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KEY ISSUES FOR 2014 AND BEYOND

Non-Recourse Carve-Outs Revisited:
Recent Developments & Practical Considerations.

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"Mixed-Use" Projects:
Major Issues in Developing & Financing These Valuable Ventures.

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DLA PIPER

EVERYTHING MATTERS

NON-RECOURSE CARVE-OUTS: RECENT TRENDS

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June 26, 2014

History and background

- Historically, commercial real estate loans were structured to limit borrower's liability for deficiencies through the use of SPEs and non-recourse provisions.
- Most exceptions to this rule (i.e., the non-recourse "carve-outs") were limited to "bad boy" acts – affirmative acts by borrower, usually within borrower's control, that were truly bad and which impaired lender's collateral or the timely payment of the debt (e.g., fraud, misapplication of funds, material misrepresentations, non-permitted transfers, etc.).

History and background, continued

- With the CMBS explosion, however, ratings agencies and other stakeholders pushed to expand the universe of non-recourse carve-outs because of the need to provide teeth to recourse events under the CMBS loan structure in which the borrower must be (and remain) an SPE whose only assets are already encumbered by lender's security documents.
- This has gradually resulted in the expansion of non-recourse carve-outs to include acts that are inadvertent, unintentional, accidental or outside of borrower's/guarantor's control.
- In many respects, this expansion of non-recourse carve-outs has all but swallowed whole the non-recourse concept itself -- resulting in a state of affairs that, according to many on all sides of the real estate finance transactional spectrum (borrowers, lenders, underwriters, investors, lawyers), is far afield from the understandings and expectations that many long understood, assumed and believed was the case on the topic of recourse liability and the commensurate provisions of loan documentation.

Categories of recourse events

Generally, there are two types of non-recourse carve-out events:

1. Above-the-line (or "loss recourse") events – Specific losses, damages or costs suffered by the lender which then become recourse to borrower/guarantor (i.e., typical bad boy acts). Lender must prove actual losses or damages resulting from the carve-out breach.
2. "Below-the-line (or "springing recourse" events – Carve-out breaches which become fully recourse to borrower/guarantor without lender having to prove losses or damages. The mere occurrence of the event results in full recourse (e.g., violation of carve-outs concerning transfer, bankruptcy, separateness covenants, subordinate financing, etc.)

As we will see, springing non-recourse carve-out events create full recourse for the borrower/guarantor even where the infraction is seemingly minor or inadvertent.

Strict construction of terms

- Courts have strictly construed the carve-out provisions according to their terms. Cases like Cherryland and others have upheld recourse liability under the carve-outs even where market conditions (e.g., falling collateral value and reduced cash flow) caused the default.
- Regardless of the seeming inequity of the result in certain cases, courts will not imply limits on the recourse provisions and usually reject most borrower/guarantor defenses -- such as claims that the non-recourse carve-out constitutes an unenforceable penalty, amounts to liquidated damages or is against public policy.

Summary of recent cases and trends

- In 2013 and the first half of this year, lenders continued to make interesting, novel and (from the perspective of borrowers/guarantors) alarming claims for recourse in several reported court cases.
- To some extent, the pendulum has now swung slightly back in the direction of the borrowers/guarantors with respect to court decisions adjudicating these claims.
- Based on our firm's research, prior to 2013, of the 35 to 40 reported carve-out cases, only 2 were decided in favor of guarantors.
- But during 2013 and into 2014, several of such lender claims were soundly rejected by courts. So, borrowers/guarantors have notched some "wins" this past year relative to prior years.
- Additionally, state legislatures have started to respond with new laws to prevent lenders from over-reaching on non-recourse carve-out claims.

In re MSR Hotel and Resorts

- For example, in the In re MSR Hotel and Resorts case (2013 U.S. Bankruptcy Court, S.D.N.Y., upheld on appeal in In re MSR Resort Golf Course LLC, 2014 U.S. District Court, S.D. N.Y.), a REIT guaranteed the obligations of the borrower under a $50 MM 4th level mezzanine loan held by Five Mile. The REIT later filed for bankruptcy.
- Five Mile asserted that the incurrence of advisory fees and attorney bills by its borrower during the pendency of the affiliate guarantor's bankruptcy constituted indebtedness of the borrower in violation of the "no other indebtedness" SPE provision, thereby triggering lender's damages claim.
- The court rejected this argument on the grounds that the lender failed to plead loss, cost or damage with specificity.
- But, we must be mindful of whether "no other indebtedness" means more than borrowed money (*i.e.*, attorney fees?).

In re MSR Hotel and Resorts, continued

- Similarly, in that same case, Five Mile asserted that a parent entity's agreement not to charge the borrower for the use of certain of the parent's intellectual property (thereby reducing the monthly operating expense of the mezz borrower and improving its financial position) constituted a violation of the restrictions on affiliate transactions (also an SPE provision) and therefore triggered damages.
- That argument, too, was rejected by the court, with the court noting that the REIT guarantor's failure to charge the sub borrower for use of the REIT's assets was not a detriment to the borrower -- and, therefore, the creditor would have a difficult time alleging loss, cost or damage from this violation.
- Takeaway: Wordsmith the "no affiliated transactions" language to permit transactions that are on "***no less favorable*** terms than would otherwise be obtained on an arm's-length basis" (rather than prohibiting "terms inconsistent with market practices" or "terms more favorable to the borrower").

J.E. Robert Co. v. Signature Properties, LLC

- Not all 2013 cases, of course, ended favorably from the perspective of the borrower/guarantors.
- Some cases made clear that the meaning of "transfer" and "property" continue to be successfully exploited by lenders to include any loss or diminishment (however minor) of any portion of the property -- such as termination of a parking license that was no longer needed by the borrower.
- For example, in J.E. Robert Co. v. Signature Properties, LLC (2013 Connecticut Supreme Court), the court considered a case where the borrower entered into a parking license agreement with an affiliated property owner allowing borrower's tenants to park in exchange for a license fee. Lender required the license as a closing condition, apparently because of a particular mortgage property tenant's parking needs.

