacent to each other, however, one integrated document could be the best way to address easements between the multiple parcels.

Other Recurring Redevelopment Issues

Cost sharing for maintenance of easement areas, such as shared driveways and drainage detention, should also be addressed. These costs, as well as sharing of common area maintenance costs payable pursuant to the center-wide REA, can be addressed in a separate agreement if the parties desire that they not be reflected in the real property records. Often, anchor parties are given discounted or subsidized CAM cost rates, and they may want to keep any reference to that out of public records.

There may also be use restrictions in the REA applicable to the proposed redevelopment. The use restrictions on an anchor parcel in the REA may take one of many typical forms: any lawful use, any lawful retail use, or any lawful use that is consistent and harmonious with the remainder of the shopping center or with a first-class shopping center. Note that a first-class shopping center may not be the best standard, as that is difficult to define. There may also be use restrictions against exclusive uses granted to other occupants of the center or against traditional "noxious" uses such as sexually oriented businesses, funeral parlors, head shops, and others. The restrictions may also include a maximum number of occupants for the anchor parcel.

Non-traditional uses have been becoming increasingly popular in mall shopping centers. These include, among others, grocery, outlet, fitness center, hotel, multi-family, religious, educational, office, and health care. When determining what use may be restricted, there is significant due diligence required of the party undertaking the redevelopment to determine the extent to which the anchor box is subject to any of the qualifying terms such as "first-class" or "retail" use or any restrictions and use exclusives imposed by other occupants of the shopping center. Although some restrictions imposed by an REA may be explicit and clear as to the intent, such as a restriction on movie theaters, others are often ambiguous and pose questions for both the party redeveloping the anchor box and the proposed occupant as to whether a use may be prohibited. For example, would a restriction on health clubs be interpreted to prohibit a children's swim school or karate studio? A chiropractic or massage therapy office? Or would a requirement that an occupant operate a "first-class" retail use prohibit an entertainment use such an upscale bowling establishment?

The retailer who remains while the vacant anchor box is being redeveloped is going to be concerned about minimizing the disruption to its business. How will the remaining retailer's customers access the parking lot and where will they park? To avoid conflict with construction traffic, the remaining retailer will want the developer to agree to limit construction traffic to particular access roads and stage construction materials away from the remaining retailer's parcel. The remaining retailer will want to ensure that any utility interruptions are scheduled for off hours so that the remaining retailer's business is not disrupted. The remaining retailer will be concerned that the construction traffic will lead to increased CAM costs and will want to limit that exposure. Finally, the remaining retailer will want the developer to be obligated to restore any common areas once the construction is finished.

Some Common Threads

If we have learned anything from the already accomplished use and re-use of anchor boxes, it is that the tension between the tenant's desire to restrict the uses within the shopping center and the developer's desire for flexibility remains as strong as ever. Similarly, the concerns of the parties are often the same as the original parties—easements, construction, visibility, and compatible use.

Whether the existing REA is being amended, restated, or supplemented with mini-REAS, what can we agree upon? We can agree that the users in the shopping center will need utilities and that they will need access to public streets. We can probably agree that the users in the shopping center will want customers to have the right to park anywhere within the shopping center. If the buildings are built to the lot line, the parties will want to grant encroachment easements and construction easements to one another. How is storm water handled? Do we need to continue drainage easements? Is there a shared monument sign where the retailers will need an easement to place their panel on the monument and an easement to access the sign to maintain the panel?

In the existing REA, the parties probably granted to each other and to the local utility provider the right to install, operate, maintain, and repair utility lines on each owner's tract. Do any of those easements need to be amended or relocated to accommodate the redevelopment of the anchor box?

Special consideration should be given to easements for stormwater drainage. Does the language prohibit altering the common areas on the burdened tract in a way that will impede the flow of stormwater from the benefitted tract?

Frequently an existing REA will already contain language allowing the burdened owner the right to relocate a utility easement. This type of language will require the burdened owner to give the benefitted owners notice, not vacate the existing utility line until the new one is ready to use, and not make it more difficult for the benefitted owners to use the utility line.

When reviewing the provisions of an existing REA discussing access easements, determine if the easement is tied to a specific location. If the access easements were granted over a specific area, the party redeveloping the anchor box will have to obtain consent from each other owner benefitting from the easement to move the easement. Sometimes an existing REA will specify that a certain specific access road, such as an access road leading from a ring road to a public road, will be granted based upon a specific location and the access road will not be relocated without the consent of all the other owners. If the existing REA does not tie access easements to a specific location, determine if there is language allowing the owner to relocate the easement and the requirements to relocate the easement.

