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SUMMER 2012 | REAL ESTATE PRACTICE

Looking for Enhanced Value in Your Property? Look Up...

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In today's challenging real estate environment, property owners seeking to maximize the value of their real estate portfolios face many obstacles. In the boom of the digital age of technology, many sophisticated property owners have been fortunate to generate revenue through the leasing of rooftop space to telecommunication wireless carriers for placement of antennas to service their customers. Those same property owners who have realized a valuable income stream from leasing their rooftops to telecommunication tenants over the years may be disappointed to learn that, when selling their real estate, the market may not recognize the value attributable to rooftop leases. Although many buyers of real estate may be interested in purchasing the real estate, buyers are reluctant to pay much, or even any, monies for the value of the rooftop leases.

Carving out two separate transactions can be a creative solution to help maximize the value of a property with rooftop telecom tenants…

At first blush, this may seem surprising, but when one considers the reasons for this—the difficulty in obtaining financing on the rooftop lease income stream, the limited number of potential tenants for such specialized use, the risks associated with the loss of the telecommunication tenants based on such uncertainties as mergers and acquisitions or changes in technology—it is understandable that a "typical" buyer of real estate may be weary of such an investment. One creative solution to help maximize the value of a property with rooftop telecom tenants is to carve out two separate transactions: (1) a sale of a rooftop easement; and (2) a separate sale of the real property with the rooftop easement in place.

In bifurcating the sale as such, the seller should always keep in mind that the easement will run with the land and that this will raise concerns to a future buyer of the real estate. Accordingly, the goal of a seller should be to position the easement with minimal title infringements running with the land, thereby providing the least interference with the property owner's future ability to sell the property.

When entering into an easement arrangement, the seller of the easement must be diligent and consider many present and future issues in structuring such an easement. A critical first step is to review the existing telecom leases prior to the negotiation of the sale of the easement. The terms and conditions of the telecom leases, which may include prohibitions on assignment or rights of first refusal, may determine whether a deal is viable for the easement seller.

Look Up… continued

The seller of the easement, or the grantor, must clearly understand the obligations that the grantor (and future buyer of the property), will remain liable for pursuant to the existing telecom leases. Whether the grantor will remain the owner of the real estate or will sell the real estate to a third party buyer, the grantor should carefully consider all the provisions of the easement and ancillary documents that grant the rooftop easement to the easement buyer, or the grantee, including the following:

⇒ The grantor should limit its representations to the grantee. It is likely that the telecom tenants obtained their own zoning and other governmental approvals, and, thus, no representations should be made regarding prior governmental approvals for operation of the telecom facilities. Representations as to regulatory matters concerning the use of the telecommunication facilities such as FCC or FAA compliance should also be avoided.

⇒ The grantor must be diligent to assure that the easement area only encompasses the area currently under lease by the telecommunication tenants and nothing greater.

⇒ The grantor should be able to fully use other areas of its property to add future telecom users on unrestricted portions of the roof if space so permits with no revenue sharing requirement. The grantor should not be bound by restrictions or limitations with respect to non-compete clauses.

⇒ Although the grantor will no longer receive regular base rent from the telecom tenants, as the grantor will receive a lump sum from the sale of the easement, the grantor may still incur costs as a property owner by continued operation of the telecommunication facilities at the property. The grantor should retain the right to charge the telecom tenants directly for non-base rent items as such items will be a continuing expense.

⇒ The easement should expire if it's abandoned for a number of consecutive years or upon termination of the underlying telecom leases.

⇒ The grantee should be required to maintain adequate insurance over the easement area at all times protecting the grantor's real property from loss or destruction as a result of the grantee's use.

⇒ The grantor should be free to negotiate any settlement or compromise of a condemnation award for the real property without need to involve the participation of the easement grantee.

Release of Easement Area from Encumbrances

As a real property owner with rooftop telecommunication tenants in place, it is important to address a potential sale of a rooftop easement with the property owner's lender well before an easement sale is structured, if possible. The buyer of a rooftop easement will require a non-disturbance agreement from any lender with a mortgage on the property in favor of the buyer and a release of any security interest in the easement area, as well as a release of any prior telecom lease assignments.

Look Up… continued

The buyer will need assurances that should the grantor default on its debt obligations with the grantor's lender, the buyer will be protected so that the lender will not foreclose on the easement interest purchased by the buyer.

Many times, property owners and lenders negotiate a pay down of the debt so that the lender receives consideration for release of its security interest. The lender may undertake a sophisticated analysis in determining the required debt reduction or may simply request that the entire proceeds from the easement sale be allocated towards paying down the lender's debt.

To avoid the "guessing game" of whether a lender will release its security interest upon sale of an easement and, if so, at what price, the property owner should negotiate a release provision in its loan documents which will establish the amount of money that the lender must accept so as to provide release of the collateral. It is especially important to consider this when a loan is first obtained in connection with a property that has, or may have in the future, rooftop leases with telecom tenants. If at loan origination, the lender does not take the income from the telecom users into account in financing the property, the property owner can make a very strong case that the lender should have no difficulty in including a potential future release of the rooftop easement for no consideration.

In addition to considerations as to release of any security interest from the easement area, the property owner negotiating the loan terms and conditions should also be aware of the effect of potential pre-payment penalties in the rooftop easement mortgage release. Specifically, should the lender agree to release its security interest as to any rooftop easements, the property owner should negotiate an exclusion of any pre-payment penalty as to any payments mandated by the lender for release of a portion of its collateral. Although this may be difficult, the property owner will have more leverage to negotiate these items at the time a loan is initially made versus at the eleventh hour when a rooftop easement sale is pending and the property owner is at the mercy of its lender in obtaining release documents as to the collateral.

Real estate owners that currently have telecommunication tenants in place can potentially realize a significant liquidity event without necessarily adversely affecting a future sale of their real estate. Those property owners that do not have telecom tenants in place should assess their real estate to determine whether they can implement a rooftop lease program to maximize value of their real estate. In both cases, the proper guidance should be obtained to yield the best results for the property owners and to preserve value in any separate sale of the real estate.

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