J.E. Robert Co. v. Signature Properties, LLC, continued

- A few months after the loan closed, another borrower affiliate that owned property adjacent to the parking license area entered into a long-term lease with Walgreens, which provided that the Walgreens facility would be constructed on the parking license site. A year later, Borrower agreed with the affiliate to terminate the parking license and did so without lender's consent.
- At the time of the license termination, the Borrower's tenant had vacated the mortgaged premises and was no longer using the parking license.
- Borrower subsequently defaulted on the loan. Lender sought full recourse under the carve-out guaranty citing an unpermitted "transfer" and a violation of the "no affiliate transactions" provisions of the guaranty.
- The court ruled that the transfer of the parking rights by the borrower for the benefit of its affiliate's new tenant – Walgreens – violated the mortgage provision against comingling of assets, thereby triggering full recourse.

J.E. Robert Co. v. Signature Properties, LLC, continued

- The court also ruled that the dealings between affiliates in this case and the termination of the parking license agreement violated the prohibition against affiliate transactions and also constituted a prohibited transfer of property – even though the tenant upon which the lender had underwritten the parking license to begin with had vacated.
- So, the term "property" may be quite broad. If a termination of this license agreement violates the transfer restrictions, so might the termination (or modification) of greater interests -- such as a lease, REA, CCR, etc. (See also Blue Hills v. J.P. Morgan (2007 U.S. District Court, D. Mass.) regarding borrower's transfer of a settlement payment in violation of the carve-out in connection with settlement of a zoning dispute.) Perhaps careful draftspersons should clarify in this context that only "material" or "substantial" portions of or interests in property can qualify as triggers for this carve-out.
- Note that affiliate transactions that are perfectly legitimate may, in retrospect, be construed as self-dealing/comingling and violative of the "no affiliate transactions" SPE provision.

Wells Fargo Bank v. MBS-The Hills Ltd.

- Liens remain potential traps. In Wells Fargo Bank v. MBS-The Hills Ltd. (2013 Texas Court of Appeals, Second District), the court considered whether the involuntary filing of third-party liens against the mortgaged property violated the carve-out provision prohibiting waste and impairment of remedies. The lender asserted that by permitting other liens to attach to the property, those liens impaired lender's ability to foreclose.
- Sidestepping the substantive issue, the court ruled on procedural grounds that lender failed to offer evidence of damages.
- Should we clarify in the loan docs that liens by others are not the basis for an "impairment of remedies" claim – and that liens filed by others do not constitute waste, and that lender should instead rely on an "intentional or material physical waste" standard (and only if sufficient revenues or cash flow is available to prevent such physical waste from occurring)?

JLM Financial v. Aktipis

- We have seen some relief and clarity on the meaning of a "voluntary lien". In this regard, a mechanics lien is not, according to certain courts, a "voluntary lien" (even if the underlying work was ordered by the borrower).
- For example, in JLM Financial Investments v. Aktipis (2013 U.S. District Court, N.D. Illinois, Eastern Division), a group of third-party contractors filed mechanic's liens against the mortgaged property. The lender sought full recourse from guarantor for "failure to obtain lender's prior written consent to any subordinate financing or ***other voluntary lien*** [emphasis added] encumbering the property" as required by the loan agreement.
- The court ruled that mechanics liens are not ***voluntary*** liens, citing the 2002 In re Barnes case for the distinction in bankruptcy cases and secured transactions between voluntary and involuntary liens. Accordingly, the guarantor was liable only for lender's damages resulting from the liens, not for full recourse as sought by the lender.

CP III Rincon Towers v. Cohen

- Similarly, in CP III Rincon Towers v. Cohen (2014 U.S. District Court, S.D. N.Y.), the lender sought full recourse under the "voluntary lien" provision in a dispute between the property owner and the general contractor which resulted in a cascading series of mechanic's liens and an eventual judgment lien. At the same time, the real estate owner's association also filed liens for non-payment.
- The carve-out provision in the loan documents provided for full recourse to the guarantor if borrower failed to get lender's consent to any voluntary lien. The loan documents did not define "voluntary".
- The court ruled on summary judgment that these liens were not voluntary liens and thus did not violate the carve-out provision. Looking to bankruptcy cases for the definition of "voluntary," the court ruled that the liens were inherently involuntary since the borrower did not agree to the liens. Citing a Black's Law Dictionary definition, the court noted that as statutory liens, mechanics liens arise "solely by force of statute, not by agreement of the parties."

CP III Rincon Towers v. Cohen, continued

- The lender also sought recourse in this case through the transfer clause in the carve-out, arguing that the mechanic's liens were within the definition of prohibited transfers which included acts that "mortgage … encumber, pledge, [or] assign" property interests.
- After ruling that the transfer provision was ambiguous, the court examined evidence about the negotiation and ruled that the parties never intended for the liens to trigger full recourse.
- Additionally, the court also ruled against the lender's claim that the indebtedness carve-out was triggered by the liens. Since the loan did not require the lender's prior approval before incurring charges from contractors or the REOA, the court ruled that lack of prior approval for the resulting liens could not trigger the guaranty's indebtedness carve-out.

Lessons and drafting tips regarding liens

- Perhaps in cases where liens are the basis for recourse (whether directly or through some indirect language), borrower's/guarantor's counsel should clarify that recourse applies only to "voluntary" or "consensual" liens.
- In so doing, the terms "voluntary" or "consensual" should be defined to specifically include or exclude activities which the parties intend to constitute a recourse event.
- For avoidance of doubt, perhaps all liens arising from a lack of cash flow – or from inaccessibility to cash (such as where funds are subject to a lender lockbox arrangement) – should be deemed "involuntary" liens not subject to recourse.
- But compare Heller Financial v. Lee (2002 N.D. Illinois), which upheld full recourse liability for beach of a carve-out regarding tax liens of which the borrower/guarantors had no knowledge.

