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US Regional Real Estate

South Carolina
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SOUTH CAROLINA

Law and Practice

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1. GENERAL

1.1 Main Substantive Skills

The practice of real estate law requires a substantive understanding of:

- estates in real property and methods of conveying real property interests;
- real estate financing;
- leasing;
- zoning and land planning;
- entity selection, including joint ventures;
- tax; and
- eligibility for local economic incentives.

1.2 Most Significant Trends

The SC real estate market has been affected by the COVID-19 pandemic in a number of significant ways. The industrial/logistics asset class remained strong in 2020, and the uptick should continue in acquisitions and assemblages of real property for industrial uses, much of which is related to the burgeoning automotive manufacturing and aerospace industry in South Carolina. The single family and second home residential housing markets remained strong through the pandemic, especially in resort communities along the South Carolina coast and in the mountains that enjoyed an influx of new out-of-state buyers.

Construction activity related to multifamily projects, and purchase and sale activity with respect to multifamily projects, continued to be robust, and there continues to be great interest in the acquisition of SC real estate by out-of-state institutional investors like REITs and private equity real estate funds. Because of the lockdown and changing consumer habits, the office and retail sectors have become more uncertain in the past 12 months, and an increased number of restructurings and conveyances are expected as lenders and landlords begin to actively pursue their remedies in distressed settings.

Many of the industrial sites being acquired are obtained from governmental or quasi-governmental regional or local development authorities; these acquisitions are generally intertwined with governmental incentives, such as real property tax abatements, cash grants, and government-provided or government-financed infrastructure granted as an inducement to site selection in South Carolina. In the financing area, private equity investors and equity fund lenders are becoming a significant source of funding for SC real estate acquisition and development.

1.3 Impact of New US Tax Law Changes

The Tax Cuts and Jobs Act (TCJA), adopted near the end of 2017, preserves the use of Section 1031 like-kind exchange rules for real property, allows for capital gains treatment for holders of a carried interest allocation in certain real estate investment vehicles, and preserves the current depreciation recovery periods for commercial real property.

The TCJA also provides for tax deferral and tax rate reduction through investments in opportunity zones. Qualifying investments in projects located in opportunity zones will result in a deferral of capital gains until either the sale of the project or December 31, 2026. In addition, the original taxable gain is reduced on a sliding scale based on the length of time the investment is held:

- a project held for five years would increase capital gains basis by 10%;
- a project held for seven years would increase capital gains basis by another 5%, for a total of 15%; and
- a project held for at least ten years would receive a step up in basis to the current market value as of the date of its disposition, potentially resulting in little or no gain upon disposition of the project.

South Carolina has 135 designated tracts approved as opportunity zones, including 128 low-income communities and seven non-low-income contiguous tracts. A total of 54 of the tracts are located in an area with a concentration of population equal to or greater than 5,000 persons, and another 111 tracts are within a five-mile radius of the boundary of such a population concentration. Opportunity Zone investment has been strong in South Carolina, and this is expected to continue into 2021.

2. SALE AND PURCHASE

2.1 Ownership Structures

The most commonly used ownership structure in SC real estate transactions is the limited liability company (LLC). Limited partnerships (LPs) are also used as real-estate investment vehicles. Corporations are less frequently used, largely because of negative tax attributes. Whatever the form of the primary ownership entity, the actual titleholder is frequently a single-member LLC subsidiary of that primary entity.

2.2 Important Jurisdictional Requirements

South Carolina has formal requirements for the validity of conveyancing real estate instruments to be recorded in the real property records located in each county. The parcel or parcels conveyed must have been legally created as separate parcels; any conveyance subdividing a parcel or combining multiple parcels into a single parcel requires an application and government approval for such reconfiguration. There are no special laws or regulations that apply to the transfer of specific types of real estate (although specific uses are always subject to zoning and land-use regulation).

2.3 Effecting Lawful and Proper Transfer of Title

Transfers of ownership of real property in South Carolina are made by deed, which may or may not include warranties of title. A deed must be in proper form and witnessed by two disinterested parties. In addition, a deed must contain an acknowledgment made by the transferor before a notary public or, alternatively, an affidavit of a subscribing witness.

In order to be valid as against third parties, deeds must be recorded in the real property records for the county in which the property is located. As discussed more fully below in 6 Commercial Leases, there is a transfer tax payable upon recordation of a deed. Each deed must be accompanied by an affidavit as to the actual consideration paid.

South Carolina is an attorney closing state, meaning that a SC attorney must undertake or supervise key parts of the real estate transaction, including the title review, the drafting of the conveyancing documents, disbursing of funds, and the recordation of documents. The SC Supreme Court takes this requirements very seriously and, as such, a lack of SC attorney involvement may affect the enforceability of the underlying documents, so investors should consult with SC counsel before attempting to close a SC real estate transaction.

2.4 Real Estate Due Diligence

Many aspects of real estate transactions are subject to arcane and technical rules and regulations, and as a result, it is critical to have the assistance of knowledgeable SC counsel. With respect to title due diligence, South Carolina is one of the few states in which law firms act as title insurance agents; most SC law firms are empowered to issue title insurance commitments and policies. This arrangement facilitates the negotiation of title insurance coverage and

allows for integration of title insurance coverage with the closing process. For these reasons, due diligence relating to title is generally conducted by purchaser's counsel, and the purchaser or its counsel is responsible for the title examination and obtaining title insurance.

South Carolina is a filed-rate state, meaning that title insurance premiums are largely fixed by state regulation, although there may be some negotiation for the price of endorsements. Although not typical, in some transactions the seller will tender a basic title commitment for review by purchaser's counsel.