As anchor boxes are developed into different uses, what does that do to parking ratios? Most anchor boxes have three entrances on two levels—how are those allocated amongst the new tenants? Should the developer create a mini-mall with the new tenants having access from a center entrance? An existing

REA might have very specific language about parking easements and parking ratios. The existing REA might say that each parcel must be self-sufficient for parking. It will generally require parking ratios of five spaces for each 1,000 square feet of retail space and something like ten spaces for each 1,000 square feet of restaurant space. If an anchor box is redeveloped for a restaurant, office, or residential use, it will trigger new parking ratios that have to be met and, depending on the language of the REA, will have to be met entirely on the parcel being redeveloped.

If there is a common sign such as a shopping center pylon or monument sign, and the anchor box has access to one of the panels on the sign, will the new tenant or tenants of the redeveloped anchor box have the right to use the same panel location? If the anchor box is being redeveloped into a couple of spaces, will the new users have the right to subdivide the panel? If the sign is located on the parcel of another owner, will each of the new users have to have an easement to maintain its panel, or will they appoint one party to handle the maintenance for everyone?

Besides noxious and prohibited uses that will need be addressed, does the REA define permissible building areas that will need to be revised to allow an enlargement or reconfiguration of the former anchor box? Does the REA require a unified architectural theme that might limit the changes that can be made to the exterior of the anchor box? If residential uses are added, the developer will have to limit the times when deliveries can be made to the retailers so that the residential tenants are not disrupted in the middle of the night. If the existing REA is being amended or restated, consider sunset provisions on various restrictions and easements.

Terminating REAs

What do you do with an REA that is coming to the end of its term? We are reaching a time when many REAs that were put into place in the 1970s and 1980s are expiring naturally. Some provide that certain access, utility, and other easements are perpetual and automatically continue after the expiration of the remaining terms of the REA, but others do not. In those cases, the need to address expiration is more urgent.

If the parties agree and want to continue to operate the center as an integrated whole, a simple extension document may suffice. If the parties desire to continue but the evolution of the center has made the REA obsolete, an amended and restated REA may be the best solution, but a short-term extension (or more than one such extension) may be necessary while the parties negotiate new documentation. An amended and restated REA can take years to complete when several parties are involved.

Another approach if the anchors and developer do not agree regarding the future of the center, or are not willing to commit to wholesale restrictions going forward, is a pared-down agreement. This can include easements, address exterior CAM only (which is often the case when redevelopment of an enclosed mall is on the horizon), or address other issues such as signage and drainage or detention. If any easements are granted or maintenance by one party of another party's property is expected, appropriate insurance and indemnity provisions should also be included. One difficult issue in this scenario can be remedies. If one party violates the agreement by blocking access, failing to maintain common areas, or failing to pay maintenance costs, what remedies do the other parties have? These could include self-help, termination of the agreement, or withdrawal of one party's property from the agreement, but more creative solutions may be needed depending on the specifics of the center.

If one party desires to pursue a separate development but the other anchors and the developer intend to continue to operate the remainder of the center in a coordinated fashion, the REA may be allowed to expire, and new piecemeal agreements may be negotiated for different parts of the center. This is often the case when one anchor with a dark anchor box and a large parcel of land elects to demolish the anchor box and redevelop the entire parcel as a lifestyle or power center. If there are multiple agreements in place (especially with overlapping parties and parcels), it can be difficult to determine how the agreements interact with each other, unless priority and other matters are spelled out in the documents.

Alternative use development should be considered in any new documents that are contemplated. As medical, educational, residential, and hotel uses become commonplace in shopping centers and redeveloped enclosed malls, the parties should evaluate whether it makes sense to keep any of the traditional prohibited uses and, if so, which ones. Parking ratios have also changed drastically since most center-wide REAs were put into place. New phenomena such as ride sharing and municipalities desiring to have more green space and less impervious surface have led to smaller minimum parking ratios, which can help to facilitate the redevelopment of older centers.

Conclusion

The loss of an anchor tenant creates both challenges and opportunities for shopping center developers and remaining tenants. The decline of traditional department store anchors is a cause for concern, but it also opens the door to new, nontraditional uses that may offer even better tenant mixes and profitability. Helping developers navigate a host of issues and a variety of stakeholders can be one of the most challenging and enjoyable aspects of a retail lawyer's practice.