US Bank v. Green Meadow SWS, LLC

- Perhaps the most disturbing case was the US Bank v. Green Meadow SWS, LLC case (2013 Ohio Court of Appeals, Fifth Appellate District, upheld by same court on appeal in February, 2014 after partial remand), whereby two things went badly: (a) the guarantor agreed that a "Reporting Default" could be the basis of full recourse (mistake number one) and (b) the guarantor then proceeded to ignore the lender's demands for financial statements upon default (which constituted a Reporting Default).
- The result of these twin mistakes meant a ruling of full recourse against the guarantor in the amount of the $4MM deficiency.
- Takeaways: (i) a reporting default should **never** be the basis for recourse, and (ii) this seemingly minor infraction can lead to vastly inequitable burdens for the guarantor if the obligation is strictly construed against the guarantor, as in this case.

Bank of America v. Freed

- Another interesting case was Bank of America v. Freed (2012 Illinois App. 1), which involved a redevelopment project in Chicago's Block 37. The loan documents included a springing non-recourse carve-out setting forth the full recourse liability of the guarantor if borrower contested, delayed or otherwise hindered any foreclosure action by lender or any appointment of a receiver. Upon lender's foreclosure following a default, guarantor contested the foreclosure proceeding and the court's appointment of a receiver (in the latter case for a period of 341 days).
- Lender sought full recourse under the carve-out, sighting guarantor's contest. The court concurred and granted judgment for lender in the amount of the $206 MM loan balance (subsequently reduced by roughly half after application of the foreclosure sale proceeds).
- The court strictly construed the carve-out provision and rejected an assortment of defenses raised by guarantor, including vagueness, liquidated damages, due process, etc.

Legislative Action

- In Wells Fargo Bank v. Cherryland Mall Ltd. P'ship (2011 Michigan Appellate Court), the court infamously held that the borrower and guarantor were personally liable for the entire loan deficiency because the borrower was insolvent and such insolvency violated the loan document's SPE covenants requiring that borrower remain solvent and pay its debts and liabilities as they became due, thereby triggering the carve-out liability.
- The court reached this result even though evidence submitted at trial showed that such insolvency resulted merely from the effects of the overall real estate downturn -- and the resulting decline in the property value and project cash flow -- and not from any actions by borrower.
- The loan document language was very specific in requiring the borrower to remain solvent in order to maintain its SPE status, even though the court acknowledged that there were no known cases holding that insolvency itself is a violation of SPE status.

Legislative Action, continued

- In response to this case and other similar actions brought by lenders, the Michigan state legislature in 2012 passed the Nonrecourse Mortgage Loan Act. The law prohibits the use of "post closing solvency covenants" as non-recourse carve-outs in loans. In addition to future loans, it also applies retroactively to existing loans.
- The Cherryland case was remanded in light of the new law, and the lender argued that the law was unconstitutional. The Michigan Court of Appeals held that the law was constitutional and that the law barred the lender's subject carve-out claims.

Legislative Action, continued

- Michigan's law was also challenged in federal court. In Borman, LLC v. 18718 Borman, LLC (2014 U.S. District Court, E.D. Michigan, Southern Division), the property went into foreclosure after the sole tenant of the property filed for bankruptcy and no replacement tenant could be found. The lender's successor-in-interest sued for a deficiency, citing the SPE borrower's insolvency and failure to promptly pay its obligations.
- The court ruled that Michigan's Nonrecourse Mortgage Loan Act was valid under the U.S. Constitution and prevented enforcement of the carve-out.
- Ohio has also passed a similar law and a bill is pending in Tennessee.

Conclusion

Putting aside the case-by-case results chronicled above, certain of the lender arguments themselves are alarming, as they underscore that borrower's/guarantor's counsel cannot really predict all of the arguments that will be made later if/when a default occurs -- and that if we try to fully predict (and negotiate around) these concerns during negotiations on the documents at the time of loan origination, our concerns would certainly be characterized by lender's counsel as theoretical and rejected during those negotiations.

GEF Specimen

DRAFT
Loan No. [redacted]

REPAYMENT GUARANTY REGARDING RECOURSE OBLIGATIONS

THIS REPAYMENT GUARANTY REGARDING RECOURSE OBLIGATIONS ("**Guaranty**") is made as of the ___ day of June, 2014, by [redacted] LP, a Delaware limited partnership (the "**Guarantor**"), in favor of [redacted] ("**Lender**").

RECITALS

A. Pursuant to the terms of that certain Construction Loan Agreement of even date herewith between [redacted] each a Delaware limited partnership (individually and collectively, as determined by Lender, "**Borrower**") and Lender, ("**Loan Agreement**"), Lender has agreed to loan to Borrower the principal sum of up to [Forty Million and No/100ths Dollars ($40,000,000.00)] ("**Loan**") for the purposes specified in the Loan Agreement, which purposes include the construction of certain improvements ("**Improvements**") described in the Plans and Specifications (as defined in the Loan Agreement) upon real property described in the Loan Agreement ("**Property**").

B. The Loan Agreement provides that the Loan shall be evidenced by that certain Promissory Note (One-Month LIBO Rate, Adjusted Monthly) of even date herewith ("**Note**") executed by Borrower payable to the order of Lender in the principal amount of the Loan and shall be secured by that certain Construction Deed of Trust of even date herewith ("**Deed of Trust**") and by other security instruments, if any, specified in the Loan Agreement. Capitalized terms not otherwise defined herein shall have the meaning ascribed thereto in the Loan Agreement.