Surveys

Surveys are an important part of due diligence – purchasers are advised to obtain new surveys meeting the standards set forth by the American Land Title Association and the National Society of Professional Surveyors, Inc. These standards contain a number of optional survey coverages and certification; SC counsel will provide guidance as to the optional provisions appropriate to the specific project. Surveys are necessary to adequately identify and locate encroachments (on or off the property), identify and locate easements and other possible title issues, and specifically locate on the property the exceptions identified in the title commitment.

Zoning and Entitlement

Zoning and entitlement due diligence likewise will be conducted by purchaser's counsel by direct contact with the applicable planning and zoning officials to obtain a "zoning letter"; this due diligence may be supplemented by a zoning report obtained from a national provider.

Environmental

Environmental due diligence will consist at a minimum of a Phase I environmental survey followed by a Phase II, as necessary. Properly conducted environmental surveys may provide

a purchaser with a defense against unlimited liability for existing contamination on the property that otherwise attaches to parties in the chain of record title. In order for a purchaser to obtain this defense, there are number of technical requirements that must be complied with in connection with the environmental surveys.

For example, the environmental surveys must be done in compliance with the regulations of the US Environmental Protection Agency. These regulations require, among other things, that the engineer conducting the survey must meet certain educational, certification, licensing, and/or experience requirements. The survey itself must be conducted compliance with the latest versions of specified engineering standards and be addressed to the purchaser. In addition, the fieldwork underlying the survey, as well as certain record reviews, must have been completed not earlier than six months prior to the purchase.

With respect to contaminated properties, purchasers may enter into a voluntary cleanup contract with the state authorities in order to limit environmental claims. The ability of the purchaser to enter into such a voluntary cleanup contract, however, is subject to a number of technical requirements. For example, the cleanup contract must be in place prior to the time the purchaser obtains title, otherwise, the purchaser may have full joint and several liability for environmental contamination on the property. Even if an agreement is reached with the state environmental authorities, this is not a guarantee that the protections in the agreement will be recognized by the federal environmental authorities.

Identification of Wetlands

Another significant due diligence item is identification of wetlands on the property. Federal and state regulation precludes development of or damage to many kinds of wetlands and regulates the discharge of stormwater runoff

into the wetlands. This wetlands regulation is highly technical; the purchaser may be required to restore damaged wetlands (typically at considerable expense) if rules are not fully complied with. Should wetland impairment be necessary for an economically viable development, such impairment may be permitted if the purchaser makes an appropriate investment in a “wetland bank” that ensures the preservation of a comparable amount of wetlands located elsewhere.

Physical Condition

Due diligence as to the physical condition of the property is typically undertaken by engineers or consultants retained by the buyer or by way of a property condition report obtained from a national provider. If construction is contemplated, geotechnical soil tests will be conducted to determine the suitability of the site for construction.

Real Property Tax

Real property tax matters are a significant part of the purchaser’s due diligence. In addition to verifying that all taxes due and payable have been paid, certain transactions may be deemed to be “assessable transfers of interest”; this designation can trigger a reassessment of the property for tax purposes in the year following the transfer, and the resulting increase in value will result in an increase in real property taxes levied.

If the property has been classified as agricultural property, a change to a nonagricultural use may result in a recapture (or “roll back”) of tax discounts given in the prior five years on account of the property’s agricultural classification.

Under SC law, the state can impose a tax lien on property in the hands of the purchaser for income and other general taxes not paid by the seller. SC law further provides several safe harbors under which this liability can be avoided based on affidavits of the seller as to its tax com-

pliance and/or a certificate from the SC taxing authorities as to compliance.

If a seller is an entity, the purchaser’s attorney will verify the existence and good standing of the seller in South Carolina and, if different, its state of formation. The purchaser’s attorney will also confirm that the transaction has been authorized by all necessary resolutions and that any other necessary entity action has been adopted or taken by the seller’s governing body.

2.5 Typical Representations and Warranties for Purchase and Sale Agreements

There are no legally mandated representations and warranties or disclosures in commercial real estate transactions – the doctrine of caveat emptor prevails. Purchase and sale agreements typically contain customary representations and warranties, although representations as to ownership and the status of title are less common – title matters are left for due diligence by the buyer’s counsel, with the buyer’s risk further mitigated by title insurance.

Sellers frequently indemnify the purchaser against breaches of representations and warranties; however, the liability of a seller for such breaches are frequently capped monetarily and subject to shortened periods in which claims may be asserted. Note that the enforceability of provisions shortening general statutes of limitation may be unenforceable under SC law, and SC counsel should be consulted. It is also common for purchase and sale agreements to preclude recovery for indirect or consequential damages.

Most real estate transaction documents also include waivers of jury trial and/or arbitration requirements. To ensure their enforceability, the drafting of such provisions requires the assistance of counsel knowledgeable about SC law.

For example, arbitration provisions may be unenforceable absent strict compliance with SC arbitration statutes.

2.6 Important Areas of Law for Foreign Investors

Foreign investors should be aware of certain laws that affect real estate investors. Under the Foreign Investment in Real Property Tax Act, up to 15% of the proceeds from the sale of real property by a foreign seller may be required to be withheld and applied to the seller's federal income tax liability. A purchaser of agricultural land may be required to make a filing under the Agriculture Foreign Investment Disclosure Act of 1978.

If the foreign purchaser conducts a US business enterprise in connection with the property, a filing with the US Bureau of Economic Analysis, an agency of the US Department of Commerce, may be required. The purchase of property located near critical infrastructure or sensitive government facilities may require approval from the Committee on Foreign Investment in the United States, commonly known as CFIUS. Under SC law, a single foreign purchaser may not own more than 500,000 acres of land in the state.