C. Guarantor is an indirect owner of Borrower and has a financial interest in the Property and will benefit from Lender making the Loan to Borrower.

NOW, THEREFORE, to induce Lender to enter into the Loan Agreement and to make the Loan, and in consideration thereof, Guarantor unconditionally guarantees and agrees as follows:

1. **GUARANTY**. Guarantor hereby guarantees and promises to pay to Lender or order, on demand, in lawful money of the United States, in immediately available funds, any and all actual, out-of-pocket losses, costs, damages, expenses (including the costs of collection in conjunction with the Loan and any obligations, debts, damages, losses, costs or expenses under any Interest Rate Protection Agreement) and liabilities that are incurred by Lender arising as a result of the occurrence of any of the following events (but excluding in all cases punitive, special, exemplary or consequential damages):

   (a) Fraud or intentional, material misrepresentation by Borrower or Guarantor or any other guarantor of the Loan in connection with the Property, the Loan, and/or the Loan Documents;

   (b) Intentional, material, physical waste of the Property, caused by the intentional acts of Borrower or Guarantor or any other guarantor of the Loan;

   (c) Intentional, misappropriation of funds by Borrower, Guarantor, any other guarantor of the Loan, or any Affiliate of Borrower with respect to the Property or the Loan, including any funds disbursed to Borrower from any reserve, escrow or impound, provided, that the use of any funds in connection with the operation, management or development of the Property shall not be the basis for any liability under this clause (c);

(d) Failure of Borrower after receipt of notice of Default from Lender to pay to Lender all revenues, rents, income and profits of the Property actually received by Borrower, as and to the extent required by the Loan Documents; provided, however, that Guarantor shall not be liable under this clause (d) with respect to amounts which are deposited into the Collection Account; provided, further, that if any such funds are used in connection with the operation, management or development of the Property, the same shall not be the basis for any liability under this clause (d);

(e) [Intentionally Omitted – No carry guaranty];

(f) Criminal acts of Borrower or Guarantor or any Affiliate of Borrower or Guarantor which result in a forfeiture of the Property;

(g) Failure to pay to Lender all insurance proceeds, condemnation awards covered by the Deed of Trust or the other Loan Documents which, under the express terms of Loan Documents, were required to be paid by Borrower to Lender or to otherwise apply such sums as required under the terms of the Loan Documents; provided, that if any such funds are used in connection with the operation, management or development of the Property, the same shall not be the basis for any liability under this clause (g);

(h) [Intentionally Omitted];

(i) Breach by Borrower in any material respect of its obligations pursuant to the provisions of that certain Section of the Loan Agreement entitled Single Purpose Entity/Separateness (excluding clause (h) thereof);

(j) [Intentionally Omitted – Look to Environmental Indemnity]; and

(k) Any voluntary Transfer in violation of the Loan Documents that is not a Full Recourse Transfer (defined below).

In addition, the Guarantor shall be fully liable for all amounts due and payable under the Loan and under or in connection with any Interest Rate Protection Agreement between Borrower and Lender in the event of the occurrence of any of the following events:

(A) The occurrence of a Full Recourse Transfer; provided that: if the Transfer constituting the Full Recourse Transfer is a Transfer of the indirect ownership interests in Borrower, Guarantor shall have a cure period equal to ten (10) Business Days to cure the applicable violation. "**Full Recourse Transfer**" shall mean: (i) any voluntary Transfer of Borrower's interest in the real estate comprising the Property effectuated by deed, bill of sale, instrument of assignment of such Property or collateral, collateral assignment or mortgage in violation of the Loan Documents; (ii) any master lease or similar arrangement in which all or substantially all of the control and/or beneficial ownership interest in the Property is effectively transferred to a third party in violation of the Loan Documents; (iii) any Transfer of a direct or indirect interest in the Borrower that does not constitute a Permitted Transfer because neither the [redacted]Control Party Test nor [redacted]Control Party Test continues to be satisfied after giving effect to such Transfer;

(B) Any of the following occurrences: (1) Borrower files a voluntary petition under the Bankruptcy Code or any other Federal or state bankruptcy or insolvency law; (2) [intentionally

omitted][1]; (3) Borrower or any Guarantor (as defined in the Loan Agreement) files an answer consenting to or joining in any involuntary petition filed against it, by any other person or entity under the United States Bankruptcy Code or any other Federal or state bankruptcy or insolvency law, other than an involuntary petition in which Lender joins in the filing thereof, or solicits or causes to be solicited, in each case in writing, petitioning creditors for any involuntary petition from any person or entity; (4) any person or entity which controls Borrower or any Guarantor files an answer consenting to or joining in an application for the appointment of a custodian, receiver, trustee, or examiner for Borrower, or any portion of the Property or any other collateral for the Loan, other than a custodian, receiver, trustee or examiner requested by Lender; or (5) Borrower makes an assignment for the benefit of creditors;

(C) Borrower, or any person or entity which Controls, directly or indirectly Borrower or any guarantor contests or opposes, in bad faith, any motion made by Lender to obtain relief from the automatic stay or seeks, in bad faith, to reinstate the automatic stay in the event of any federal or state bankruptcy or insolvency proceeding involving the Borrower or any general partner or managing member of Borrower.

In addition, the limitations hereof shall not be deemed to limit: (i) any right Lender might otherwise have to obtain injunctive relief against Borrower; (ii) any suit or action in connection with the preservation, enforcement or foreclosure of the liens, mortgages, assignments and security interests now or at any time hereafter securing the payment and performance of all sums and obligations under this Agreement or any of the Loan Documents (including the Interest Rate Protection Agreement); or (iii) the collection from parties other than Borrower, Guarantor and their respective affiliates, of amounts which may become owing or payable under or on account of insurance, condemnation awards or damages for other public actions or surety bonds maintained or provided by Borrower; provided, however, that the assertion by Lender of any such right, suit, action or collection of amounts shall not result in a monetary claim upon the general assets of Borrower except as otherwise provided herein.