2.7 Soil Pollution and Environmental Contamination

Purchasers may become liable for environmental contamination simply by acquiring an interest of record in contaminated real property. For this reason, it is critical in South Carolina to conduct environmental assessments of property prior to acquisition. If property is found to be contaminated, a purchaser may enter into a voluntary cleanup contract with the state that limits the exposure of the purchaser to environmental claims asserted by the state; these voluntary clean-up contracts, however, must be entered into prior to the time the purchaser acquires the

real property interest and do not necessarily protect a purchaser against claims asserted under federal law.

Generally, purchase and sale agreements provide that the seller is responsible for any clean-up costs and other liabilities arising from contamination occurring prior to the transfer of title, with the purchaser being liable for contamination occurring after the transfer of title. In larger transactions, purchasers are sometimes required to bear all the risk of contamination and may even be required to indemnify the seller against liabilities relating to such contamination.

2.8 Permitted Uses of Real Estate under Zoning and Planning Law

Purchasers of SC real estate may either verify directly with the appropriate local zoning authorities the zoning classification of the property or obtain a property zoning report from a third-party supplier. Zoning ordinances and maps are publicly available, and the property's zoning classification and the resulting permitted uses and restrictions can be directly determined.

For appropriate projects, most local authorities will enter into development agreements to facilitate development of property deemed desirable by the local authorities. Development agreements may modify or supersede existing zoning provisions and facilitate development in accordance with the peculiarities of the specific project.

2.9 Condemnation, Expropriation or Compulsory Purchase

Condemnation is permitted in South Carolina, and may be exercised by states, counties, municipalities, and utilities. Property may be taken only for true "public uses" such as roads, airports, ports, and utility facilities; condemnation for the benefit of private enterprise or general redevelopment is not permitted.

2.10 Taxes Applicable to a Transaction

South Carolina imposes a transfer tax on real property conveyances. The amount of the tax is USD1.85 for each USD500, or fractional part thereof, of the value of the property transferred. The calculation of the value of the property transferred, however, is fairly technical and dictated by statute; the value is sometimes but not always based on the consideration paid.

The transfer tax is also subject to a number of technical exceptions, and it is sometimes possible to structure the transaction so as to avoid the imposition of the transfer tax entirely.

The transfer tax applies only to transfers conveyed by way of a deed, and generally does not apply to economic changes in ownership resulting from equity transfers by the title-holding entity. Some local jurisdictions, however, require that notice of an equity transfer be given to the local taxing authorities; this notice may trigger a reassessment of the value of the property in the year following the equity transfer, resulting in an increase in annual taxation.

2.11 Rules and Regulations Applicable to Foreign Investors

See **2.6 Important Areas of Law for Foreign Investors**.

3. REAL ESTATE FINANCE

3.1 Financing Acquisitions of Commercial Real Estate

Acquisition of commercial real estate is generally financed by mortgage lenders, who may be either institutional lenders or private equity funds; by way of JV investment; or some combination of the foregoing. In addition, mezzanine financing is becoming more common and may be used in conjunction with the more traditional mortgage loan. Many loans of income-producing property

are structured to the rating agency requirements for inclusion in a commercial mortgage-backed loan package.

Larger real estate portfolio acquisitions are frequently financed by private equity or multi-lender loans.

3.2 Typical Security Created by Commercial Investors

Most real estate financing is secured by a mortgage, which will grant to the lender a lien on the subject real property. Upon default by the borrower, the lender may institute judicial foreclosure proceedings and cause the public sale by the court of the mortgaged property. The proceeds of that sale will be applied to reduce the borrower's indebtedness secured by mortgage.

Deficiency

Whether the borrower is potentially liable for any deficiency remaining after sale is determined by the terms of the financing documents. Moreover, South Carolina has an anti-deficiency statute that allows a borrower to use an appraisal process to potentially reduce or eliminate any deficiency judgment. A borrower's rights under this anti-deficiency statute may be waived, but the waiver must meet a number of statutory and procedural requirements, including the giving of a notice in a prescribed form prior to the transaction and the execution of a waiver in a prescribed form as part of the transaction.

A lender who seeks to preserve the right to a deficiency judgment against a borrower should obtain advice from SC counsel.

Private Enforcement of Mortgages

South Carolina does not recognize private enforcement of mortgages, such as by way of a power of sale. Further, a lender is not entitled to take possession of the mortgaged property after default – a lender's remedy is limited to

judicial foreclosure. In a judicial foreclosure, a receiver may be appointed by the court to take possession of the property and collect rents for the benefit of the lender, but only if the appropriate language is contained in the mortgage loan documents.

Lenders are advised to consult SC counsel to ensure that the financing documents include the necessary receivership provisions.

Assignment

In addition to a mortgage, borrowers are generally required to execute an assignment of the leases, rents, and profits the property; this may be done in a separate instrument or by inclusion of an appropriate provision in the mortgage itself. SC counsel should be consulted to ensure the adequacy of any such intended assignment. To the extent there is significant non-real-estate collateral located on the property (such as machinery and equipment), a borrower may grant a personal property security interest in that non-real-estate collateral.

Finally, security can also be taken at the equity level of the real estate owning entity. This is done by way of a pledge of the equity interests in the real estate owning entity by the owners of those interests.

3.3 Regulations or Requirements Affecting Foreign Lenders

Foreign banking organizations are subject to regulation at the federal level, with the nature and extent of the regulation depending upon whether the foreign banking operation is chartered in the United States or abroad.

Although there are several potentially applicable exemptions for mortgage lenders, foreign lenders may be required to obtain a certificate of authority to transact business in South Carolina. SC counsel should be consulted as to whether

the transaction may be structured so as to avoid the need for a certificate of authority.