Notwithstanding anything to the contrary herein or in any Loan Document:

(1) no liability shall be asserted against or borne by Guarantor under clause (1)(k) or (A) as to any Transfer with respect to which Borrower or any other Person has failed to provide notice to Lender or the opportunity to review any documentation in connection with such Transfer, or copies of the documentation relating to such Transfer, for which such Transfer would otherwise constitute a Permitted Transfer if Borrower had provided such requisite notice and/or provided such documentation to Lender (but this provision shall not negate the existence of any Event of Default arising therefrom); and

(2) an event, circumstance or condition which arises from insufficient revenue from the Property, the insolvency of Borrower, negative cash flow from the Property, and/or Borrower's lack of access or limited access to revenue from the Property or a Default by Lender under the Loan Documents is not, and shall not be deemed to be, a voluntary act or voluntary failure to act of Borrower and there shall be no basis for liability hereunder or under any other Loan Document against Guarantor with respect to the same.

2. **REMEDIES**. If Guarantor fails to promptly perform any obligations under this Guaranty, Lender may from time to time, and without first requiring performance by Borrower or without exhausting any or all security for the Loan or any Interest Rate Protection Agreement between Borrower and Lender, bring any action at law or in equity or both to compel Guarantor to perform its obligations

[1] Duplicative of (3)

(B) Net Worth. Guarantor and all other guarantors under the Loan, collectively (as opposed to individually), and on an aggregate basis, shall maintain at all times a Net Worth (defined as Gross Asset Value minus Total Liabilities) of at least $100,000,000.00.

(C) Minimum Liquidity of Guarantor. Guarantor and all other guarantors under the Loan, collectively (as opposed to individually), and on an aggregate basis, shall maintain at all times Liquid Assets of at least $25,000,000.00, as determined by professionally prepared financial statements, tax returns, and other related financial documents of Guarantor. "**Liquid Assets**" shall mean the following: (a) unrestricted cash, cash equivalents, unused lines of credit and unfunded capital commitments, and readily marketable securities (valued, in the case of securities at the 10 day average of the then prevailing market price listed on NYSE or NASDAQ, as of any applicable date of determination) or such other assets or properties as Lender may (in its sole discretion) deem acceptable as evidenced by Lender's written confirmation, excluding any and all retirement accounts and deferred profit-sharing accounts; less (b) outstanding unsecured debt (under revolving lines of credit or otherwise, other than unused lines of credit which shall be included in Liquid Assets) of any one or more of the persons/trusts which comprise Guarantor. Any failure to maintain Minimum Liquidity as provided herein during the term of the Loan shall result in a Default hereunder.

24. Exculpation. Notwithstanding anything to the contrary contained herein, in any of the other Loan Documents, or in any other instruments, certificates, documents or agreements executed in connection with the Loan (collectively, the "**Relevant Documents**"), no recourse under or upon any obligation, representation, warranty, promise or other matter whatsoever shall be had against any of the direct or indirect constituent members, Affiliates or partners of Guarantor or the direct or indirect partners, shareholders, members, officers, directors, employees, agents and representatives (collectively, the "**Non-Recourse Parties**") of Guarantor or such Non-Recourse Parties, and Lender expressly waives and releases, on behalf of itself and its successors and assigns, all right to assert any liability whatsoever under or with respect to the Relevant Documents against, or to satisfy any claim or obligation arising thereunder against, any of such Non-Recourse Parties of Borrower, such constituent partners or members or out of any of their assets. The foregoing is not intended to affect the obligations of Guarantor under this Guaranty.

[Signature page follows]

GALLAGHER
EVELIUS & JONES LLP
ATTORNEYS AT LAW

Mixed-Use Projects
Development and Financing Issues

June 26, 2014

Mark P. Keener, Esquire
Gallagher Evelius & Jones LLP

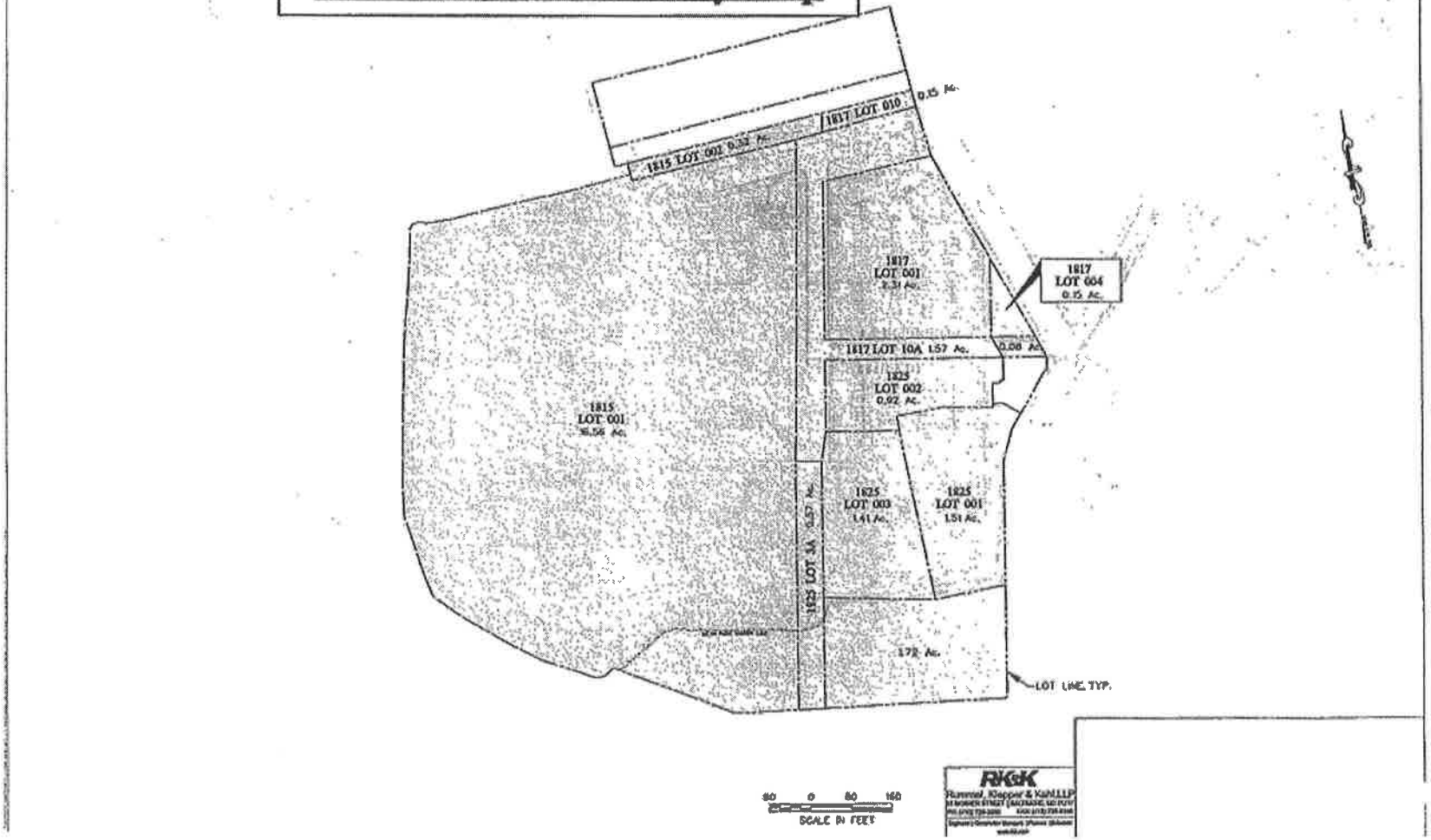
Major Considerations

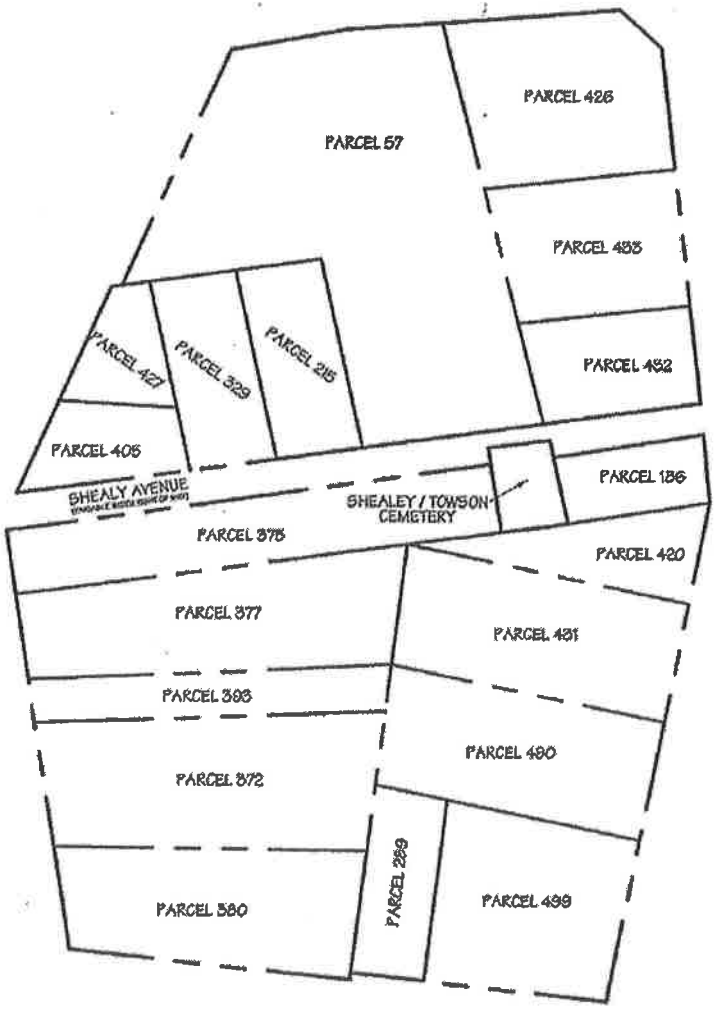
- Acquisition Issues
- Entity Formation
- Subdivision – Commercial Condominium
- Financing
- Plans and Specifications – Contractor, Architect, Other Consultants
- Exceptions to Separation of Projects

Exhibit A
Tax Parcel & Boundary Map

GENERAL NOTE:

EXISTING TOPOGRAPHIC SITE FEATURES SUCH AS BUILDINGS, ROADS, PROPERTY BOUNDARIES, FENCE LINES AND SHORELINE PERIMETERS ARE BASED ON SURVEYS PERFORMED BY GREENHORNE & O'MARA, INC. DATED JAN. 2004, MORRIS RITCHIE ASSOC., DATED JUNE 1993/MAY 2006, DANIEL CONSULTANTS, INC. DATED MARCH 1999 & BOWMAN CONSULTING, DATED JAN. 2010.





PARCEL IDENTIFICATION DETAIL
N.T.S.