There is effectively no usury in South Carolina and no other interest rate regulation with respect to commercial finance.

3.4 Taxes or Fees Relating to the Granting of Enforcement of Security

There are no mortgage taxes, transfer taxes, or documentary taxes imposed on the granting of mortgages or other security in real estate interests.

3.5 Legal Requirements before an Entity Can Give Valid Security

SC entities are empowered to do all things necessary or convenient to carry out their business and affairs, including the mortgaging of their properties. Customarily, the governing body of a borrowing entity will adopt a resolution (or act by written consent) making a determination that the granting of the particular security is in the best interest of the entity and in furtherance of the business purposes of the entity.

3.6 Formalities When a Borrower Is in Default

A mortgage lender seeking to enforce its rights after a borrower default first must take any steps required by the loan documents. For example, the lender must give any notice as of right to cure or provide such demand letters as may be required contractually. Once these preliminary matters are accomplished, the mortgage lender must bring a judicial foreclosure action in order to realize upon the mortgaged property.

This foreclosure action will result in a public auction sale by the court of the mortgaged property. The mortgage lender may “credit bid” at the sale. Sale of the mortgaged property under a power of sale is not permitted; a judicial foreclosure proceeding is required. Likewise, a mortgage lender

on default by the borrower is not entitled to take possession of the property.

Establishing Priority

In order to establish the priority of the mortgage over interests of competing creditors, the mortgage lender must record the mortgage in the applicable county's real property records. Competing creditors claiming an interest in the mortgaged property must be named as defendant-parties in the judicial foreclosure action; the public sale will be free and clear of those junior claims and interests.

Appointing a Receiver

Assuming the loan documents have the necessary provisions, assignments of leases, rent, and profits may be enforced by the appointment by the court of a receiver in connection with the foreclosure proceedings. The court may authorize the receiver to collect rents and other profits derived from the property, and, after deducting costs of operation of the property and the receiver's fees, to disburse the remaining proceeds to the lender to be applied to the secured indebtedness. SC counsel should be consulted at the loan origination stage so that the necessary assignment of rents and receivership provisions are included.

Pledged Security

Where the equity owners of the real estate entity have pledged that equity as security, the lender is authorized under the Uniform Commercial Code to sell such equity at public or private sale after due notice to interested parties; no judicial action is required. The lender may credit bid at a public sale but may not bid at all in a private sale.

3.7 Subordinating Existing Debt to Newly Created Debt

Existing indebtedness may be subordinated to new indebtedness by a contractual subordination agreement. Otherwise, existing secured

indebtedness will generally retain its priority. Although advances made in connection with construction financing will generally maintain priority based on the original filing date of the mortgage, advances made after both the filing and the service of a mechanics lien may lose priority to the mechanic's lien.

These priorities are determined in large part by the SC recording acts, which are not straightforward and leave much to common law doctrine. For example, priority is not necessarily determined by the time of recording.

In addition to general priority questions that are determined by ordinary priority rules, in extraordinary circumstances involving lender misconduct, a court may subordinate existing indebtedness under the legal doctrine of "equitable subordination." Finally, again, in extraordinary circumstances, usually in bankruptcy proceedings, debt may be recharacterized as equity, with the result that the debt is effectively subordinated to claims of other creditors.

3.8 Lender's Liability under Environmental Laws

As a general rule, a lender does not become liable under environmental laws by virtue of holding a mortgage or by virtue of foreclosing the mortgage and taking title to the property for the purpose of reselling it to an ultimate purchaser. A lender may nevertheless become liable if the lender actively participates in the management of the property. "Active participation" by a lender means that the lender exercised decision-making control over environmental compliance with respect to the property or exercised general management control such as that typically exercised by a manager of the facility or property.

A lender may, however, inspect the property, require a borrower to respond to contamination issues, provide the borrower with financial

advice, or amend or restructure the mortgage or the mortgage loan terms – these activities are not deemed to constitute active participation.

3.9 Effects of Borrower Becoming Insolvent

A filing of bankruptcy proceedings by or against a borrower will result in an automatic stay or injunction against all creditors. This automatic stay will prohibit any acts to enforce the mortgage or collect the mortgage indebtedness. In order to proceed with foreclosure or collection activities, a lender must have this automatic stay modified by the bankruptcy court.

A mortgage lender is deemed to be a secured creditor to the extent of the value of its collateral. As part of the bankruptcy process, the repayment terms of the mortgage indebtedness may be extended for a longer period and the interest rate may be modified, but in theory, the amended repayment terms must grant the lender on a present value basis the equivalent value of its mortgage interest.

Mortgages may be set aside in bankruptcy if the mortgage was granted within the period immediately preceding the bankruptcy filing as security for a preexisting unsecured debt, if the mortgage lender did not provide reasonably equivalent value to the borrower in exchange for the granting of the mortgage, or if there is a significant delay in the recording of the mortgage. A mortgage may also be set aside in bankruptcy if it is not timely and properly filed and indexed in the real property records so as to cause the mortgage to have priority over competing lien creditors. The most important actions a mortgagor lender may take to protect itself from bankruptcy risks is to ensure that the mortgage is recorded in a timely manner and properly indexed in the appropriate recording office.

3.10 Taxes on Mezzanine Loans

There is no existing, or pending legislation in South Carolina that proposes to impose a mortgage recording tax, or tax on a pledge of share, or membership interests in the borrower in connection with a mezzanine loan.

4. PLANNING AND ZONING

4.1 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction

Most jurisdictions have adopted building codes, incorporating construction standards such as required building elevation, general structural matters, loadbearing and wind resistance, and electrical and plumbing requirements. Land disturbance and construction permits are required prior to the commencement of construction, and during construction arrangements must be made for periodic governmental inspections to verify compliance with applicable building codes. Building code compliance is also required in connection with any major refurbishment of existing structures.

Some, but not all, jurisdictions have architectural review boards or equivalent entities with approval rights over the design and exterior appearance of new and renovated structures.

4.2 Regulatory Authorities

Most local governments have planning and zoning departments charged with enforcing zoning and land use regulations and building inspection departments charged with enforcing construction requirements. These regulations typically include permitted uses, lot coverage, setback requirements, and general construction standards. In some rural areas, however, there is no applicable zoning regulation, although building codes will nevertheless be applicable.

In addition to general planning and zoning and construction regulation, the construction of “curb cuts” granting physical access to existing public roads requires approval of the applicable Department of Transportation. If there are regulated wetlands on the parcel, approval of the development plans by the US Army Corps of Engineers will generally be required. Approval of water, sewer, and storm water retention and dispersal requirements is regulated by the SC Department of Health and Environmental Control and local governments.

4.3 Obtaining Entitlements to Develop a New Project

Planning and Zoning Departments

If the proposed use is consistent with existing zoning codes, then the initial step in development of property is to obtain approval from the applicable planning and zoning departments of a site plan setting forth the basic layout of the project. The site plan may include (or will be followed by) civil engineering plans showing regulated wetlands, stormwater retention and dispersal plans, utility plans such as water and sewerage, and building footprints. Additional approvals required in connection with the site plan approval process include approval of stormwater containment and dispersal plans, approval of curb cuts for access to public roads obtained from the applicable department of transportation, and approval of wetlands delineation and impairment by the US Army Corps of Engineers.

In addition, in larger projects, a traffic study may be required. A developer must also provide water and sewerage availability letters from the applicable utilities.

Architectural Review Board

Architectural plans likewise require approval of the applicable planning and zoning department as well as, if applicable, the governing architectural review board. Appropriate permits must be

issued before land disturbance and the commencement of construction. If the project and proposed use of the property conforms to existing zoning requirements, there is generally no formal public input into the permitting process.

To the extent the project or the resulting use of the property requires a variance or a zoning amendment, the property owner must comply with a formal application process, requiring among other things one or more public hearings. The public is given the right to object to any requested variances or zoning amendment and to participate in the related public hearings.

4.4 Right of Appeal against an Authority's Decision

Most state and local authorities have a board of zoning appeals or a functionally equivalent body that is expressly authorized to hear appeals from permitting and zoning actions, including denials of or the imposition of conditions on permits and zoning variances. Aggrieved parties generally have an appeal as a matter of right to the appeals board with respect to any adverse decision made under a zoning or development ordinance, including adverse decisions with respect to the issuance of permits.

4.5 Agreements with Local or Governmental Authorities

The construction or development of projects that are in conformity with applicable zoning and land use requirements does not require specific agreements with local authorities. Nevertheless, in order to provide certainty to developers prior to the investment of substantial funds, local governments are authorized to enter into development agreements with property owners. The development agreements are intended to allow for preapproval of the scope and permitting of a proposed project and will typically address zoning and land use issues, density, infrastructure, and the funding of related public services.

Local governments are required to have one or more public hearings after public notice before entering into development agreements. Development agreements are commonly used in connection with larger projects and where the specific project requires amendments or variances from the current zoning.

4.6 Enforcement of Restrictions on Development and Designated Use

Restrictions on development and the designated use of property are generally enforced at the permit level; land disturbance and building permits are denied if the proposed project is not consistent with applicable restrictions. Certificates of occupancy may be denied for the same reason. Restrictions on use and the development of property may also be enforced by both the local governmental authorities and the public by way of legal proceedings seeking to enjoin the unauthorized use or development of the property.

5. INVESTMENT VEHICLES

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

Title real estate can be held by any legally recognized entity having a separate legal existence, including partnerships, LPs, limited liability companies, corporations, and statutory trusts. Title can also be held by trustees under common law trusts. The type of entity most frequently used to hold title to real estate is the LLC. LPs are also frequently used.

The use of corporations and partnerships as title holding vehicles is less common.

5.2 Main Features of the Constitution of Each Type of Entity

Limited Liability Corporations

LLCs provide limited liability protections — members and managers are not liable for debts of the LLC. LLCs have great flexibility with respect to:

- management and control options;
- allocations of profits, losses, and other tax attributes among the members;
- distributions among the members; and
- limitation of duties owed by members to each other and to the LLC.

In addition, in some states, creditors of individual members may only reach the distributional interest of that member and not the member's actual limited liability interest; to this extent, an LLC may provide limited asset protection benefits. LLCs may be either single-member or multiple-member companies.

Partnerships

Partnerships are similar to LLCs, but have a significant disadvantage: the individual partners are jointly, or jointly and severally, personally liable for the debts and obligations of the partnership — there is no limited liability. Thus, a partner in a partnership may have liability greatly exceeding the amount of the partner's investment in the partnership.

Limited Partnerships

An LP is similar to a partnership, but must have at least one general partner and one or more limited partners. Although the general partner is fully liable for the debts and obligations of the LP, the limited partners' liability is limited to their investment in the LP. As an LP is able to offer limited liability to its partners, it is a commonly used vehicle when there are multiple third-party investors.

Corporations

Corporations are also established methods of holding title and provide limited liability to their shareholders. The use of corporations as title holding entities is less common than the use of LLCs and LPs because corporations are considered less tax-efficient real property investment vehicles.

5.3 Tax Benefits and Costs

Limited Liability Corporations

Single-member LLCs are generally ignored for income tax purposes, with taxation occurring at the parent or owner level. Multiple-member LLCs are typically taxed as partnerships. As a result, the LLC is a pass-through entity for tax purposes — taxation is at the member level and not the entity level. LLCs may, however, elect to be taxed as C corporations under the Internal Revenue Code, such that the tax is also levied at the entity level.