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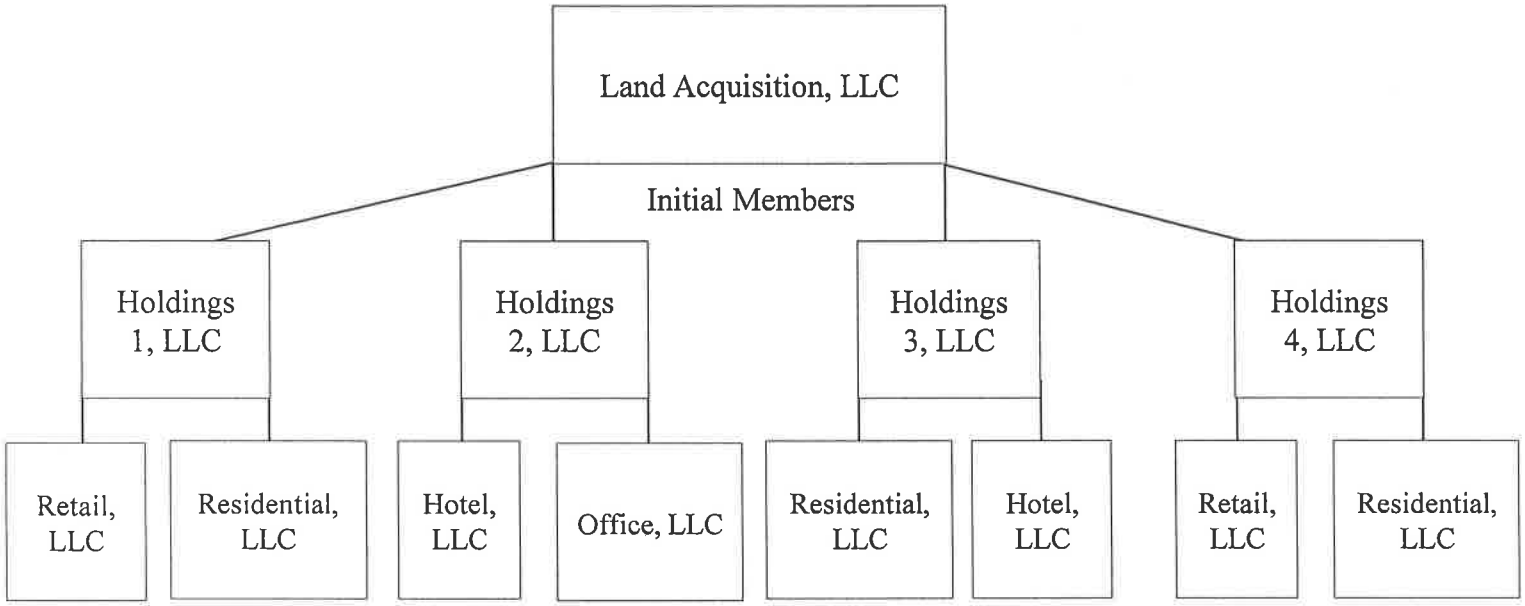
ATTORNEYS AT LAW