Partnerships and Limited Partnerships

Partnerships and LPs are pass-through entities for tax purposes, with taxation at the partner level and not the partnership level.

Corporations

Corporations are taxed at the entity level, and distributions of property and cash may also be subject to taxation at the shareholder level; because of this double taxation, and less favorable tax consequences on liquidation, corporations are generally viewed as less favorable vehicles from a tax perspective for the ownership of real property.

5.4 Applicable Governance Requirements

LLCs are usually governed either by the members or by appointing managers, although they can also be governed by a board of directors. Partnerships and LPs are governed by their gen-

eral partners. Corporations are usually governed by a board of directors.

In each case, the applicable members of the governing bodies approve proposed transactions by way of resolutions or actions by written consent.

6. COMMERCIAL LEASES

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

The granting of the right to possess real property without the transfer of title is usually accomplished by lease. Leases grant a right of possession, typically for a term of years, and frequently grant the tenant a right to one or more extended terms upon the expiration of the initial term.

A limited right of possession or use may also be granted by way of a license — typically, however, a license is for a very short, transitory period and for a limited, specific purpose. Moreover, leases granting an exclusive right of possession are considered an interest in real property; licenses do not grant an exclusive right of possession and are not considered an interest in real property.

The right to use another's property for a specific purpose may also be granted by way of an easement. Easements may be perpetual or for a specified term and may be classified as appurtenant, meaning that the easement benefits transfer with the benefited property, or personal, meaning that the easement benefits are not transferable. Personal easements are frequently for a limited term. Easements are considered interests in real property.

6.2 Types of Commercial Leases

Commercial Leases

Commercial leases are generally classified based on the nature of the property leased. A commercial lease that grants the right to possession to unimproved land only is commonly referred to as a ground lease. Commercial leases may also grant the right to possession of an entire facility or property – both land and improvements. Likewise, leases may grant the right to possession of a portion of existing improvements, such as in office buildings. These leases of only a portion of property are frequently referred to as “space leases”.

Ground Leases

Ground leases are typically used where the lessee intends to construct and own title to the buildings, with title to the ground remaining in the lessor. Ground leases tend to be for longer terms and may be the functional and economic equivalent of a conveyance of full title. Frequently, the lessee under a ground lease may finance the construction of improvements by executing a leasehold mortgage on its leasehold interest.

6.3 Regulation of Rents or Lease Terms

Rents and lease terms in commercial leases are, generally, not regulated. For certain property tax regulatory purposes, however, ground leases having terms of 90 years or more may be deemed to be full transfers of title to the lessee.

There is statutory regulation of residential leases, limiting remedies, providing for rights to cure defaults, requiring the provision of essential services, and regulating security deposits. There is, however, no direct rental amount regulation, except with respect to certain federally subsidized housing.

6.4 Typical Terms of a Lease

Lease terms vary based on the nature of the lease and the nature of the property subject to

the lease. Typically, commercial leases have a term of between ten and 30 years, with provisions for multiple optional extension terms that may double the initial lease term. Ground leases usually have much longer terms, ranging from 30 years to 99 years. Space leases typically have terms in the range of five years to 20 years.

6.5 Rent Variation

Most leases provide for periodic, automatic increases in rent during the lease term. The adjustments may occur each lease year or in some multiple thereof (eg, every five years). If the lease provides for renewal or extension terms, the rent will typically increase at the inception of each such additional term.

Leases for large retail businesses have traditionally included an “override”, meaning that the tenant will, in addition to scheduled rent, owe additional rent calculated as a fixed percentage of its gross sales in excess of an agreed-upon baseline amount.

6.6 Determination of Changes in Rent

Changes in rent are frequently based on negotiated fixed increases set forth in the lease at inception. Changes in rent may also be based upon changes in one or more measures of the consumer price index or other governmental indices of inflation.

6.7 Payment of VAT

There are no taxes or governmental levies payable with respect to rent, except that rent received by an owner will be included in the gross income of the owner for general income tax purposes.

6.8 Costs Payable by Tenant at the Start of a Lease

Tenants typically pay a security deposit equal to one or more months’ rent at the inception of the lease. Alternatively, the landlord may require a letter of credit to serve as a security deposit.

Tenants are also generally required to pay the first month's rent upon signing the lease.

Landlords frequently offer tenants an upfit allowance, which is a designated amount that the landlord agrees to spend to make tenant-requested improvements to the leased premises. Improvements requested by a tenant that cost more than the allowance will be paid for by the tenant. Landlords may agree to make other specified capital improvements requested by a tenant, with the cost of such improvements paid for by the tenant by way of an increase in the rent sufficient to allow the landlord to recoup the cost of the additional improvements.

6.9 Payment for Maintenance and Repair

Where there are multiple tenants in a property, the cost of maintenance and repair of the common areas (commonly referred to as CAM charges) is divided among the tenants. Generally, each lease will specify a fixed, specified proportionate share of the CAM charges attributable to that tenant. Tenants are typically required to make monthly payments calculated by multiplying their proportionate share by the total monthly CAM charges.

6.10 Payment for Services, Utilities and Telecommunications

In most cases, utilities are directly metered to the separate tenant spaces and paid for by the tenant. Otherwise, where there are multiple tenants, each tenant is typically charged a percentage of the total utility bill based upon an agreed-upon percentage set forth in the lease at inception.

6.11 Insuring Real Estate That Is the Subject of a Lease

In most commercial leases, the tenant pays directly the cost of insurance on the leased premises. When there are multiple tenants, each tenant will pay its pro rata share based on

its proportionate share as set forth in its lease. Alternatively, the landlord may pay the cost of insurance and be reimbursed on a monthly or annual basis by the tenants. With respect to ground leases, where the tenant typically owns the improvements, the tenant will pay the cost of insurance.

Most leased properties are insured against fire and other casualty. In larger projects, terrorism insurance may be included. In certain geographic regions, insurance will include one or more of earthquake, ground subsidence, windstorm and hail, and flood insurance. In addition, many owners of leased property will carry rent loss and business interruption insurance.

6.12 Restrictions on the Use of Real Estate

Landlords are free to restrict the use of leased premises by way of restrictive provisions in the leases. In addition, the permitted uses of leased premises will always be subject to general zoning and use limitations applicable to the location of the leased premises irrespective of the provisions of the lease.

6.13 Tenant's Ability to Alter or Improve Real Estate

Whether a tenant may alter or improve the lease premises is governed by the terms of the lease. Typically, a lease will expressly prohibit alteration or improvement of the lease premises without the prior written consent of the landlord. If alteration or improvement is allowed, the landlord will require indemnity against mechanics liens and other liability from the tenant and require the payment of any additional insurance premiums resulting from the alteration or improvement. The construction or alteration of leased premises will also be subject to the general construction and permitting requirements of the jurisdiction.

6.14 Specific Regulations

There are safety regulations applicable to high-density uses, such as multifamily properties, hotels, and office buildings, including requirements for smoke detectors, sprinkler systems, isolated stairwells, firewalls, and general resistance.

High-risk uses may be subject to special regulation by the US Department of Homeland Security. For example, chemical manufacturing facilities may be subject to the Chemical Facilities Anti-Terrorism Standards regulations promulgated by the Department of Homeland Security. These requirements typically include fencing adequate to limit access and fencing and screening adequate to limit sightlines onto the property.

Commercial real property that is to be used for the sale or consumption of alcoholic beverages is subject to regulation under state law as to whether such sale or consumption is permitted on the property. Otherwise, except for generally applicable zoning and land use regulations, there are no specific regulations and/or laws that apply to particular categories of commercial real property leases.

6.15 Effect of Tenant's Insolvency Insolvency

An insolvent tenant who fails to pay rent when due may be evicted from the property, and the landlord may terminate the lease. A landlord may also recover past-due rent and damages arising from the tenant's failure to pay future rent.

Bankruptcy

A tenant in bankruptcy, however, will generally have the right to reject any lease determined to be burdensome to the tenant, and as a result of such rejection, the lease will terminate. Further, a tenant's bankruptcy will result in an automatic stay prohibiting acts to enforce the lease or

evict the tenant without prior bankruptcy court approval.

6.16 Forms of Security to Protect against Tenant's Failure to Meet Obligations

Typical protections obtained by a landlord against the defaulting tenant include the taking of a security deposit or obtaining a letter of credit at the inception of the lease and/or requiring that a solvent third party execute a guaranty of tenant's obligations under the lease.

6.17 Right to Occupy after Termination or Expiration of Lease

A tenant has no right to possession after termination of the lease and may be evicted by appropriate court procedures. If the lease so provides, a tenant holding over beyond the expiration of the term may be liable for rent during the holdover period at some multiple of the original rental amount.

6.18 Right to Terminate Lease

A landlord has a statutory right to terminate lease upon nonpayment of rent. Most commercial leases in addition contain a detailed list of defaults that will allow the landlord to terminate the lease and evict the tenant. These defaults frequently include the nonpayment of rent, the failure to maintain the premises, the unauthorized use of the premises, the unauthorized assignment of the lease, the unauthorized subleasing of the premises, a violation of environmental laws with respect to the premises, abandonment of the premises, and the insolvency of the tenant.

Investors should consult with SC counsel to verify that the list of defaults in a commercial lease is appropriate and sufficient.

6.19 Forced Eviction

If the lease contains appropriate language, a tenant in default under a lease may be evicted prior to the expiration of the lease by way of a summary eviction proceeding. Eviction proceedings typically take between several weeks and several months to complete.

6.20 Termination by Third Party

Condemnation of property that is subject to a lease will result in termination of the lease. As between the property owner and any tenant, a condemnation award is divided in accordance with the terms of the lease. Absent a governing provision in the lease, the allocation of the award between landlord and tenant will be decided by the courts.

7. CONSTRUCTION

7.1 Common Structures Used to Price Construction Projects

The most common form of construction contract pricing is the use of a fixed price contract. Also used are cost-plus contracts, with general contractor compensation based either on a percentage of total costs or a negotiated fixed fee amount basis.

7.2 Assigning Responsibility for the Design and Construction of a Project

In most projects, design responsibilities are separated from construction responsibilities – commonly referred to as “design-bid-build”. Typically, the design function is assigned to third-party architects. Less frequently, a design-build contract is used, in which the contractor itself provides the design services.

7.3 Management of Construction Risk

Management of construction risk is largely through the use of third-party inspectors, ie, architects or other construction professionals.

These inspectors make periodic inspections – typically coincident with each construction loan draw or advance – and assess the percentage of completion and verify that the improvements on the ground are consistent with the amount of funds disbursed to date. The use of fixed-price contracts with appropriate delay penalties is another method of addressing construction risk.

Another common approach for the management of construction risk by lenders is to require a guaranty of completion from a parent or other affiliate of the owner entity. Lenders also typically require a substantial equity investment either prior to or coincident with advances of construction loan proceeds. The equity investment may or may not be segregated and pledged to a lender.

Additional equity deposits are frequently required by lenders in the event a construction loan becomes “out of balance.”