Entity Formation



Deeds-In-Dissolution – Section 12-108(q)
Section 12-108(p) exemption

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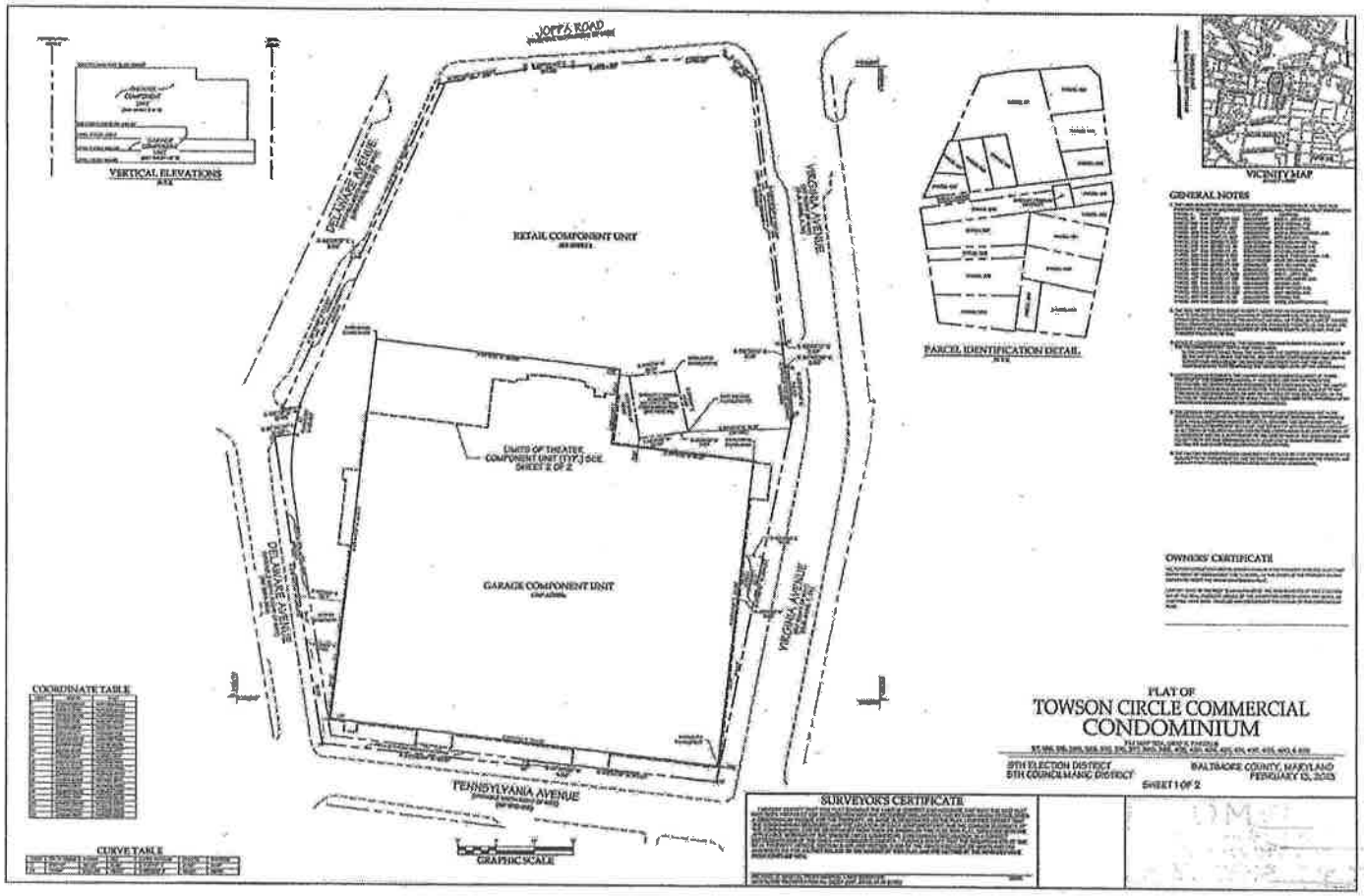
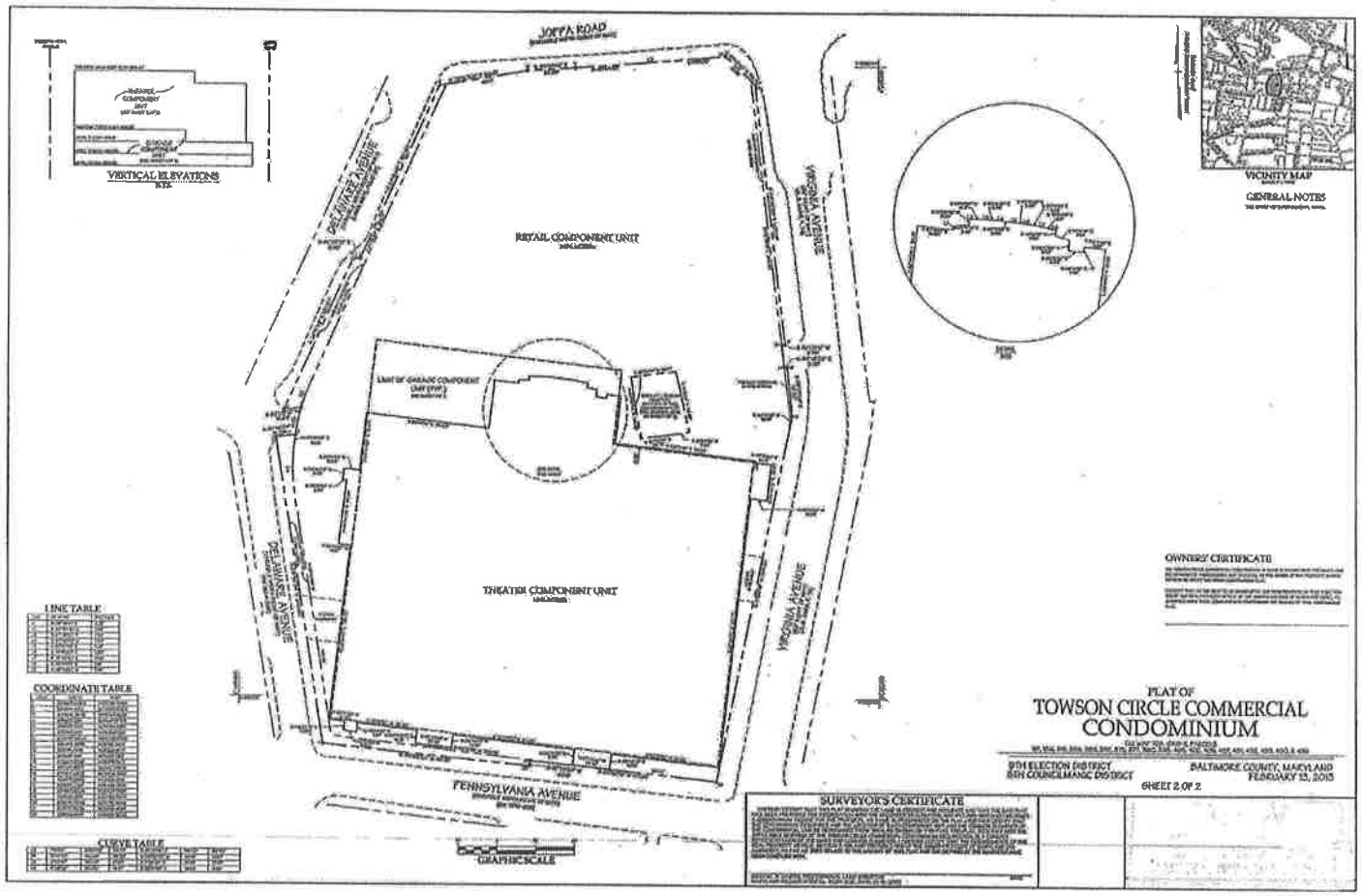
Subdivision/Commercial Condominiums



GALLAGHER
EVELIUS & JONES LLP
ATTORNEYS AT LAW

Subdivision/Commercial Condominiums



Financing Considerations

- Separate Ownership
- Separate Agreements and Plans and Specifications
  - Significant Resistance form Contractors, Architects, Bonding and Insurance Companies
- Anticipated Capital Stack
  - First Lien Financing
  - Mezz Debt
  - Equity
- Public Subsidies
  - Tax Increment Financing
  - PILOT's
  - Profit-Sharing
  - "Informal" TIF's

Exceptions to "Separation"

- Reciprocal Easement/Cost Sharing Arrangements
- Development/Construction Agreements
- Cross Default/Cross Collateralization
- Bonding Companies

Early Planning is Key

- Acquisition/Entity Formation
- Title Work
- Survey/Condominium Documents – Experienced Engineer
- Keep Track of Costs (Allocation?) – Land Contribution as Equity