7.4 Management of Schedule-Related Risk

Schedule-related risk in construction projects is managed by use of third-party inspectors and the inclusion in the underlying construction contract of substantial penalties for delays in meeting intermediate milestone dates and the completion date. In addition, lenders frequently incorporate construction milestones into the financing documents.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

Owners frequently seek additional assurance as to performance by contractors by way of a payment and performance bond issued by surety. The use of letters of credit in construction projects in South Carolina is not common.

7.6 Liens or Encumbrances in the Event of Non-payment

Persons performing work or providing materials with respect to construction and development of property who are not paid for such work or materials are entitled to file a lien on the property as security for the amounts owed. In addition, liens may be filed by persons providing security services, by surveyors, by leasing (but not selling) real estate brokers, by persons providing landscaping services, and by persons providing design services (architects and engineers).

Lender construction advances have priority over mechanic's liens so long as those advances are made prior to the time both a notice of the mechanic's lien is filed of record and a notice of mechanic's lien is served on the lender. Construction advances made after the notice is filed and served will be subordinate to the mechanic's lien.

Mechanic's liens may be discharged from the real property by the posting of a bond; the lien then attaches to the bond and is released from the real property. Further, a court may in a proper circumstance order the removal of a mechanics lien from real property.

7.7 Requirements before Use or Inhabitation

Buildings may not be occupied until a certificate of occupancy has been issued. The requirements for obtaining a certificate of occupancy include the inspection of the major functional portions of the building (including electrical and plumbing) during the construction process and verification that construction was done in accordance with the approved plans and specifications.

8. TAX

8.1 Sale or Purchase of Corporate Real Estate

The gain on the sale of real estate is taxed as income under general state and federal income tax laws. In addition, there is a transfer tax levied on transfers of ownership of real estate evidenced by deeds, as discussed elsewhere. There is no sales tax on the sale of corporate real estate.

8.2 Mitigation of Tax Liability

The transfer tax (deed recording fee) may, in some cases, be avoided or reduced by structuring the transaction appropriately. For example, the deed recording fee may be avoided by contributing the property to be sold to a single-member LLC, and then selling the equity in that single-member LLC to the economic purchaser of the property.

8.3 Municipal Taxes

Although there is in most jurisdictions a business license tax assessed against businesses at the county and city level, this tax is based on gross revenues of the business in the jurisdiction and not on the property per se. The ownership and operation of real property would constitute a business subject to this business license tax.

In addition, commercial properties may be subject to the solid waste disposal fees, stormwater fees, and other user fees. SC law also allows for special assessments of property for adjacent improvements (such as street paving). There are no specific occupancy taxes or taxes on rent other than ordinary state and federal income taxes.

8.4 Income Tax Withholding for Foreign Investors

Foreign purchasers of real estate should review whether applicable treaties exempt such pur-

chaser from the imposition of general income tax withholding requirements by the State of South Carolina or the United States on income from the property purchased or on proceeds from the resale of such property. Absent such a treaty-based exemption, it may be possible to use appropriate transaction structures such as “blocker” corporations to limit the tax liability and withholding obligations with respect to foreign investors.

Under the federal Foreign Investment in Real Property Tax Act, up to 15% of the proceeds from the sale of real property by a foreign seller may be required to be withheld from the foreign seller to be applied to federal income taxes.

In addition, under SC law, foreign investors that are deemed “non-resident sellers” may be subject to withholding with respect to the proceeds of the sale of SC real property to the extent of the gain recognized by the investor under the income tax laws. SC law provides that “non-resident sellers” include individual residents outside of the state, entities organized outside of the state, and trusts administered outside of the state. An entity formed under the laws of South Carolina is considered a resident; accordingly, taking title to SC property in a SC-organized subsidiary may avoid any otherwise-applicable requirement for the withholding of a portion of the proceeds of the sale of the property.

There are limited exceptions to this withholding requirement for foreign investors who qualify as “deemed residents”. For example, a deemed resident includes a corporation organized outside of South Carolina, but which has its principal place of business in South Carolina and conducts no business in its state of formation (this exception facilitates the use of Delaware or other foreign state entities to conduct business in the state). There is also an exception for foreign entities that:

- have been in business in South Carolina for the last two taxable years (including the year of sale);
- will continue substantially in the same business after the sale;
- are not delinquent with respect to the filing of any SC income tax returns;
- have filed at least one SC income tax return; and
- have a certificate of authority to do business in South Carolina.

8.5 Tax Benefits

South Carolina is known for taking an aggressive approach to economic incentives for businesses opening and conducting operations in the state. These incentives include both tax credits and the reduction of property taxes and are typically based on the size and scope of the operation, the number of jobs created, and the wages those jobs command, as well as the facility’s geographic location within the state. Experienced SC counsel working in this area should be consulted to assist clients in structuring incentive packages, which may include fee-in-lieu of tax agreements, job tax credits, payroll tax rebates, tax abatements, capital credit agreements, tax increment financing, and various types of infrastructure grants.

The owner of real property is generally entitled to take deductions for depreciation with respect to buildings and improvements located on the land. In addition, investors in real property who are not dealers in that property and have met the requisite holding periods may be entitled to defer the recognition of gain on the sale of real property by entering into a like-kind exchange pursuant to Section 1031 of the Internal Revenue Code. Finally, property owners who invest the capital gain proceeds from the sale of real property into an Opportunity Zone project may defer or reduce the amount of gain ultimately recognized, all as discussed more fully below.

Developers can also benefit from South Carolina specific tax credits related to historic building rehabilitation and abandoned building revitalization. Real property owners who develop solar farms on their property may be entitled to state and federal tax credits.

8.6 Key Changes in Federal Tax Reform
See **1.3 Impact of New US Tax Law Changes.**

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